2006

Donald Ray Tolley v. Michael Tolley and Marie Jess : Brief of Appellee

Utah Court of Appeals

Brian C. Johnson; William B. Ingram; Strong and Hanni; Attorneys for Petitioner Appellant.
C. Richard Henricksen, Jr.; Rober M. Henricksen; Henricksen and Henriksen; Attorneys for Respondent Appellee Michael Tolley; Stephen J. Buhler; Attorney for Respondent Appellee Marie Jess.

IN THE UTAH COURT OF APPEALS

DONALD RAY TOLLEY,

Petitioner/Appellant,

v.

MICHAEL TOLLEY and MARIE JESS,

Respondents/Appellees.

BRIEF OF APPELLEES

CASE NO. 20060489-CA

Appeal from a final judgment of the
Third Judicial District Court of Salt Lake County, Utah
Honorable Leslie A. Lewis

BRIAN C. JOHNSON (3936)
WILLIAM B. INGRAM (10803)
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180-1125
Attorneys for Petitioner/Appellant

C. RICHARD HENRIKSEN, JR. (1466)
ROBERT M. HENRIKSEN (11296)
HENRIKSEN & HENRIKSEN PC
320 South 500 East
Salt Lake City, UT 84102
Telephone: (801) 521-4145
Attorneys for Respondent/Appellee Michael Tolley

STEPHEN J. BUHLER (6502)
3540 South 4000 West, Suite 245
West Valley Cityh, Utah 84120
Attorney for Respondent/Appellee Marie Jess

IN THE UTAH COURT OF APPEALS

DONALD RAY TOLLEY, Petitioner/Appellant, v. MICHAEL TOLLEY and MARIE JESS, Respondents/Appellees.	**BRIEF OF APPELLEES** CASE NO. 20060489-CA

Appeal from a final judgment of the
Third Judicial District Court of Salt Lake County, Utah
Honorable Leslie A. Lewis

BRIAN C. JOHNSON (3936)
WILLIAM B. INGRAM (10803)
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180-1125
Attorneys for Petitioner/Appellant

C. RICHARD HENRIKSEN, JR. (1466)
ROBERT M. HENRIKSEN (11296)
HENRIKSEN & HENRIKSEN PC
320 South 500 East
Salt Lake City, UT 84102
Telephone: (801) 521-4145
Attorneys for Respondent/Appellee Michael Tolley

STEPHEN J. BUHLER (6502)
3540 South 4000 West, Suite 245
West Valley Cityh, Utah 84120
Attorney for Respondent/Appellee Marie Jess

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES & RULES

STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(3)(j).

ISSUES PRESENTED

I. Whether the district court correctly granted summary judgment where there was no issue of material facts and no evidence of a confidential relationship resulting in undue influence?

Summary judgment is proper if the evidence, depositions, affidavits, and admissions, when viewed in the light most favorable to the losing party, show that there is no genuine issue as to any material fact, and therefore the moving party is entitled to a judgment as a matter of law. *Norman v. Arnold*, 2002 UT 81, ¶15, 57 P.3d 997. The non-moving party has the burden to set before the court a genuine issue of material fact. *Thayne v. Benificial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994).

II. Whether the district court correctly held that the Petitioner did not meet his burden where he did not proffer any clear and convincing evidence that the decedent had an different intent when she created the joint bank accounts?

Once Respondents moved for summary judgment, Petitioner had the burden to provide evidence in support of all of the essential elements of his claim. *Thayne,* 874 P.2d at 124. "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." Utah Code Ann. § 75-6-104(1).

III. Whether the district court properly reviewed the evidence in the light most favorable to the Petitioner?

Summary judgment is proper if when viewed in the light most favorable to the losing party, there is no *genuine issue* as to any *material fact,* and therefore the moving party is entitled to a judgment as a matter of law. *Norman*, 2002 UT 81, ¶15.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS

Utah Code Ann. § 75-6-104(1); See Appellant's Addendum No. 2.

Utah Code Ann. § 75-6-104(5); See Appellant's Addendum No. 2.

Utah Code Ann. § 75-7-805; See Addendum No. 1.

Utah R. App. P. Rule 24(k); See Addendum No. 2.

Utah R. Civ. P. Rule 56(c); See Appellant's Addendum No. 1.

Utah R. Civ. P. Rule 56(e); See Appellant's Addendum No. 1.

STATEMENT OF THE CASE

This is a simple case regarding the decisions made by a mentally sharp, decisive completely competent woman during the last months of her life. Nina E. Tolley, the decedent, passed away on October 16, 2003. (R. 532.) During the last few months of her life she was cared for by the Respondents, her grandchildren, Michael Tolley and Marie Jess. (R. 532.) The grandchildren expected they would be caring for their grandmother for a long time, but unfortunately and very unexpectedly she passed away after being in Utah for only four months. (R. 532.)

It was not long after this tragedy that the Petitioner accused the grandchildren of an improper confidential relationship with their grandmother. (R. 20.) On or about November 5, 2003, Petitioner obtained a Temporary Restraining Order, requiring Respondent, Marie Jess, to turn over to Petitioner's attorney, certain funds she had received from joint accounts owned with her grandmother, the deceased Nina E. Tolley. (R. 18.) Respondent, Marie Jess, appearing at that time pro se, stipulated to the funds being held in Petitioner's attorney's interest bearing trust account, under the terms of the November 5, 2003 Order, for the pendency of this action. (R. 208; 419.)

On or about September 15, 2004, Petitioner filed a Petition for Declaratory Judgment and Recovery of Property against Respondents. (R. 254.) In his Petition, Petitioner claims that Respondents obtained the funds from Ms. Tolley by either a) exercising undue influence over Ms. Tolley, b) violating Ms. Tolley's intentions and will, c) fraud, d) conversion, or e) violating a constructive trust. (R. 254; 419.)

During the temporary restraining order hearing, held on November 5, 2003, Marie persistently held that the funds in the joint accounts were hers because of the right of survivorship. (R. 606; Appellant's Add. 3, p. 2-34.) Marie continually asserted that the will was not applicable to funds with the right of survivorship, and that the funds were hers. (R. 606; Appellant's Add. 3, p. 20.) She gifted money to those whom her grandmother had requested, further affirming that these gifts were not given under "any legal obligation." (R.

606; Appellant's Add. 3, p. 34.) The district court recognized that she was not acting under any "fiduciary responsibility." (R. 606; Appellant's Add. 3, p. 14.)

In August of 2005, both Respondents filed with the district court's Motions for Summary Judgment requesting dismissal of all claims. (R. 416; 525.) At the summary judgment hearing on February 15, 2006, the district court even granted Petitioner an additional thirty days of discovery to depose two more witnesses. (R. 1115.) After briefs had been filed, including supplemental briefs following continued discovery, and oral argument had been heard, the district court took the matter under advisement and on May 16, 2006 granted both motions for Summary Judgment on all claims in favor of the Respondents. (R. 1239; 1243).

Throughout the entire process it was never disputed that Nina Tolley, the decedent, was always a strong willed lady to the day she died. (R. 1248.) She was mentally sharp, decisive, strong willed and knew exactly what she wanted and what she did not want. (R. 1248.) Nina Tolley made up her mind, and you could not change it for her. (R. 1248.)

STATEMENT OF THE FACTS

Nina Tolley, the decedent, ("Nina") was always very firm minded. (R. 528.) Even up until the end of her life, she was mentally sharp, decisive, strong willed and knew exactly what she wanted and what she did not want. (R. 528.) Nina made up her mind, and you could not change it for her. (R. 528.) Even though Nina was completely mentally sharp, for the last several years of her life she became very physically impaired. (R. 529.) She was

confined to her bed or to a wheelchair and needed a lot of assistance. (R. 529.) Nina had only very limited use of her hands and arms, and was afflicted with bed sores for a long time. (R. 529.)

Nina had three children, Cheryl, Kenneth, and the Petitioner Donald. (R. 528.) Kenneth, the father of Respondents Michael and Marie, predeceased Nina Tolley. (R. 528.) For many years Nina lived away from her family in South Dakota. (R. 420.) Because she had been physically dependent, for years she relied on many people, including her caretaker, Chris Dolecheck, to give her personal care in washing her, clothing her, cooking for her three times a day...etc. Mr. Dolecheck performed this service for nine years. (R. 329; 420.) During these years, her mental status was sharp, she was alert, and she was very sharp on her finances. (R. 422.)

Nina kept in close contact with her grandchildren, the Respondents. (R. 529.) Her grandson Michael Tolley ("Michael") was aware of her needs and had dedicated himself to helping her and taking care of her. (R. 421: 897.) Michael had lived with his grandmother Nina at several different time periods for several years in the mid eighties and early nineties. (R. 529.) At one point he had even moved out to South Dakota to help care for her. (R. 529.) He was always very close to her. (R. 529.) They often would speak to each other by phone. Michael and Nina had frequently spoken about her coming to live with him and that he would help take care of her. (R. 529.)

Nina came to Utah and stayed with her granddaughter, Respondent Marie Jess ("Marie") for a couple months in 2000 or 2001 and started talking about moving to Utah shortly after that visit. (R. 420.) Marie kept in close contact with her grandmother, and spoke with her by phone on a weekly basis. (R. 421.) Moreover, Nina kept in contact with her grandchildren and would telephone and correspond with them. (R. 421.)

Nina was growing increasingly afraid for Mr. Dolecheck's health and felt that he would no longer be able to adequately care for her. (R. 530.) Nina did not want to move in with her son Donald Ray Tolley. (R. 530.) She had once stayed with him for a while and it had been an extremely unpleasant experience. (R. 530.) Likewise, Nina did not have a good relationship with her daughter Cheryl because of past differences. (R. 530.) Their relationship had been strained so much that at one point they did not speak to each other for several years.(R. 530.)

Nina found out that her close friend and care taker Chris Dolecheck had cancer. Understanding that caring for her would be an increasingly difficult burden on her friend, she decided she would ask her grandchildren, the Respondents, to help care for her. She made this decision in May of 2003, two months before she actually moved. She saved for the move. (R. 420; 424.) Nina left South Dakota the first week of July, 2003. (R. 420.)

Michael Tolley was living in a comfortable house, which he liked very much, he had only purchased about one year previously. (R. 530.) When Nina decided to move out to Utah, she asked him to sell his new house in order to buy another which would better fit her

special needs. (R. 530.) He sold it at her request, but at a financial loss. (R. 530.) Nina was heavily involved in the purchase of a new home. (R. 531.) Michael spent a lot of time talking to Nina by phone to decide which house to buy. He sent her photographs and other information on various houses, and finally together they decided on one. (R. 531.) Nina gave Michael $18, 592.11 for the down payment, because she wanted to give him a gift and also wanted to help him in buying the house. (R. 531.) Although the house was in his name, it was clear that she intended that she would live there for the rest of her life. (R. 531.) Michael paid the entire mortgage payments.

Upon buying the house, Michael spent a lot of time, money, and effort in order to renovate the house and make it wheelchair accessible for Nina. (R. 531.) Nina was very particular and firm in making decisions about the house. (R. 531.) She requested that Michael do a lot of work on the house. (R. 531.) Upon her request, he had the kitchen floor redone, the walls repainted, installed a ramp and moved walls. (R. 531.) Using her credit card he purchased flowers and other plants to help beautify the home. (R. 531.) She was very proud of the flowers and of the beautiful home. (R. 531.)

Nina frequently let trusted people use her credit cards to purchase things at her specific direction. (R. 530.) Generally she would telephone the store in advance to inform them that somebody would be coming to use her credit card. (R. 530.) But even if she didn't call, she only let her credit card out of her hand when she wanted somebody to specifically buy something for her. (R. 530.)

From the time that Nina moved to Utah, her Grandchildren Michael and Marie as well as others provided her constant medical care because of her very weakened physical condition, like Chris Dolecheck had previously done. (R. 532.) Marie would visit Nina daily, fix her lunch, give her mail, and see to any other needs. (R. 421.) Because of the problems with Nina's arms and right hand Marie would occasionally help her fill out checks to review and sign them. (R. 421.) However, Marie was not the only person who would help Nina write checks. (R. 421.) Marie also did shopping for Nina and took her to her doctor's visits. (R. 421.) Nina loved and trusted her grandchildren, and they never gave her any reason not to trust them.(R. 421.)

Nina was cared for, in Michael Tolley's home, several times a week by nursing, physical therapy, and other healthcare professionals, including Julie Willardson, R.N. and therapist Kelly Springer. (R. 422.) Ms. Willardson's care for Nina included cleaning and dressing her bed wounds. (R. 423.) Nina was in poor health and bedridden, but her mind was sharp. (R. 423.) On each visit Ms. Willardson assessed her general health, as she is required to do. (R. 423.) In September 2003, Ms. Willardson regularly attended Nina at home, she cleaned and dressed her wounds. (R. 423.) Nina did not appear to have any neurological deficit. (R. 423.) She was alert and oriented. (R. 423.) Nina was in her right mind and capable of making her own choices and decisions during the entire time that Ms. Willardson treated Nina, specifically the week of September 22-26, 2003. (R. 423.)

Ms. Springer's care for Nina included stretching and stabilization exercises. (R. 423.) She testified that although Nina was in poor health and bedridden, her mind was sharp. (R. 423.) On each visit Ms. Springer also assessed Nina's general health, as she was required. (R. 423.) On September 22, 2003, Ms. Springer worked with Nina for approximately 45 minutes, doing stretches and other exercises. (R. 423.) On that date Nina was pleasant and willing to participate. (R. 423.) On September 26, 2003, Ms. Springer attended Nina in her home, again for approximately 45 minutes. (R. 423.) Nina was very sore that day, but was alert and oriented. (R. 423.) To the best of Ms. Springer's knowledge, Nina was in her right mind and capable of making her own choices and decisions during the entire time Ms. Springer treated her in the home, in particular, during September, 2003. (R. 424.)

Nina stayed in contact with her good friend, Mr. Chris Dolecheck, they spoke almost every day. (R. 422.) He had been and continued to be her confidant. (R. 422.) During these conversations she never complained to Mr. Dolecheck about her living conditions, anyone taking advantage of her, her healthcare, etc... (R. 422.) He testified that while Nina's physical strength may have deteriorated in the months leading up to her death, he confirms that her mental acuity, her strong will, and her ability to make up her own mind did not diminish and that she remained an individual who was in control of her faculties.

When Nina came to Utah, she opened a bank account at Bank One. (R. 424.) Later she became dissatisfied with Bank One because of the manner they managed her account and processed her social security checks. (R. 424.) Nina spoke with the manager of Bank One,

Shelly Christopher, and tried to resolve the matter. (R. 424.) Ms. Christopher spoke with Nina many times by phone during the first month the account was open, and again after the account had been closed. (R. 1148.) During all of these conversations she testified that Nina was mentally sharp. (R. 1148.) She said, "she was very alert. I do have customers that I can...tell when they start to lose their mind...She just to me sounded like and seemed not only in person but also on the phone as together mentally as we are..." (R. 1147-48.) She testified that Nina never complained to her during the course of their friendly professional relationship about anyone taking advantage of her. (R. 1147.)

Despite Nina's conversations with Ms. Christopher she decided to close her accounts and switch banks. (R. 424; 1147.) At Nina's request, Marie called First Utah Bank, to invite Mr. Tim Claridge, to come to the house, meet with Nina, and explain her banking options. (R. 424.) Mr. Claridge was an assistant manager of First Utah Bank, at the West Valley Office. (R. 424.) On or about September 25, 2003, he met with Nina and her granddaughter, Marie, at Michael's home. (R. 424.) When Mr. Claridge met with Nina, he discussed the reasons for her opening accounts at First Utah Bank. (R. 425.) She told Mr. Claridge that she was upset with the way her account was managed at Bank One and was switching to First Utah Bank. (R. 425.) Mr. Claridge discussed various banking options with Nina and ascertained from her which types of accounts she wanted and how much money she wanted to deposit in each. (R. 425.) Marie did not participate in the majority of the conversation, but only a "bit of small talk." (R. 1149-50.) Nina and Mr. Claridge discussed the joint right of

survivorship. (R. 1149-50.) Mr. Claridge testified "I do specifically remember discussing with her [Nina] the joint with right of survivorship topic as we signed the card...[we] discussed the ownership and that is a 100 percent ownership by both parties." (R. 1129-34 [Claridge Depo. At 34:4-12(emphasis added)].) He regularly, even in front of the additional signer, makes sure his customers understand the reality of joint with right of survivorship, and that it gives the other tenant 100 percent ownership. (R. 1150.)

Mr. Claridge testified that Nina Tolley "was very witty and sharp...She was very spirited and chatty." (R. 1149.) Nina opened all three accounts as joint accounts with Marie with rights of survivorship, and Mr. Claridge had Nina and Marie sign signature cards for the accounts. (R. 425.) Mr. Claridge was satisfied that Nina understood the character of the joint account with the right of survivorship as well as any other who opens such accounts. (R. 1149-50.) Moreover, he tends to refer to joint accounts and the right of survivorship more extensively with elderly people. (R. 1150.) He testified that Marie did not state she desired to be a joint tenant, but it was the directive of Nina. (R. 1148; 1150.) Based upon his training, Mr. Claridge did not feel any indication that Nina was being coerced in any way. R. 1151.) During his telephone conversations with Nina, she was always comfortable with him and very cheerful and jovial. (R. 1151.)

Ms. Christopher and Mr. Claridge, who consulted with the decedent regarding her banking and creation of the joint bank accounts with Respondent Marie confirmed that Nina was very particular in communicating her intentions and that she did not make any statements

or gestures which would indicate she was being coerced, manipulated or otherwise directed in her actions. (R. 1146.) Marie did not know why Nina put her name on the joint accounts. (R. 425.)

Long after the accounts had been created, Nina indicated to Marie there were a few people she might like to gift some of the money, including family members. (R. 425.) Nina understood that putting her money in the joint account with the right of survivorship took the money out of her estate. (R. 606; Appellant's Add. 3, p. 20.) Nina affirmed to Michael that the money would go to Maire when she died. (R. 606; Appellant's Add. 3, p. 24.) After Nina's death, Marie withdrew the remaining money from her joint account and gifted some to a couple of relatives. (R. 606; Appellant's Add. 3, p. 2-3.) Marie understood that she was under no legal obligation to disburse any of the funds, and that such gifts were done because her grandmother had asked her. (R. 606; Appellant's Add. 3, p. 34.)

Although Nina was physically dependant on others, she was not terminally ill. All of Nina's family hoped she would live for many years to come, she unfortunately and surprisingly passed on just months after having moved to Utah. (R. 532.) Nina Tolley passed away on Oct. 16, 2003. (R. 532.)

Decedent's last-known will predated her death by over eleven years. (R. 711.) The will left her estate in equal shares to her three children, Kenneth John Miller, Donald Ray Tolley and Cheryl Lynn Blaisdell. (R. 711.)

It was not long after the funeral of their grandmother that Petitioner, Donald Tolley found that Nina had not left him the inheritance he had expected. (R. 18.) He then began to accuse Respondents of creating a confidential relationship with their grandmother and substituting their will for hers. (R. 20.)

SUMMARY OF THE ARGUMENT

The district court properly determined that summary judgment was appropriate where the Appellant failed to proffer evidence sufficient to meet the elements of his claims, thereby failing to raise a genuine issue as to any material facts. *Sanns v. Butterfield Ford*, 2004 Ut. App. 203 ¶9, 94 P.3d 301. It undisputed that "Nina Tolley was always very firm minded. Even up to the end of her life she was mentally sharp, decisive, strong willed, and knew exactly what she wanted and what she did not want." (R. 1248.) Petitioner provided absolutely no evidence that Respondents substituted their will for hers in any of her decisions, and therefore there is no factual basis for a confidential relationship. Additionally, neither Marie nor Michael was ever a trustee or administrator of any property of Nina, and neither has ever stated otherwise. Moreover, no evidence has been proffered indicating that Nina ever established a trust.

Furthermore, the court properly ruled that "Nina Tolley was very particular in communicating her intentions...regarding her banking and creation of the joint bank accounts with Respondent" and that "Petitioner has failed to produce evidence to support any of his various theories against Marie Jess." (R. 1247-49.) The bank manager explained the rights

of survivorship to Nina and sensed she clearly understood. Where the law presumes that any "sums remaining on deposit at the death of a party to a joint account belong to the surviving party," and Petitioner did not proffer any clear and convincing evidence that Nina had "a different intention at the time the account was created" the court properly granted summary judgment. Utah Code Ann. § 75-6-104(1).

The district court properly reviewed all the evidence and reasonable inferences in the light most favorable to the Petitioner. The Petitioner was nonetheless required to present supported facts and make reasonable inferences. *Rawson v. Conover,* 2001 UT 24, ¶33, 20 P.3d 876. The court properly determined that "...the Petitioner relies on inferences which cannot be reasonably made and incorrect interpretations of the evidence in the record," and that he "skewed" and "inaccurately interpreted testimony." (R. 1249.) The Petitioner continually misleads the court with untrue facts and statements, incomplete quotes, testimony taken out of context, and unreasonable inferences. Consequently, there was no genuine issue of material fact and summary judgment was appropriate.

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO PRESENT ANY GENUINE ISSUE OF MATERIAL FACT EVIDENCING A CONFIDENTIAL RELATIONSHIP.

The district court correctly applied the legal standard for summary judgment. The district court took this matter under advisement and gave Petitioner more time to do

discovery and supplemental memoranda. The Court then carefully reviewed the entire record of this case, including five volumes of pleadings, documents, twelve affidavits, transcripts of several depositions (including depositions of neutral third parties), and the transcripts of the prior hearings. The brief of the Appellant is misleading; the district court understood its role and found that it was never disputed that, "Nina Tolley was always very firm minded. Even up to the end of her life she was mentally sharp, decisive, strong willed, and knew exactly what she wanted and what she did not want." (R. 1243; Order ¶ 23.) Applying such evidence to the applicable legal authority, the district court held that the Petitioner did not provide "a shred of evidence" to indicate a relationship of inequity or dominion inferring that Nina Tolley's will was overpowered or overcome in any way. (R. 1243; Order ¶ 29.) Given the complete absence of evidence to indicate a confidential relationship or any undue influence, the court determined as a matter of law, Petitioner had failed to establish any evidence of a confidential relationship or that the Respondents unduly influenced the decedent. (R. 1243; Order ¶ 30.)

The law is well established that Petitioner had the burden to set before the district court a genuine issue of material fact. *Thayne v. Benificial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994). Summary judgment is proper if the evidence, depositions, affidavits, and admissions, when viewed in the light most favorable to the losing party, show that there is no *genuine issue* as to any *material fact,* and therefore the moving party is entitled to a judgment as a matter of law. *Norman v. Arnold*, 2002 UT 81, ¶15, 57 P.3d 997 (emphasis

added); *Campbell, Maack, and Sessions v. Derby,* 2001 UT App 397, ¶7, 38 P.3d 984. *See also Jensen v. Mountain States Tel & Tel. Co.*, 611 P.2d 363 (Utah 1980).

This brief will demonstrate that summary judgment was appropriate in this case where: first, Petitioner could not proffer any evidence to establish the essential elements of his claim, and second, Petitioner built his case only upon unreasonable, unsupported, and irrelevant inferences.

First, Petitioner did not proffer sufficient evidence to support the elements of his claim. Once Respondents moved for summary judgment, Petitioner had the burden to provide some evidence in support of all of the essential elements of his claims. *Thayne,* 874 P.2d at 124. His burden was to set forth specific facts showing that there was a genuine issue for trial. *Rawson,* 2001 UT 24, ¶33; *Thornock v. Cook,* 604 P.2d 934, 936 (Utah 1979); *See also* Utah R.Civ. P. Rule 56(e). A genuine issue is an issue which is essential or material to the applicable rule of law. *Thayne*, 874 P.2d at 124; *Norton v. Blackham,* 669 P.2d 857 (Utah 1983); *Sanns,* 2004 UT App 203, ¶6. "Summary judgment is appropriate against a party who, after discovery, fails to set forth facts sufficient to establish the existence of an element essential to that party's case." *Christiansen v. Union Pac. R.R. Co.*, 2006 UT App 180 ¶6, 551 Utah Adv. Rep.3; Utah R. Civ. P. 56(c).

It is undisputed that Nina was firm minded, mentally sharp, decisive, and strong willed even up to the end of her life. Therefore, where Petitioner has failed to produce evidence to meet the elements of his claim, "there can be no genuine issue as to any material fact, for

summary judgment purposes, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Sanns,* 2004 UT App 203, ¶9.

Second, Petitioner's bald and unsupported inferences regarding a confidential or fiduciary relationship do not suffice to establish a genuine issue of material fact. *Rawson,* 2001 UT 24, ¶33. The disputed facts must also have evidentiary foundation. *Webster v. Sill,* 675 P.2d 1170 (Utah 1983). "Bare contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude entry of summary judgment." *Schnuphase v. Storehouse Mkts.,* 918 P.2d 476 (Utah 1996). The district court said, "It should be emphasized that the Petitioner has not provided one shred of evidence which would counter the overwhelming amount of affidavit and deposition testimony, including from independent third-parties... the Petitioner relies on inferences which cannot be reasonably made and incorrect interpretations of the evidence in the record." (R. 1249, Appellant's Add. 4, p. 5 [Memorandum Decision].)

A. It Was Appropriate for the District Court to Dismiss the Appellant's Claim Where There Was No Evidence of a Confidential or Fiduciary Relationship.

1. *Elements necessary to establish a confidential relationship.*

A confidential relationship arises when one party, 1) after having gained trust and confidence of another, 2) exercises *extraordinary* influence over the other party, resulting in the *substitution of will* of the latter for the former. *Von Hake v. Thomas,* 705 P.2d 766,769

(Utah 1985); *Bradbury v. Rasmussen*, 401 P.2d 710, 713 (Utah 1965) (emphasis added). *See also Estate of Jones v. Jones,* 759 P.2d 345 (Utah Ct. App. 1988). The Petitioner must proffer evidence supporting both of the elements of confidentiality to have a valid claim. The law presumes that one ordinarily makes his or her own judgments, however imperfect, and acts on them; it does not readily assume that one's will has been overborne by another. *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). Therefore, the law does not lightly recognize the existence of a confidential relationship. *Id.*

This doctrine rests upon a principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. *Bradbury*, 401 P.2d at 713. The relationship of [grand]parent and [grand]child is not evidence of such confidential relationship as to create presumption of undue influence. *Id.* In order to support the second element, there must be an exhibition of more than influence or suggestion, there must be substantial proof of overpowering of the person's will. *Estate of Ioupe,* 878 P.2d 1168, 1174 (Utah Ct. App. 1994).

2. *The second element of a confidential relationship was not met.*

Petitioner did not proffer any evidence to support his claim that the Respondents exercised extraordinary influence over the decedent, resulting in the substitution of their will for hers. Respondents produced twelve affidavits and several depositions which unanimously agreed that Nina was strong willed, decisive, and mentally sharp. All evidence supported that there was no changing her mind once she had made a decision. Petitioner did

not provide the court with any contrary testimony, but merely unreasonable inferences which had no evidentiary support.

There was no evidence of inequality or superiority between Nina and her grandchildren. Moreover, the grandchildren carried out their grandmother's wishes on a daily basis. It was undisputed that this is not a case where one person's will was substituted for another, and accordingly summary judgment was appropriate.

3. *Nina Tolley did not create a trust and Respondents did not have a fiduciary duty to their grandmother.*

Because Petitioner cannot establish a confidential relationship by the facts and evidence of this case, he is now attempting to establish a confidential relationship through an alleged per se fiduciary relationship. Consequentially, his only issue on appeal is not concerning a factual finding of a confidential relationship but whether there was a legally presumed fiduciary relationship between Respondent Marie Jess and the decedent which would imply confidence. *See Appellant's Brief* p. 14. Petitioner did not raise any fiduciary issue against Respondent Michael Tolley.

Petitioner relies on the three sentences in the opinion of *Walker Bank & Trust Co. v. Walker,* to incorrectly imply to this Court that a trustee has a per se confidential relationship with the settlor. However, the Supreme Court in *Walker Bank*, merely disposes of the contention over confidentiality because the requirement of accounting is the same whether based on a trustee relationship or a confidential relationship. 412 P.2d 920 (Utah 1966). Additionally, the facts of *Walker* are not applicable to this case. In *Walker*, the defendant

was the trustee of several real properties and securities he received from his sister which he held in trust "with the understanding that such property should be used to defray her expenses and burial." *Id.* He admitted to holding the assets in trust for this purpose. *Id.*

This case is quite distinguishable, because a trust was not created. "Even if the intent to create a trust is assumed, it cannot be effective unless certain essential trust elements are properly described, namely, the subject matter, the trust purpose, and the beneficiaries." *Estate of Grimm*, 784 P.2d 1238, 1244 (Utah Ct. App. 1989). The Supreme Court said that in the creation of a trust, the trust property must be clearly specified and set aside, and the "essential terms of the trust must be clear enough for the court to enforce..." *Id.* (quoting *Sundquist v. Sundquist*, 639 P.2d 181,184 (Utah 1981)).

Moreover, precatory words are generally insufficient to create a testamentary trust. *See Estate of* Lewis, 738 P.2d 617, 620 (Utah 1987); *see also* CJS *Wills §1437.* Precatory expressions are non-binding words of entreaty, request, wish, or recommendation and do not impose a trust on the property given. *See* BOGERT §48; AMJUR WILLS §1021. No trust is created if the settlor manifests an intention to impose merely a moral obligation. REST 2d TRUSTS §25(b). His manifestation of intention only amounts to a suggestion or wish that the transferee should use or dispose of the property in a certain manner, leaving it to the transferee to follow the suggestion or comply with the wish only if the transferee desires to do so and is not a binding trust. *Id.*

The Petitioner has not provided any evidence supporting any of the essential elements of a trust. There is no evidence in the record indicating that the Respondents Marie or Michael were trustees or administrators of any the decedent's property. Neither has ever admitted to being a trustee, or holding funds in trust for their grandmother. The Petitioner has again "skewed" the facts and statements to meet his own objective. The portions of Marie's testimony cited by Petitioner are misleading and insufficient to create a trust where the essential elements of a trust have not been shown. Moreover, such testimony would not support a trust where it indicates precatory language which is not binding on Marie.

Similar to this case, in *Pagano v. Walker*, a mother had a will dividing her property equally between her children. 539 P.2d 452, 453-55 (Utah 1975). She had not maintained a close relationship with three of her four children and therefore took money out of her estate and placed it in a joint bank account with her daughter. *Id.* The mother later told her daughter to "pay her personal bills, keep a little out for my arthritis and divide up the rest." *Id.* The other children attempted to show that a trust was formed. *Id.* The Supreme Court found that the contract with the bank to hold the funds in joint ownership with rights of survivorship could not be converted thereafter to a trust. *Id.* The Supreme Court held specifically that in order to create a trust, the trust must have been created at the time the joint account when the right of co-ownership and survivorship was created, and that the status of the account could not be changed by later statements or intentions of the mother. *Id.* The Supreme Court upheld the joint tenancy in spite of the claims of the two disinherited

children. *Id.* "That is, if the account was originally created as a true joint account with right of co-ownership and survivorship in Mary [daughter], as it appears to have been, that status would not be changed even if the mother Lucy had at some subsequent time orally made declarations [a trust]." *Id.* at 455.

Like *Pagano*, no trust can be found in this case. Petitioner's claim is based solely upon a the fact that after Marie became the survivor of the funds through joint tenancy with rights of survivorship, she sent some money to relatives she believed Nina might desire to endow upon her death. This was not done through any obligation; the money belongs to Marie Jess. Nonetheless, Marie's actions do not circumvent the Supreme Court holding that the contract of joint survivorship cannot be broken and converted to a trust. *Pagano*, 539 P.2d at 455.

The Petitioner later argues that Marie's intention to disburse the funds as her grandmother might have intended would relinquish control from Nina. *See Brief of Appellant* p.17. However, the evidence proves that Marie did not take or use any of the money in the account with unless she was specifically directed to do so by her grandmother. Her gracious act, giving her own money to relatives, was done after the death of Nina, and because the decedent was dead this act in no way would have "relinquished control over her [Nina's] decision making" as the Petitioner alleges.

The evidence indicates that Nina decided to open the joint accounts; that she personally spoke with and instructed the banker regarding those accounts; and that she

decided to put Marie on the accounts with rights of survivorship. These funds, by contract with the bank, fall outside the administration of Nina's Last Will and Testament. Utah Code Ann. § 75-6-104(5). Moreover, where the law assumes the contract made between Nina and the bank is valid and binding, and no evidence was given to establish that a valid trust was formed therefore Marie did not have any legal relationship with the decedent, and the district court's ruling should be upheld.

4. *Even If this Court Holds that Marie Jess was a trustee of the funds in the joint accounts the results are the same, and Summary Judgment is still proper.*

Even if this Court holds there was a trust set up by Nina as the settlor and Marie as the trustee, placing her funds in trust to be distributed to select friends and family members, this would not create a confidential relationship between the Respondent and the decedent, and the summary judgment dismissing the Petitioner's claims is appropriate.

The Petitioner is making an inconsistent argument, he argues that the funds in the accounts should return to the estate because of a fiduciary relationship as trustee that Marie would have with the decedent; however, if such a trustee relationship did exist the alleged trust would not relinquish the funds to the estate and former will, but would remove the funds from the estate the same as a joint account.

Additionally, if the Court holds there was a trust, Marie properly distributed or intended to distribute the funds according to her grandmother's wish. There was no evidence or even "inferences" indicating that Marie Jess did not distribute the funds "expeditiously and

in good faith" as her grandmother had wished. *See* Utah Code Ann. § 75-7-805. Where Marie Jess's testimony was that she intended to distribute her money to the family, "because [her] grandmother spoke of giving each- certain people money when she was still alive," even if there was a legal relationship, Marie Jess fulfilled all of her duties under such an alleged relationship, and this issue irrelevant. The Court should therefore uphold the district court's ruling on the Summary Judgment.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE PETITIONER DID NOT MEET HIS BURDEN WHERE HE DID NOT PROFFER ANY EVIDENCE THAT THE DECEDENT HAD A DIFFERENT INTENT WHEN SHE OPENED THE JOINT BANK ACCOUNTS.

The court properly found that "Nina Tolley was very particular in communicating her intentions...regarding her banking and creation of the joint bank accounts with Respondent" and that "Petitioner has failed to produce evidence to support any of his various theories against Marie Jess." The law presumes that any "sums remaining on deposit at the death of a party to a joint account belong to the surviving party." Utah Code Ann. § 75-6-104(1). In order to overcome Marie's ownership of the funds, and place the funds within Nina's estate to be administered, Petitioner must have proven by clear and convincing evidence that Nina had "a different intention at the time the account was created." *Id.*

"[W]here an intention to create a joint account is clearly expressed in a written contract executed by the parties, which remains unaltered, and there is no evidence of fraud, undue influence, mistake, or other infirmity, the question of intention ceases to be an issue and the Courts are bound by the agreement." *First Sec. Bank of Utah v. Burgi*, 251 P.2d 297,

301 (Utah 1952). "Likewise it is true that the fact that all the funds were contributed by one of the parties will not prevent the creation of a joint tenancy in the account if all the essentials for the creation of such an account exist." *Id.* The Petitioner had the burden of proving by clear and convincing evidence that at the time the bank account was created the decedent did not wish Marie to have the right of survivorship, even though she was being placed as a joint tenant with this right. Utah Code Ann. § 75-6-104. This rule of law has been followed in the State of Utah for over half a century. *See Cont'l Bank & Trust Co. v. Kimball*, 442 P.2d 472, 474 (Utah 1968); *See also Hobbs v. Fenton*, 479 P.2d 472 (Utah 1971).

The only case cited by the Appellant to support this issue is *First Sec. Bank of Utah v. Demiris,* 354 P.2d 97, 99-100 (Utah 1960). In *First Sec. Bank of Utah*, an elderly husband places his estranged wife as a joint tenant for his convenience because he was entering the hospital. *Id.* at 98. Although legally married to him, she had been residing separately for thirteen years, and did not get along well with her husband. *Id.* While the husband was in the hospital, the wife withdrew all of his funds from the joint account. *Id.* at 99. The wife's purpose was to get possession of the funds for herself, with the intention of wrongfully depriving him of his rights therein. *Id.*

The Supreme Court in *First Sec. Bank of Utah*, specifically stated the fact that the wife withdrew the funds during the lifetime of her husband was "significantly different" from the situation of *Holt* where the money was withdrawn from funds which remained in a joint account after the death of one of the tenants. *Id.* at 99; *See also Holt v. Bayles*, 39 P.2d 715

(Utah 1932). In *First Sec. Bank of Utah*, the Court placed compelling weight on the fact that the defendant had taken all of the money out of the account while the co-tenant was still living. 354 P.2d at 99. Acknowledging that the law presumes joint tenancy funds are transferred to the surviving joint tenant, the Supreme Court adopted an equitable rule from New York in that, when a joint tenant withdraws all of the funds from a joint account wrongly taking possession from the other tenant, " the withdrawal of monies from a joint account does not destroy a joint tenancy...it merely opens a door to competent evidence...that no joint tenancy was originally created or intended." *Id. See also In re Kelly's Will,* 263 N.Y.S. 661, 667.

"Significantly different" from *First Sec. Bank of Utah*, Marie did not take the funds from the joint accounts until after the death of her grandmother, and at which point she had full ownership of the funds by contract and law. On September 25, 2003, Nina transferred funds to a new bank, First Utah Bank, into accounts she established in joint tenancy with rights of survivorship with Marie. The law presumes, unequivocally, that Nina intended those funds to belong to Marie through the right of survivorship thus established. It is presumptive that Ms. Tolley meant to do just what she did. All witnesses have testified that Nina was astute, mentally sharp and careful with her money. All witnesses testified that during the days surrounding the transfer, Nina continued to be mentally competent. The district court afforded Nina the same respect and consideration that all competent adults are

afforded, and presumed to have meant to do exactly what she actually did, where there is no evidence to the contrary.

When Nina created the accounts, Mr. Claridge, the bank manager, discussed various banking options with Nina and she indicated to him she desired joint accounts. Marie did not participate in the discussion. Mr. Claridge discussed with Nina joint right of survivorship, to make sure she understand the reality of joint with right of survivorship, and that it gives Marie one hundred percent ownership. During his conversations with Nina he did not feel any indication that she was being coerced in any way, Nina was always comfortable with him and very cheerful and jovial. Because he recognized she was mentally sharp, he was satisfied that Nina understood the character of the joint account with the right of survivorship as well as any other who opens such an account.

In his brief, Petitioner bases his claim on the fact that there "was no circumstance to suggest any affirmative intent on the part of the decedent to make a gift or transfer ownership of the funds outright to Appellee Jess." *See* Brief of Appellant page 19. Petitioner has mis-interpreted the law, the intent of survivorship is presumed by the law, the burden is placed on him to produce clear and convincing evidence that at the time of the creation of the account Nina had a different intent. Utah Code Ann. § 75-6-104(1); *See also Cont'l Bank & Trust Co.*, 442 P.2d at 474; Hobbs, 479 P.2d 472.

The plain language of the statute requires that the Petitioner show that the decedent had another intent *at the time she created the accounts. Id.* (emphases added). Petitioner's

argument concerning Nina's prior will, which was drafted more than eleven years prior to opening these accounts is irrelevant. Also, there were changed circumstances that occurred between the decedent signing the will and her death. Her son Kenneth Miller died; Nina became estranged from her other two children, Donald Tolley and Cheryl Blaisdell; and, Nina moved to Utah to live with Kenneth's children who made many life adjustments to care for her and make her comfortable. "A right of survivorship arising from the express terms of the account or under this section...cannot be changed by will." Utah Code Ann. § 75-6-104(5).

Likewise, the arguments made by Petitioner concerning what happened to the funds after the death of Nina are irrelevant to her intent on September 25, 2003. Marie withdrew her money as a survivor of a joint account after the death of her grandmother, this is appropriate under law and in no way indicates Nina's intent months earlier. A joint tenant's later suggestion as to what becomes of a joint fund, would not break the joint tenancy contract and create a trust. *Pagano*, 539 P.2d at 455. Later conversations between Nina and Marie were made after the joint tenancy was created and are not clear and convincing evidence regarding Nina's prior intentions at the time the joint account was created.

Evidence regarding the fact that Nina discussed with Mr. Claridge, the bank manager, the joint use of the funds in the account while Nina was alive does not indicate that she had a different intent for the funds after her death. Such discussions indicate that Nina fully understood that as a joint tenant, Marie could have "complete access to any of her bank

accounts to make sure that she [Marie] could maintain bills, hospital needs, [and] whatever else would come up." Moreover, even if the subject of survivorship was never discussed between Mr. Claridge and Nina, the lack of discussion is in no way an indication of different intention. Furthermore, such lack of discussion would clearly indicate that Petitioner did not meet his burden of showing a different intention by clear and convincing evidence.

The Petitioner has failed to provide any case law which supports his position. Nina was mentally competent and perfectly able to transfer the money to a joint account with rights of survivorship with Marie, as she intended. Moreover, there is no evidence that clearly indicates that on September 25, 2003 Nina had any different intent, other than to create a regular joint account with the typical right of survivorship. The standard of clear and convincing evidence is high to protect decedents who can not rebut false testimony, where Petitioner did not meet his burden, and did not provide any relevant evidence that would indicate Mrs. Nina Tolley did not wish her granddaughter to have rights of survivorship, this Court should uphold the district court's rulings.

III. THE DISTRICT COURT PROPERLY REVIEWED THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PETITIONER.

The court properly reviewed all of the pleadings, evidence, admissions, and reasonable inferences in the light most favorable to the Petitioner and did not dismiss any facts which were material, relevant, and supported. *Norman*, 2002 UT 81, ¶15. Petitioner had 29 additional pages available in his brief to more specifically inform the Court of any specific facts which he felt the district court had incorrectly dismissed. *See* Utah Rules App.

P. Rule 24(f). Notwithstanding, Petitioner writes less than one page and refers to only "the admissions of Appellee Jess and evidence of the decedent's intent." Appellee believes this subject was properly covered in the previous two sections of this reply brief.

Nonetheless, it is important to note that the district court recognized that, "... the Petitioner relies on inferences which cannot be reasonably made and incorrect interpretations of the evidence in the record." (R. 1249, Appellant's Add. 4, p. 5 [Memorandum Decision].) "Bare contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact." *Schnuphase,* 918 P.2d 476. "Mere assertion that an issue of fact exists without proper evidentiary foundation to support that assertion is insufficient." *Webster,* 675 P.2d 1170.

The district court recognized that the Petitioner "skewed" testimony and inaccurately "interpreted testimony." (R. 1248, Appellant's Add. 4, p. 4 [Memorandum Decision].) Petitioner has again, in this appeal, continued his trend of misconstruing the facts. *See* Utah R. App. P. 24(k). The Petitioner continually misleads this court with untrue facts and statements, incomplete quotes, testimony taken out of context, and unreasonable inferences.

For example, throughout the Petitioner's brief he alleges that Marie under oath admitted that she "acted exclusively as an administrator of the decedent's estate," that she "admitted to holding fiduciary duties," and that she admitted to "holding assets of the decedent in trust." *See* Appellant's Brief pp. 10, 11, 15, and 17. Petitioner supports these allegations by citing to the temporary restraining order hearing. During such hearing the

Respondent Marie, pro se at that time, never made such admissions. Marie continually stated that her "grandmother put this money into an account with my name, leaving me as the survivor, right of survivorship." (R. 606; Appellant's Add. 3, pp. 2; 9; 13; 15; 20; and 34.) She further testified that the will (probate) was not applicable to funds where they were not in the estate because of the right of survivorship. (R. 606; Appellant's Add. 3, p. 20.) She expressed she was not legally obligated to give portions of her money to family members, but she did so because her "grandmother had asked."

A second example where the Petitioner has misled the Court is the manner he skewed the testimony of Mr. Claridge, the Bank Manager. On page nine, paragraph eight of the Appellant's brief, Petitioner states, "the legal ramifications of right of survivorship and associated consequences at death pointedly were not [discussed]." Nina and Mr. Claridge discussed the joint right of survivorship. (R. 1149-50.) Mr. Claridge testified "I do specifically remember discussing with her [Nina] the joint with right of survivorship topic as we signed the card...[we] discussed the ownership and that is a 100 percent ownership by both parties." (R. 1129-34 [Claridge Depo. At 34:4-12(emphasis added)].) Mr. Claridge was satisfied that Nina understood the character of the joint account with the right of survivorship as well as any other who opens such accounts. (R. 1149-50.) Moreover, he tends to discuss joint accounts and the right of survivorship more extensively with elderly people. (R. 1150.)

A third example is Petitioner's statement that Nina went through a "series of high level spending" following her move to Utah. *See* Appellant's Brief p. 4. The Petitioner

during oral argument specified that "petitioner's primary evidence [of undue influence] is the decedent's spending habits shortly before her death, as compared to her frugality throughout her life." The evidence indicates that Nina was mentally sharp and especially sharp with her finances. There was no "high level spending," but only the payment of reasonable and foreseeable expenses related to moving a person such as Nina. Nina saved for the move, and it is reasonable to anticipate moving would require some spending. Again, where Nina was found to be mentally strong willed, decisive and sharp, such spending does not indicate anything other than she chose to pay for the typical moving expenses. Evidence indicates money went toward remodeling the home, remodeling which was necessary to meet her needs, (i.e. wheelchair ramp) and in no way would indicate that Nina had ceased to be frugal with her money.

After evaluating the evidence and the *reasonable* inferences *fairly* drawn from that evidence, this Court will find that Petitioner, through his several and various attempts, has failed to provide any evidence in support of the essential elements for his claims. Therefore, it was proper for the district court to grant the summary judgment on the Respondents' behalf. *Hale v. Beckstead*, 2003 UT App 240, ¶2, 74 P.3d 628 (overruled for other grounds).

IV. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE FRAUD AND CONVERSION CLAIMS AND THIS COURT SHOULD AFFIRM THE RULING.

The district court also granted the Respondent's Motion for Summary Judgment on the fraud and conversion claims. Even though the Petitioner has not briefed these claims, it

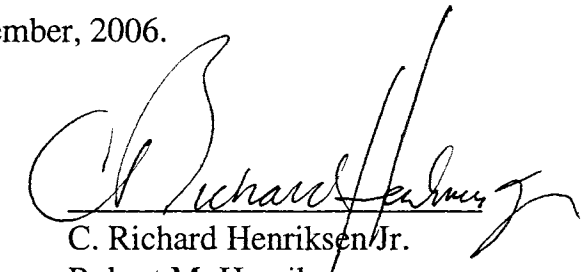
is clear this Court should affirm the district court's order. The petitioner failed to plead and establish the elements of fraud at the district court level. To prove fraud, in the absence of a confidential relationship, Petitioner had to proffer evidence indicating that Respondents knowingly misrepresented a material fact with the intent to induce Nina to act or refrain from action and that Nina reasonably relying on the misrepresentation, acted to her detriment. *Blodgett v. Martch*, 590 P.2d 298, 301 (Utah 1978).

Likewise, the Petitioner failed to set forth the essential elements of a conversion claim. Petitioner failed to cite any law that would allow a conversion claim to proceed, where "conversion is an act of willful interference with chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 974 P.2d 288 (Utah 1999). Where there was no evidence of fraud or conversion, the district court properly dismissed those claims on summary judgment.

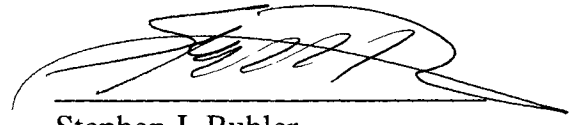
CONCLUSION

For the reasons set forth herein, Appellees respectfully request that the Court affirm the district court's Order Granting Summary Judgment of all claims.

DATED this 27 day of November, 2006.



C. Richard Henriksen Jr.
Robert M. Henriksen
Henriksen & Henriksen, P.C.
320 South 500 East
Salt Lake City, Utah 84102
Attorneys for Appellee Michael Tolley

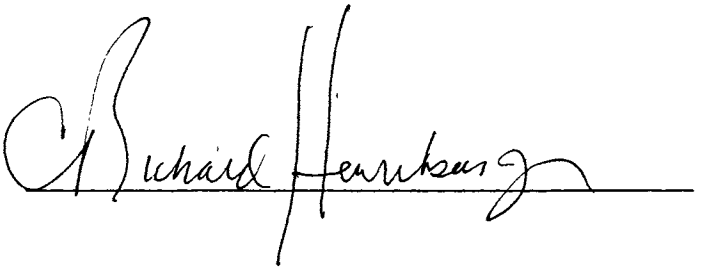


Stephen J. Buhler
3540 South 4000 West, Suite 245
West Valley City, Utah 84120
Attorney for Appellee Marie Jess

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 27 day of November, 2006 a true and correct copy of the foregoing **BRIEF OF APPELLEES,** was hand delivered, to the following:

Brian C. Johnson
William B. Ingram
STRONG & HANNI
Attorneys for Petitioner/Appellant
3 Triad Center, Suite 500
Salt Lake City, Utah 84180



ADDENDUM 1

(Utah Code Ann. §75-7-805)

75-7-805. Costs of administration.

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

ADDENDUM 2

(Utah R. App. P. Rule 24(k))

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references. (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-
Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any

appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Note. Rule 24 (a)(9) now reflects what Utah appellate courts have long held. See In re Beesley, 883 P.2d 1343, 1349 (Utah 1994); Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original)(quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). See also State ex rel. M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.