

2006

# Steven R. Davis, as trustee of the Eugene Davis and Zelma B. Davis Living Trust v. Russell E. Young and Patricia Ann Zufelt : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STEVEN R. DAVIS, as trustee of the  
EUGENE DAVIS AND ZELMA B.  
DAVIS LIVING TRUST

Plaintiff and Appellee,

v.

RUSSELL E. YOUNG, and  
PATRICIA ANN ZUFELT,

Defendants and Appellants,

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: **REPLY OF THE APPELLANT**  
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: App. Case No.: 20061057 - CA  
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: Oral argument requested  
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Appeal from the Judgment of the Eighth Judicial District Court,  
County of Duchesne, State of Utah  
The Honorable A. Lynn Payne

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## ARGUMENT

### **A. APPELLANT HAS RAISED AND PRESERVED HIS ISSUES FOR APPELLATE REVIEW**

Although Appellee's brief focuses on procedural defects without examining the merits of Appellant's argument as to legal errors committed by the trial court, the fact remains that the issues presented in Appellant's Brief were raised and preserved at trial. In fact, Appellant's Brief complied with Appellate Rules of Civil Procedure 24(a)(5)(A) when it cited to the record indicating that Appellant's issues were raised and preserved at the trial level. (Appellant's Brief at 1-4, 13, 19, 21-22, 24-25, 26-27, 29).

Further, Utah courts look at three factors when determining whether a party properly preserved an issue for appeal: "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998); *see also State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993) (for an issue to be properly preserved for appellate review, it must be raised to a level of consciousness such that the trial judge can consider it).

Here, Appellant raised the issues presented on appeal during the proceedings and trial of this matter in the district court. Appellant has cited to the record indicating where his issues were raised and preserved for appeal. This was done both in the presentation of the issues in Appellant's Brief and in the various sections of the Argument. (Appellant's brief at 1-4; *passim*).

However, even if Appellant may have failed to strictly comply with Rule 24(a)(5)(A), the following demonstrates that in fact Appellant's issues were raised and preserved in the trial court; as such, the following citations to the record indicate where Appellant's issues were preserved for appeal:

- The Quitclaim Deed was effective to revoke the Trust and convey the Farm to Russell Young: R. 636-641; Tr. 777-784; R. *passim*.
- The Utah Uniform Trust Code applies and is the controlling law with respect to the Trust: Tr. 776-780
- The execution of the Quitclaim Deed substantially complied with the terms of the Trust: Tr. 782-784
- The Quitclaim Deed manifested clear and convincing evidence of the settlors' intent to revoke the Trust: Tr. 791-792; 794
- No consideration was necessary for the Quitclaim Deed to revoke or convey the Farm to Russell Young: Tr. 17-22, 782
- Eugene had the authority pursuant to the Utah Uniform Trust Code, the terms of the Trust and pursuant to a Durable Power of Attorney to act alone in revoking the Trust: Tr. 782-784.

**B. THE QUITCLAIM DEED WAS EFFECTIVE TO REVOKE THE TRUST AS TO THE FARM AND TO TRANSFER THE PROPERTY TO RUSSELL**

**1. The Motion in Limine did not Dispose of the Issue of the Effect of the Quitclaim Deed, the Issue is Legal and the Trial Court Addressed and Heard Evidence on the Effect of the Quitclaim Deed During the Trial**

Appellee's attempt to represent that the trial of this matter was not focused on the effect of the Quitclaim Deed is inaccurate and misguided. As is clear from the record, the trial court's ruling in limine ("In Limine Ruling") ruled, "absent additional

evidence, the deed . . . is invalid to revoke the trust . . .” (R. 739) (emphasis added).

As such, by the In Limine Ruling’s own terms, the issue was left open for the trial of this matter at which point the trial court received additional evidence. In fact, the trial of this matter took place over three days in which the trial court heard, analyzed and ruled on the Quitclaim Deed and evidence related to the effect of the Quitclaim Deed.

Further, at the trial of this matter, not only did the trial court consider, hear and rule on evidence regarding the effect of the Quitclaim Deed with respect to a revocation or amendment of the Trust, but the trial court stated that it would be happy to hear and rule on evidence reflecting the effectiveness of the Quitclaim Deed to revoke or amend the trust pursuant to Utah Rule of Civil Procedure 54(b). (Tr. 22).

Notably, Appellee offers no law whatsoever regarding the effect of a party’s failure to specifically appeal from a pretrial motion in limine which, by its own terms, provisionally deals with anticipated evidentiary matters where the same are raised and argued at length during the trial, and where the court makes new orders thereon during trial. In fact, although Appellee states that the trial court stood firm and did not reopen the issues of the motions in limine (Appellee’s Brief at 10), such statement is far from reality. In fact, the trial court conceded it was possible that it could have been wrong on its pretrial In Limine Ruling and if so, it was the court’s fault. (Tr. 21) The court also acknowledged that the ruling on the motions in limine would provisionally apply, although if they were reopened during the trial, the other side would have an

opportunity to respond to them. (Tr. 22-23). Then, the court considered, heard evidence and ruled on the effect of the Quitclaim Deed as to whether it accomplished a partial revocation of the Trust. (Tr. 776-794).

Appellee cites the case of *State v. Rodriguez*, 841 P.2d 1228 (Utah App. 1992) to support the position that Appellant's failure to appeal and argue the pre-trial ruling is fatal. However, *Rodriguez* does not discuss a pre-trial ruling or motion in limine. Rather, *Rodriguez* stands for the basic principle that a party may not bring an issue up for the first time on appeal. The appellate court stated that if a defendant fails to raise an issue on appeal, the court will not raise it *sua sponte*. *Id* at 1229. *Rodriguez* does not stand for the proposition that the failure to expressly appeal from an in limine evidentiary ruling precludes review of trial rulings made on the same issues.

Here, the trial court recognized that the In Limine Ruling was provisional, opened up the issue of the effect of the Quitclaim Deed at trial, and entertained evidence and argument on the Quitclaim Deed and its effect on the revocation and/or amendment of the Trust. (Tr. 19-22, 99-105, 214-235, 776-784, 817-822, 830-835, 845-855 ). Specifically, the court stated, that after hearing all of the evidence and at the end of trial, that if it was wrong on the law in issuing its ruling in limine [on the Quitclaim Deed] then that was its fault (Tr. 21-23). Importantly, the trial court recognized that not all the evidence was heard or presented regarding the Quitclaim Deed during the motions in limine and that the court "can't assume things . . . not

provided.” Tr. 20.

Therefore, as the issue of the effect of the Quitclaim Deed was not disposed of with the provisional ruling on the motions in limine, Appellant has no duty to challenge such; rather, the Appellant has properly challenged the trial court’s ruling after the trial of this matter.

At the conclusion of the trial, the trial court reaffirmed “that after hearing the evidence in this case and considering the law, [the Quitclaim Deed] did not alter or amend the Trust in this case.” (Tr. 845). Obviously, this is the ruling Appellant has appealed from.

**a. The Question of Whether the Quitclaim Deed is Legally Determinative of Revocation does not Require a Resort to Factual Findings and is a Question of Law to be Reviewed for Correctness.**

Appellee claims that Appellant has challenged the trial court’s factual findings regarding intent and therefore has a duty to marshal the evidence. Appellee argues that Appellant has challenged factual findings by stating that at trial “Russell insisted on a trial to create a record and specifically argued the intent of Eugene and Zelma with respect to the farm” and Russell has taken “an appeal from the district court’s post-factual findings.” (Appellee’s Brief at 21-22.) However, Appellee then states that although the trial court recited numerous detailed factual findings of fact that went “way beyond” its prior ruling in limine, Russell has not challenged a single one of those findings. (*Id.*) On this point Appellee is correct: Appellant has not challenged

the trial court's factual findings.<sup>1</sup> Rather, Appellant has challenged several of the trial court's clear errors of law. As such, Appellant has properly appealed from only the legal rulings of the trial court and does not have a duty to marshal the factual evidence. *Peirce v. Peirce*, 994 P.2d 193 (Utah 2007).

Apparently, Appellee's position is that an appeal of legal rulings require a challenge of factual findings and marshaling of evidence. But such is not the case. On this appeal, Appellant accepts as correct the trial court's factual findings and contends that the trial court applied the law to those findings in error. If Appellee's position were adopted, nearly every legal conclusion reached by a trial court would be subject to a marshaling requirement simply because certain facts at trial relate to the legal issue. When a trial court makes a clear error of law, such issue is not subject to the marshaling requirement unless the findings of fact are also challenged. *Pierce* at 198.

Moreover, although case law does in fact state that marshaling evidence is required where certain legal conclusions are dependent on a trial court's factual determinations (*United Park City Mines Co., v. Stichting Mayflower Mountain Founds*, 140 P.3d 1200, 1206 (Utah 2006)), none of the present challenged legal errors are

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<sup>1</sup> As the record reflects, Appellee was ordered to prepare findings of fact by the trial court who instructed that "whoever does this finding is going to have to review . . . the tape [because] it's not going to be possible for anybody to get all of this by notes." (Tr. 831). However, Appellee did not submit or reduce the trial court's ruling in this matter to separate "Findings of Fact and Conclusions of Law." Therefore, there exist no "Findings of Fact or Conclusions of Law" in this matter.

dependent on factual findings. Here, Appellant's challenges are questions of law to be reviewed by this Court for correctness. (*See* Appellant's Brief at 1-4).

For example, the effect of the Quitclaim Deed is a purely legal issue. Utah courts have recognized that a conveyance is valid upon delivery of a deed with present intent to transfer. *Crowther v. Mower*, 876 P.2d 876, 879 (Utah App. 1994). Further, this Court has held that

if a "contract [deed] is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement. A court may only consider extrinsic evidence if, after careful consideration, the contract language is ambiguous or uncertain."

*Id.* quoting *Winegar v. Froerer Corp.*, 813 P.2d 104, 110 (Utah 1991).

Here, Appellee's attempt to convince this Court that Appellant has somehow challenged the trial court's factual findings of intent is misguided. The trial court did not make a finding of ambiguity relating to the deed but invalidated it based on its legal conclusion that gifts cannot be made from the Trust. Further, the trial court did not rely on any extrinsic evidence in its invalidation of the Quitclaim Deed but rather ruled that the Quitclaim Deed was not supported by fair consideration. (Tr. 834). This legal conclusion did not depend on any findings of fact made by the trial court.

Regarding the standard of review applied by the reviewing court, this Court must look at the underlying legal rulings and determine if the legal errors depend on findings of fact. *United Park City Mines Co., v. Stichting Mayflower Mountain*

*Found's*, 140 P.3d 1200, 1206 (Utah 2006). Here, it is clear that the trial court made important legal errors regarding the Trust and the effect the Quitclaim Deed had on partially revoking the Trust which conclusions do not depend on a successful challenge of the trial court's findings of fact.

As such, the trial court committed legal error by not applying Utah law and giving effect to the Quitclaim Deed as a legal instrument revoking the trust as to the Farm. Simply stated, Appellant has not challenged the trial court's factual finding of intent, or lack thereof, because such findings are not relevant to a legal determination that the Quitclaim Deed, on its face, is legally sufficient to partially revoke the Trust as to the Farm.

**b. The Interpretation of the Trust is not Factually Dependent and is a Question of Law.**

Next, Appellee cites case law for the principle that the interpretation of a trust, which includes consideration of extrinsic evidence, is a question of fact. (Appellee's Brief at 22). In support of his position, Appellee cites *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985). However, in *Kimball* the court made a specific finding that the contract in question was ambiguous thereby necessitating a resort to extrinsic parol evidence. *Id.* at 716. As such, *Kimball* is inapplicable to the present situation. Here, there was no finding that the Trust documents were ambiguous and there was no resort to extrinsic evidence regarding the interpretation of the Trust. Rather, as stated above,

the trial court concluded, as a matter of law, that the Trust did not allow gifts and that the Quitclaim Deed was not supported by consideration. This was not based on any extrinsic facts but rather the court's interpretation of the legal effect of the language of the Trust. Tr. 831-833.

Further, case law establishes that the interpretation of a trust document as well as a contract or deed is a question of law to be reviewed for correctness. *Kline v. Utah Department of Health*, 776 P.2d 57, 60 (Utah App. 1989) (court of appeals held that the interpretation of a trust agreement is a matter of law to which the court reviews for correctness); *see also Crowther* at 879-880.

Therefore, as the trial court made no finding that the Quitclaim Deed or the Trust were ambiguous, the question of intent is gleaned from the four corners of the deed and is a question of law to be reviewed for correctness, with no deference to the trial court. *Crowther* at 879-880.

Here, although the trial court may have made certain factual findings, which Appellant has not challenged, many of those labeled factual findings are in reality legal conclusions. For example, Appellee states that the court made a factual finding that gifts were not allowed under the Trust. (Appellee's Brief at 24, Tr. At 832-833; R. 659.5). However, the record to which Appellee cites contains no such finding by the court. Rather, the court simply stated as a legal conclusion that the Trust precluded the

trustee, acting in the capacity of the trustee to convey a gift. (Tr. 832). Utah law is clear that the interpretation of a trust, when resort to extrinsic evidence is not required, is a question of law to be reviewed for correctness. *Crowther* at 879-880; *Kline* at 60.

Therefore, the trial court committed legal error in ruling that the Quitclaim Deed did not operate to revoke or amend the Trust. Not only does the Trust Code provide for a more liberal view of revoking revocable trusts, but case law demonstrates that courts will look at legal acts with an eye towards the actor's intent as demonstrated by the act. *See Waldron v. Commerce Union Bank*, 577 S.W.2d 669, 675 (Tenn. 1978); *Enoch v. Enoch*, 2006 WL 1006648 \*5 (M.D. Tenn. 2006); *Boulton v. Bronn*, 2006 WL 563311 (Utah App. 2006).

Therefore, as the trial court specifically heard evidence and ruled on the effect of the Quitclaim Deed at trial, Appellant was not required to challenge a provisional ruling on a motion in limine. Further, the issue of the effect of the Quitclaim Deed is in fact a question of law which this Court reviews for correctness. *Crowther* at 879-880.

## **2. The Quitclaim Deed is Effective to Revoke the Trust, Both Pursuant to Common Law Principles and According to the Trust Code**

Despite Appellee's attempt to persuade this Court to affirm the trial court's ruling based on procedural attacks of Appellant's brief, the law is well established that when a settlor creates a revocable trust and subsequently conveys property out of the trust, "the conveyance itself is an implied revocation of the trust, since the trustee and

the beneficiary are divested of all interest in the trust.” *Boulton v. Bronn*, 2006 WL 563311 (Utah App 2006), 2006 UT App. 91 \*1.

Further, case law and secondary authorities are uniform in establishing the principle that a power to revoke the trust will be interpreted as including a power to revoke the trust in part by withdrawing a part of the trust property from the trust. (Restatement (Second) of Trusts (1959) § 330, Comment N). Furthermore, and as set forth in Appellant’s Brief, courts throughout the country, including Utah, have routinely held that where a settlor conveys or indicates another use for a specific asset held in a revocable trust, such conveyance or indication demonstrates the settlor’s intent to modify or revoke the trust with respect to that property. *See Waldron v. Commerce Union Bank*, 577 S.W.2d 669, 675 (Tenn. 1978); *Enoch v. Enoch*, 2006 WL 1006648 \*5 (M.D. Tenn. 2006); *Boulton v. Bronn at \*1*.

Utah case law is consistent with the principle that “the power [to revoke] may be exercised by any method which sufficiently manifests [Grantor’s] intention to modify [or revoke] the trust.” *In re Estate of Flake*, 71 P.3d 594 (Utah 2003); see also Restatement (Second) of Trusts, Section 331. Moreover, these authorities hold that a conveyance of property out of a trust is a legally sufficient act to manifest the intention to revoke, as to such property, despite not using explicit language of revocation or even when the revoking instrument does not refer to the trust or state that it was revoking the

trust. *See Boulton* at \*1; *Waldron* at 675.

Here, it is clear that Eugene, acting as settlor and trustee, legally effectuated a partial revocation of the Trust by signing an instrument (the Quitclaim Deed) which conveyed the Farm out of the Trust to Russell.

**a. The Utah Uniform Trust Code is Applicable, the Issue was Raised at Trial and the Trust Code Supports the Conclusion that the Execution and Delivery of the Quitclaim Deed Manifested the Intent to Revoke the Trust as to the Farm**

Utah Code Ann. § 75-7-605(3), of the Utah Uniform Trust Code, sets forth various methods by which a settlor may revoke or amend a revocable trust. These methods are: (1) by substantially complying with a method provided in the terms of the trust; or (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by (a) specifically devising property that would otherwise have passed according to the terms of the trust; or (b) any other method manifesting clear and convincing evidence of the settlor's intent. These methods are in addition to any method provided for under the applicable trust instrument.

The applicability of the Trust Code was raised and argued at the trial of this matter. (Tr. 776-780). During the trial, Appellant argued and attempted to persuade the court that the Trust Code was applicable and that the court should apply its provisions with respect to the revocation of the Trust. (Tr. 776-780). However, the

trial court, in reviewing its earlier rulings, noticed that the Code was amended in 2004. At that point, the Court and Counsel had the discussion referred to in Appellee's brief. (Appellee's Brief at 29). However, Appellee has cited this dialogue in such a context so as to claim that counsel had invited the trial court's error of not applying the Trust Code to the case. (Appellee's Brief at 29). However, in fact, it was the trial court which erred and stated to the parties that the Trust Code, as amended, was "not controlling." (Tr. 830). Counsel did not stipulate with the Court's ruling. Instead, counsel indicated more research would be required to respond to the Court's bench ruling. (Tr. 829-830). This dialogue in no way invited the trial court to commit an error of law when it ruled that the Trust Code did not control and govern the interpretation of the Trust, nor does it somehow waive Appellant's right to challenge the trial court's clear error of law on appeal.

Furthermore, counsel for Appellant did not agree with the court that provisions of the Trust Code cited by Appellant were not controlling; rather, counsel merely agreed with the court that the specific amended section of the Trust Code did not exist prior to 2004. Tr. 829-830.

Further, the fact that the trial court, during oral argument, announced that the Trust Code did not apply because it was enacted in 2004, and also because none of the parties at that time were able to cite to § 75-7-1103(1)(a) (which provides that the Code

applies retroactively to all trusts created before July 1, 2004), simply does not bind or preclude a party from appealing a trial court's error of law. Therefore, as the applicability of the Trust Code was raised during trial and as the trial court erred by not applying it, said issue is properly before this Court for review.

Further, and important to a determination that the Trust Code applies retroactively, the *Boulton* case was decided in 2006 in which this Court applied the Trust Code retroactively to the events and Trust documents at issue. Specifically, this Court applied the Trust Code's provision that where no specific method of revocation is required, a settlor may revoke a trust in "any method manifesting clear and convincing evidence of intent" to revoke. *Boulton* at \*1 citing U.C.A. § 75-7-605 (Supp. 2004).

Moreover, and contrary to Appellee's argument that the Trust Code does not apply to acts done before July 1, 2004, *Boulton* retroactively applied the Trust Code as amended in 2004 to the settlor's acts which necessarily took place before enactment of the Trust Code in 2004.<sup>2</sup> As such, this Court has retroactively applied the Trust Code

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<sup>2</sup> Prior to the Court of Appeals' decision in March of 2006, the settlor of the trust in *Boulton* sold two parcels of real property that were the primary assets of the trust. She then deposited the funds from the sale into her personal bank account and later invested the funds into two investment accounts in her own name and not as trustee of the trust. Later, she and her husband moved to Virginia where she consolidated the investments into a single account. *Boulton* at \*1. Necessarily, all this had to occur before a trial was conducted, an appeal taken, briefing completed and a decision rendered; which would mean these acts took place prior to July 1, 2004.

to Trusts created prior to July 1, 2004 as well as acts taken before the amendment, consistent with § 75-7-1103(1)(a).

Here, the facts are indistinguishable: Eugene executed and delivered the Quitclaim Deed to Russell, thereby manifesting an unmistakable intent to transfer the Farm out of the Trust. As such, the Trust Code is applicable to demonstrate that by Eugene's legal acts, he manifested "clear and convincing evidence of intent" to revoke the Trust. U.C.A. § 75-7-605(3)(b)(ii); *Boulton* at 1. Therefore, the Trust Code is the controlling law governing all matters of interpretation regarding the Trust.

**i. The Trust Does Not Make Exclusive the Means Whereby it Can be Revoked**

The Trust Code provides that as an alternative to substantial compliance with the terms provided in the Trust<sup>3</sup>, a settlor may revoke a revocable trust in whole or in part by any method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method of revocation or if the method provided in the trust is not made expressly exclusive. U.C.A. § 75-7-605(3)(b)(ii) (emphasis added). In this case, the Trust provides:

While either grantor is living, the trust created by this instrument may be revoked, in whole or in part, by an instrument signed by Grantors, or the survivor of them, and delivered to the Trustees.

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<sup>3</sup> For Appellant's argument on substantial compliance see Appellant's Brief at A(1)(a).

Trust § 2.01(a).

As such, it is clear that the Trust does not make exclusive the means whereby it can be revoked but rather provides a method of revocation. Although Appellant argued this point at the trial of this matter, the trial court erred when it ruled that the Trust made exclusive the means whereby the it could be amended or revoked. (Tr. at 831, 833).

Therefore, as the Trust does not make exclusive the means whereby it can be revoked, pursuant to U.C.A. § 75-7-605(3)(b) the settlors of the Trust could revoke the Trust by any method manifesting clear and convincing evidence of their intent to revoke. As stated in Appellant's Brief, Utah case law has also established that "the power [to revoke] may be exercised by any method which sufficiently manifests [an] intention to modify [or revoke] the trust." *In re Estate of Flake*, 71 P.3d 594 (Utah 2003; *see also* Restatement (Second) of Trusts, Section 331.

**C. EUGENE HAD THE AUTHORITY TO ACT ALONE TO CONVEY PROPERTY AND REVOKE THE TRUST**

**1. The Utah Uniform Trust Code Allows Either Spouse to Revoke the Trust and This Issue was Raised at Trial**

Under U.C.A. § 75-7-605(2), "[i]f a revocable trust is created by more than one settlor, to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone. . ." *Id.* "Community Property" is defined as:

Assets owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or a gift to one spouse, each spouse generally holding a one-half interest in the property.

*Blacks Law Dictionary*, (8<sup>th</sup> ed., Thompson-West 1999).

Although Appellee is correct in asserting that Utah is not a traditional community property state, the Utah Trust Code uses the term “community property” for purposes of defining and giving meaning to certain property held in trust. The term refers to property which the husband and wife own together which was acquired during the marriage. As such, the Utah legislature specifically uses the term “community property” in order to give meaning to the legislative basis upon which a spouse, acting alone, can revoke a revocable trust.

Appellee simply argues that since Utah is not a “community property” state, “the statute does not apply.” (Appellee’s Brief at 35). However, the statute is not another state’s law; rather, it is Utah’s statute and courts must give meaning to the legislature’s words. *ExxonMobil Corp. V. Utah State Tax Com’n*. 86 P.3d 706, 710 (Utah 2003). It is absurd to contend that § 605(2) has no meaning or application. To the contrary, it is clear that the Utah legislature’s use of the term “community property” is applicable to define a certain category of property held in trust for purposes of a spouse’s ability to act alone in revoking the trust as to that property. This is the only reasonable interpretation that can be made of the statute.

Further, the law and cases cited in Appellant's brief are instructive to demonstrate that unless the trust instrument provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. (Appellant's Brief at B(1)). Therefore, Eugene had the authority under Utah law to act alone to revoke the Trust with respect to the Farm since the Farm was held by Eugene and Zelma as their "community property."

Moreover, this issue was preserved for appeal when counsel argued to the trial court that the Trust Code was applicable to demonstrate that the Quitclaim Deed was effective to revoke the Trust by Eugene. Appellant clearly argued at trial that Eugene had the right, acting alone, to revoke or amend (in whole or in part) the Trust on the basis and authority of U.C.A. § 75-7-605. (Tr. 776-784).

**2. Eugene had the Authority to Revoke the Trust Pursuant to His Durable Power of Attorney**

Although the trial court ruled that Eugene legally did not act in his capacity as the holder of the power of attorney in granting the Quitclaim Deed to Russell and that the durable power of attorney did not grant Eugene the authority to act for Zelma (Tr. 836), such rulings are conclusions of law and are in clear error. *Crowther* at 779-880.

The unchallenged findings of fact in this case and well established law demonstrate that a general durable power of attorney grants an agent the authority to revoke a trust where the agent is given broad powers over the principal's affairs and

where the durable power of attorney grants “full power of revocation.” This is true even though the power of attorney does not specifically identify the power to revoke the trust. *In re Schlagel Trust*, 51 P.3d 1094, 1094 (Colo App 2002). In *Schlagel*, the court found that because the wife executed a durable power of attorney in favor of her husband at the same time she and her husband created the trust, the parties intended that the power of attorney was meant to allow each other the authority to revoke the trust. *Schlagel* at 1096. Further, the court pointed to the fact that the power of attorney specifically included the granting of “full power of revocation.” *Id.*

The facts in this case are substantively identical. As is clear from the Durable Power of Attorney, which was executed contemporaneously with the Trust, Zelma granted Eugene full power of revocation over the Trust. (Appellant’s Brief at B(3)). Durable Power of Attorney for Zelma Davis, Exhibit E to Appellant’s Brief. (Emphasis added).

Appellee attempts to distinguish the case law but ultimately fails in his attempt. *Schlagel* and *First Union National Bank of Virginia v. Thomas*, 1995 WL 1055807, at 3-4 (Vir. Cir. Ct. 1995) make clear that durable powers of attorney, executed jointly by spouses simultaneously with a revocable trust, which grant “full powers of revocation”, do in fact grant authority to a spouse to partially revoke trusts with respect to certain property.

Moreover, Appellee's policy argument regarding the circumvention of the Trust's stated purpose is unconvincing. If the trial court's ruling is upheld, the policy would be, in effect, that although joint settlors of a revocable trust execute durable powers of attorney, granting to each other full power of revocation in connection with the execution of their trust, that doing so does not grant them the authority to make decisions regarding the trust on behalf of each other. Such a conclusion would ignore the clear intent of the settlors and does not make good policy sense.

Second, the trial court erred when it ruled that Eugene did not act for Zelma pursuant to his Durable Power of Attorney. The court ruled that in order to act pursuant to the Durable Power of Attorney, Eugene "would had to have two signatures there, one indicating that he was acting on behalf of Ms. Davis in his capacity as a, her attorney in fact." Tr. 836. This conclusion is a clear error of law which ignores and goes against the overwhelming weight of case law. The trial court erred when it refused to acknowledge or analyze the effect Eugene's preparation of the Quitclaim Deed had on the effectiveness of the same for Eugene and Zelma Davis as Trustees and Grantors. In preparing the Quitclaim Deed, Eugene set forth Zelma's and his name as trustees and grantors, and then signed his name as acting for both him and Zelma. As he was vested with "full power of revocation" under the Durable Power of Attorney, Eugene had authority to act on Zelma's behalf to partially revoke the Trust as to the

Farm property.

In his argument, Appellee fails to consider the clear weight of legal authority. Numerous courts have addressed similar situations regarding agents' signatures under durable powers of attorney and the various effects of such in binding their principals. As stated in Appellant's brief, *Kahn v. Royal Banks of Missouri*, 790 S.W.2d 503 (Miss. Ct. App. 1990) sets forth the good policy reasons under which a spouse exercises a durable power of attorney. (Appellant's Brief at B(3)(a)).

It is instructive to look at relevant Utah law with respect to the effect of an agent's signature in binding the principal when the agent does not state he is signing in a representative capacity. Under U.C.A. § 70A-3-402 of the Utah Uniform Commercial Code, Negotiable Instruments, "if the form of the [agent's] signature does not show unambiguously that the signature is made in a representative capacity or the represented person is not identified in the instrument, the representative is liable on the instrument." U.C.A. § 70A-3-402(2)(b) (emphasis added). Although this law has specific reference to transactions governed by the UCC, it is relevant to gain an understanding of the policy and principles surrounding principal-agent relationships.

Appellee cites to the *Schlagel* case in support of his position that in order to act as an agent under a durable power of attorney, the document must set forth that the agent is signing in a representative capacity. (Appellee's Brief at 46). However,

*Schlagel* was cited by Appellant for the principle that if a general durable power of attorney is executed at the same time as a revocable trust and grants broad powers to the agent, the durable power of attorney allows an agent to act on behalf of the principal to revoke the trust. *Schlagel* does not stand for the proposition that the form of the agent's signature requires a separate statement that the agent is acting for the principal in a representative capacity. Indeed, Utah law only requires that the principal is identified as the instrument which the authorized agent executes. As such, Appellee's citation to *Schlagel* on this point is immaterial and unhelpful to a determination that Eugene legally acted in Zelma's stead under the Durable Power of Attorney.

Further, under *Kahn*, the court found that even though the document did not refer to the durable power of attorney or state that the agent was signing in said capacity, the placement of the principal's name on the document gave notice to third parties that the agent was indeed acting in a representative capacity. *Kahn* at 510. Appellee has failed entirely to refute or distinguish the cases cited by Appellant.

Moreover, Appellee misstates the application and effect of U.C.A. § 70A-3-402(2)(b). (Appellee's Brief at 47). Section 402(2)(b) provides that the principal will be liable if the agent either signs in a representative capacity or the represented person is identified in the instrument. *Id.* The trial court committed clear error when he ruled

that Eugene was required to sign the Quitclaim Deed twice, one in his own capacity and “one indicating he was acting on behalf of Ms. Davis in his capacity as her attorney in fact.” (Tr. 836).

Here, Eugene prepared and signed the Quitclaim Deed and properly identified himself and Zelma as trustees and as grantors of the property under the Trust. As such, he identified the person being represented and thereby gave notice to all third parties that he was representing Zelma in his representative capacity. *Kahn* at 510. As such, it is evident that he intended to demonstrate that he was acting on behalf of himself and Zelma, as trustees and grantors, to partially revoke the Trust and deed the Farm to Russell Young.

Additionally, in contrast to the trial court’s and Appellee’s position, the court in *Boulton* held that it was immaterial that the revoking instrument did not specifically state that such would operate as a revocation. *Boulton* at 2. Moreover, the court held that the trust was revoked even though the settlor/trustee signed the sale documents as trustee. The court stated that it was totally appropriate to sign as trustee to assure the legal validity of the conveyance as the trust was the title owner of the property. *Id.*

Therefore, the trial court erred when it failed to correctly analyze and apply controlling law with respect to Eugene’s exercise of his Durable Power of Attorney on behalf of Zelma.

**3. The Trust Provides that Should Either Grantor or Trustee Fail to Serve then the Other May Act Alone; the Issue of Zelma's Failure to Serve Was Raised at the Trial Level.**

Appellee takes the position that because Appellant argued below that Zelma was competent when she signed the Quitclaim Deed in 2003 that he is now precluded from setting forth an alternate means whereby the trial court's ruling should be reversed. (Appellee's Brief at 36-37.) However, Appellee mistakes the nature and significance of Appellant's argument that Zelma failed to serve in her capacity as trustee. Appellant is not challenging the trial court's finding that Zelma was incompetent to sign the Quitclaim Deed; rather, Appellant is adopting that finding as controlling to demonstrate the court's legal error in light of the trial court's finding that Zelma was incompetent. As such, and because Appellant is not challenging the trial court's finding of fact, there is no duty to marshal. *Chen v. Stewart*, 2004 UT 82, ¶19, 100 P.3d 1177, 1184 (Utah 2004).

Under § 3.01 of the Trust (Substitute Trustee): "If either of the above named trustees [Gene and Zelma Davis] fail or cease to serve for any reasons, the other may serve alone." The trust further states that only if both of the original trustees, Gene and Zelma, fail or cease to serve, are substitute trustees appointed. *Id.*

Here, the trial court made specific findings as to Zelma's incompetency and ruled that since 1994 her mental condition had deteriorated steadily to the point that

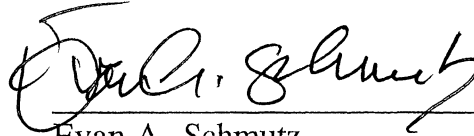
Zelma herself informed her Dr. that she was slowly losing her mind. (Tr. 859; 147). As such, it is abundantly clear from the trial court's own findings and conclusions that Zelma failed to serve as set forth by the terms of the Trust thereby authorizing Eugene to act alone in partially revoking the Trust as to the Farm. This legal conclusion is a necessary result compelled by the trial court's factual finding concerning Zelma's mental incompetency and inability to serve. Although Appellee seeks to have it both ways, i.e., that Zelma's signature on the Quitclaim Deed is invalid due to her incompetence and that Eugene could not act alone in signing the Quitclaim Deed, logic and the trial court's findings require it to be one or the other. Therefore, consistent with the trial court's finding of Zelma's mental incompetence, Eugene would be legally entitled to act alone.

### CONCLUSION

Based on the above arguments, Appellant Russell Young respectfully requests that this Court: (1) reverse the trial court's order that the conveyance of the Farm to Russell Young by the Quitclaim Deed did not partially revoke the Trust as to the Farm, (2) reverse the trial court's order that the Quitclaim Deed is void ab initio, (3) order that the Quitclaim Deed was effective to partially revoke the Trust and convey the Farm to Russell Young, and (4) remand the case for entry of a new judgment quieting title to the Farm in Russell Young.

DATED this 14 day of January, 2008.

HILL, JOHNSON & SCHMUTZ, L.C.

A handwritten signature in cursive script, appearing to read "Evan A. Schmutz", written over a horizontal line.

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Andrew V. Wright

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Russell B. Young

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of January, 2008, I caused a true and correct copy of the foregoing to be served on the following:

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