

2007

Ina C. Holman Family Trust : Brief of Appellant

Utah Court of Appeals

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John L. Valentine; Howard Lewis and Petersen; Mark F. Robinson; Robinson, Seiler and Glazier; Douglas T. Hall; Counsel for Appellees.

Hunt W. Garner; Counsel for Appellant.

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE,	/	BRIEF OF APPELLANT
INA C. HOLMAN FAMILY	/	Case No. 20060390 - CA
TRUST	/	

John L. Valentine, Esq.
Howard, Lewis and Petersen
For Appellee Central Bank

COUNSEL FILING BRIEF:
Hunt W. Garner, Esq.
For Appellant Robert Holman

Mark F. Robinson, Esq.
Robinson, Seiler and Glazier
For Appellees Jenevieve Holman;
Kathleen Robinson, et al.

Douglas T. Hall, Esq.
For Appellee Phyllis Hall

FILED
UTAH APPELLATE COURTS
SEP 06 2007

LIST OF ALL PARTIES

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TABLE OF AUTHORITIES

Statutory Authorities:

Utah Code, § 75-2-502

Utah Code, § 75-2-503

Utah Code, § 75-7-111

Utah Code, § 75-7-605

Utah Code § 78-2-2

Utah Rules of Court:

Utah Rules of Civil Procedure, Rule 52(a).

Utah Rules of Civil Procedure, Rule 59(a).

Utah Rules of Evidence, Rule 802

Utah Rules of Evidence, Rule 1002

Utah Rules of Evidence, Rule 1003

Utah Rules of Evidence, Rule 1004

Caselaw:

Barnard v. Sutliff, 846 P.2d 1229 (Utah 1992).

Carrier v. Pro-Tech Restoration, 944 P.2d 346 (Utah, 1997).

Secondary Authorities:

29 Am Jur 2d Evidence § 157 (2007).

29A Am Jur 2d Evidence § 1049 (2007).

Restatement (Third) of Trusts § 63, p. 443 (2001).

JURISDICTIONAL STATEMENT

This matter was appealed from a final judgment of the Fourth Judicial District Court, thus granting jurisdiction to the Utah Supreme Court pursuant to Utah Code § 78-2-2(3)(f). The Utah Supreme Court subsequently transferred jurisdiction of this matter to the Utah Court of Appeals pursuant to Utah Code, § 78-2-2(4).

STATEMENT OF ISSUES & STANDARD OF REVIEW

Appellant asserts the following issues on appeal:

1. **First Issue:** Whether the Trial Court Erred in Applying an Improper Evidentiary Standard in Determining Whether the Purported Amendment was Indeed Part of Grantor's Trust.

- a. Determinative law: Appellant alleges that, pursuant to Utah Code, § 75-7-605, the burden rests upon the proponent of an amendment to a trust to demonstrate by clear and convincing evidence that the purported amendment indeed reflects the will of the grantor. The Trial Court applied a less-stringent preponderance of the evidence standard. This is demonstrated by the Court's failure to give proper consideration to provided testimony showing inconsistencies between the proponent's position towards the Amendment and her prior actions.
- b. Failure to follow the proper evidentiary standard is an error that occurs after the making of the trial record.

Therefore, it is plain error and does not need to be preserved on the record.

- c. Appellant maintains that the appellate standard of review on this issue is the “clearly erroneous” standard.¹

2. **Second Issue:** Whether the Trial Court Erred by Receiving Into Evidence Photocopies of Documents of Purported Amendments to the Trust, and Later Receiving the Purported Originals After the Close of Evidence.

- a. Determinative law: Appellant alleges that the decision of the Court below to accept photocopies of crucial documents whose authenticity was disputed violates Rule 1002 of the Utah Rules of Evidence. The decision of the Court below to receive into evidence the purported originals of these same documents following the close of evidence violates Rules 802 and 1002 of the Utah Rules of Evidence in that it was inadmissible hearsay.
- b. Appellant’s counsel properly objected to the admission of these documents on the record² thus preserving the issue for appeal.

¹ See Utah Rules of Civil Procedure, Rule 52(a).

c. Appellant asserts that the proper appellate standard of review in this issue is “independent review of questions of law.”³

² See Testimony of David MacBeth, Partial Record of Trial, pages 18 – 19.

³ See *Carrier v. Pro-Tech Restoration*, 944 P.2d 346 (Utah, 1997).

CONSTITUTIONAL OR STATUTORY PROVISIONS

Constitutional Provisions:

None

Statutory Provisions:

Utah Code, § 75-2-502

Utah Code, § 75-2-503

Utah Code, § 75-7-111

Utah Code, § 75-7-605

Utah Code § 78-2-2

STATEMENT OF CASE

1. Whether the application of a preponderance of the evidence standard as opposed to a clear and convincing evidence standard in determining the validity of a an amendment of a deceased grantor constitutes reversible error.
2. Whether the admission of duplicate documents over the objections of counsel when the genuineness of the originals is in doubt constitutes reversible error.

STATEMENT OF THE FACTS

The following facts were presented in evidentiary hearing in the Court Below; they do not appear to be in dispute. Grantor, Ina Holman, had five children: Marian Spencer—now deceased, Appellees Kathleen Robinson, Jenevieve Olson (nka Holman) , Phyllis Hall and the Appellant, Robert Holman. On July 27, 1990, Grantor executed a Trust Agreement (the Trust).⁴

The original Trust Agreement provided that, upon Grantor's death or incapacity, all four of her living children would serve as co-trustees and

⁴ Marian Spencer died before the trust was created but is survived by her children. The Trust did not specifically state whether Marian Spencer or her issue would receive a distribution. However, the Court Below determined that Marian Spencer should be treated as a pretermitted heir, and that her share should go to her issue. Her surviving issue are Appellees R. Henry Spencer, Cindy Riley, Pam Gondola, Jana Hay, Sue Frampton, Beth Jeppson, John Spencer, Edith Dunn, Andrew Spencer, Heather Spencer, and Allison Mack. Appellant is not disputing this determination.

equal beneficiaries. At the time she executed the Trust, Grantor was living in Orem, Utah. She lived there until January of 2001 when she was hospitalized following a fall. While in the hospital, she underwent gall stone surgery. Following her release from the hospital, she went to live with her oldest daughter, Kathleen, in Midway, Utah.

While living in Kathleen's home, Kathleen prepared a document for Grantor's signature. This document was entitled "Update to the Trust of Ina C. Holman" (the "Amendment")⁵. This Amendment purports to remove Appellant as a beneficiary and also to remove Jenevieve Holman and Appellant as co-trustees of the trust. This document purported to be signed in February of 2001.

In April of 2002, two of Grantor's attending physicians issued certificates declaring her incompetent.

In August of 2002, Appellant and the other three children designated as beneficiaries and trustees in the original trust agreement met and signed a handwritten document.⁶ In that document, the parties agreed to a number of matters of trust business. They agreed that the trust funds would be placed into a commercial bank, and that they would disperse some of the trust funds

⁵ Trial Exhibits 2, 9, 2A, 9A.

⁶ Trial Exhibit 5

amongst themselves. These disbursements were to be considered advance distributions of trust assets. Shortly thereafter, Kathleen Robinson and Jenevieve Holman announced that they were withdrawing from this agreement.

Some time during 2003, Central Bank assumed the duties as the corporate trustee of the subject trust. Following Grantor's death in March of 2005, Central Bank petitioned the District Court for a determination of certain issues, including the validity of the Amendment, and the beneficiary status of the various children and other family members.

At the ensuing evidentiary hearing on November 14, 2005, none of the parties were able to produce the original of the Amendment. One of the witnesses was able to provide the Court with photocopies of the Amendment which the Court received over the Appellant's objections.⁷

Following the close of evidence, Kathleen Robinson and Jenevieve Holman produced what they claimed were two original copies of the Amendment, which the Court received without reopening the hearing.⁸

⁷ Trial Exhibits 2 and 9

⁸ Trial Exhibits 2A and 9A

The judgment of the Court Below provides, in essence, that the Amendment is valid, and that it effectively removes Appellant as both co-trustee and as beneficiary of the Trust.

SUMMARY OF ARGUMENT

1. Utah law requires that any purported alteration or amendment to a testamentary instrument—including a trust—be shown to represent the true intent of the grantor. Such intent must be shown through clear and convincing evidence, and the burden is on the proponent of the alteration or amendment to so demonstrate. The Trial Court erred in that it applied a lower preponderance of the evidence standard. The Trial Court did not expressly state in its ruling which standard it was applying. However, Appellant was able to demonstrate at hearing that the proponent of the amendment, Appellee Kathleen Robinson, in full knowledge of the purported Amendment, ignored its existence and acted inconsistently with its terms—in spite of the fact that it was to her financial advantage to do otherwise. However, the Trial Court failed to even address this evidence in its ruling. This gives rise to the presumption that the Trial Court applied only a preponderance of the evidence standard.

2. Utah Rules of Evidence require a proponent of a document whose authenticity is in doubt to either produce the original of the document or else account for its whereabouts. This “best evidence” rule is intended to prevent fraud or mistake in proof of the contents of a writing. Although Appellant has repeatedly disputed the authenticity of the purported Amendment, the originals of the Amendment were not produced at hearing, and photocopy duplicates were admitted over his objection. Later, after the close of evidence, the Trial Court received and admitted what purport to be the originals of these documents without offering Appellant the opportunity to respond.

ARGUMENT

I.

The Trial Court Applied an Incorrect Standard of Review in Determining Whether the Purported Amendment was Indeed a Part of the Trust.

Testamentary transfers—either through will or through trust—are held to a high standard of review. The rules that apply to the interpretation of and disposition of property by wills also apply to trusts.⁹ Under these sections, any testamentary instrument, either a will or a trust, must meet certain formalities. It must contain, at a minimum, the testator’s (or the grantor’s) signature, and be signed also by at least two competent witnesses.¹⁰

The subsequent section states that a document that does not comply with these formalities may nonetheless be enforceable provided that the document’s proponent can establish by “*clear and convincing* evidence that

⁹ See Utah Code, § 75-7-111.

¹⁰ See Utah Code, § 75-2-502.

the decedent intended the document or writing to constitute [a valid testamentary instrument].”¹¹

Similarly, another statute states that a Grantor may revoke or amend a revocable trust by employing “any. . . method manifesting *clear and convincing evidence* of the [grantor's] intent.”¹² This is an even higher evidentiary standard than that of most states: that a modification to a trust must be established by clear and convincing evidence.¹³

In the current case, Appellee Kathleen Robinson was the proponent of the alleged Amendment. As such, she bore the burden of proof to demonstrate its validity. This burden of proof was not that of the customary preponderance of the evidence, but rather, to the standard of clear and convincing evidence—a significantly higher standard.¹⁴ Unfortunately, the

¹¹ See Utah Code, § 75-2-503 [emphasis added].

¹² See Utah Code, § 75-7-605(3)(b)(ii) [emphasis added].

¹³ Restatement (Third) of Trusts § 63, p. 443 (2001). “Settlor’s power to revoke or modify the trust can be exercised in any way that provides clear and convincing evidence of the settlor’s intention to do so.”

¹⁴ 29 Am Jur 2d Evidence § 157 (2007). “Generally the party with the burden of persuasion must establish the elements of its case by a preponderance of the evidence; that generally occurs when the factfinder is

Trial Court does not state in its Memorandum Decision or elsewhere the standard of proof it employed. An examination of the Decision and the Transcript strongly suggests that it applied the lower preponderance standard.

Appellant has continuously maintained that the alleged Amendment is either a forgery, or, more likely, it was extracted from Grantor either when she lacked capacity to sign it, or under undue influence. It is undisputed that the alleged Amendment was written or otherwise procured by Kathleen Robinson, and that she oversaw its execution.¹⁵ The Amendment did not

satisfied that the fact is more likely true than not true.. . .

“Occasionally constitutional or policy considerations impose a greater burden of persuasion; in such instances a party will be required to prove its case by clear and convincing evidence. [citation] Clear and convincing evidence is defined in a variety of ways; for example, to establish a fact or an element by clear and convincing evidence a party must persuade the jury that the proposition is highly probable, [citation] or must produce in the mind of the factfinder a firm belief or conviction that the allegations in question are true. [citation]”

¹⁵ See Testimony of Kathleen Robinson, Partial Record of Trial page 38.

conform to the formalities set forth in Utah Code, § 75-2-5-502. It was not witnessed by disinterested persons.

Not only was the purported Amendment deficient on its face, but Kathleen Robinson's subsequent behavior regarding it raised more questions about its authenticity. Both during the hearing, and in their closing statements, Appellant's and Phyllis Hall's counsel raised these issues, but the Trial Court failed to take these rather compelling arguments into account in making its ruling.

As pointed out previously, the Amendment ostensibly took effect in February of 2001—approximately fourteen months before Grantor was formally declared incompetent. The testimony presented to the Trial Court about Grantor's competency during early 2001 was contradictory and given by highly interested witnesses.

However, it is plain that the Amendment benefited its proponent, Kathleen Robinson, tremendously. Not only did it effectively increase her distributive share of the Trust assets by removing Appellant as a beneficiary, but it removed two of her siblings (Jenevieve Olsen and Appellant) who otherwise would have served as successor co-trustees along with her.

With this said, Kathleen Robinson's own actions following the signing of the Amendment suggest that she, herself, had doubts about its

validity. As discussed previously, in August of 2002, Robinson along with the other three siblings signed a handwritten agreement¹⁶ that purports to transact trust business. This document refers to Appellant as one of the co-trustees of the Trust and also as one of the beneficiaries—despite the fact that the earlier Amendment purported to remove him from these capacities. Even though Kathleen Robinson was aware of the Amendment, she concealed this fact from her siblings and continued to treat Appellant as an interested party—although she did not state why in her testimony.¹⁷

If the Amendment were genuine, Kathleen Robinson's decision to either conceal its existence or deny its validity to her siblings and thus dilute both her authority and her distributive share make no sense. The more likely explanation is that she, herself, knowing her mother's mental capacity at the time she signed it, doubted its enforceability. Otherwise, her actions in August of 2002 make no sense. In a similar vein, the hearing record indicates that after the four siblings signed the Agreement in August of 2002, Kathleen represented to a number of third parties—including banks and title companies—that Appellant was indeed a co-trustee of the trust.

¹⁶ Trial Exhibit 5.

¹⁷ See Testimony of Kathleen Robinson, Partial Record of Trial page 50.

Although this Court typically does not question the weight and credibility to be given to evidence, it needs to ensure that the trial court applies the proper evidentiary standard. The fact that the Trial Court failed to even mention any of the above inconsistencies in reaching its decision suggests that it failed to even consider them. This infers that the Trial Court applied the lower preponderance of the evidence standard.

II.

The Trial Court Improperly Admitted Prejudicial Evidence in Violation of the “Best Evidence” Rule.

Rule 1002 of the Utah Rules of Evidence reads, in pertinent part, as follows:

“To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by Statute.”

The underlying purpose of this so-called “best evidence” rule is the prevention of fraud or mistake in proof of the contents of a writing.¹⁸ In practice, this Rule is occasionally invoked to keep a photocopy of a document out of evidence when there is reason to doubt the authenticity of

¹⁸ See 29A Am Jur 2d Evidence § 1049 (2007)

the original.¹⁹ Rule 1004 of the Utah Rules of Evidence provides a number of exceptions to the best evidence rule, but none of these exceptions appears to apply here.

As stated earlier, Kathleen Robinson's testimony was that Grantor executed the Amendment in duplicate. However, at hearing, the witness was only able to produce photocopies of these two documents.²⁰ Because he doubted the authenticity of the originals, Appellant's counsel objected to the admission of these documents:

MR WINTERS: Your Honor, if I might comment on that. If, if it's being submitted for the purpose of establishing at one point in time there were two originals I'd have no objection to that. If it's being submitted for the purposes of helping the court deal with the administration of this estate for interpreting the estate, I would object to that. *I think we need the originals for the court to see what to interpret.* But if it's simply establishing that at one point in time there were two now missing originals I have no objection to it being

¹⁹ See Utah Rules of Evidence, Rule 1003.

²⁰ Trial Exhibits 2 and 9. See testimony of David MacBeth, Partial Record of Trial, pages 17 – 18.

admitted for that limited purpose just establishing that at some point there were two. That does not establish that either one is in existence today.

THE JUDGE: Well, I won't take that as a valid objection.

MR. WINTERS: In that case, I'll have to object to both.²¹

The Trial Court then went ahead and admitted the two duplicate documents over counsel's objection. Concerning these documents, the Trial Court later stated:

At the November 14, 2005 evidentiary hearing, the parties were unable to produce originals of the Update to the Trust. Copies of two versions of the Update were received into evidence as Exhibit 2 and Exhibit 9. Subsequent to the hearing Respondents Jenevieve Holman and Kathleen Robinson found the originals of such exhibits, and filed a "Motion to Substitute Original Documents for Photocopies Received Into Evidence as Exhibit 2 and Exhibit 9, submitting the originals to the court along with additional testimony in the form of affidavits.

²¹ Testimony of David MacBeth, Partial Record of Trial, pages 18 – 19

[emphasis added]

The court will accept the originals and they will be marked as Exhibit 2A and Exhibit 9A to correspond with the exhibit numbers of the copied documents submitted at trial. The court declines to receive the additional proffered testimony as contained in the affidavits.²²

In other words, the Court admitted duplicate documents over Appellant's objection, and then later admitted what purported to be the originals after the close of evidence without affording Appellant opportunity to comment on or even examine these documents. Both actions are highly prejudicial to Appellant since he has "a genuine question . . . as to the authenticity of the original."²³ Moreover, it deprives the Appellant to his right to confront witnesses, examine documents, and object to the foundation of out-of-court statements as afforded by traditional hearsay protections.²⁴

In addition, Under Utah R. Civ. P. 59(a), newly proffered evidence is admissible only under subpart (4), which requires that the proffered evidence be newly discovered and such that the proponent could not, with reasonable

²² Memorandum Decision, page 3 [emphasis original].

²³ See Rule 1003, Utah Rules of Evidence.

²⁴ See Rule 802, Utah Rules of Evidence.

diligence, have discovered and produced at the trial.²⁵ In this case, there is no information available as to why the originals were not produced during the hearing. Moreover, Appellant had no opportunity to cross-examine the proponent of these documents to determine why they were not produced at the hearing.

Indeed, the authenticity of the Amendment *is* the entire case. The Trial Court should have taken greater caution to ensure that these documents were properly admitted.

²⁵ Rule 59(a), Utah Rules of Civil Procedure. See also *Barnard v. Sutliff*, 846 P.2d 1229 (Utah 1992).

CONCLUSION

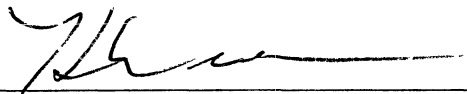
The Trial Court applied an inappropriately low evidentiary standard in determining whether the proposed amendment was valid or whether it was procured through fraud or undue influence. The Trial Court did not expressly state in its ruling which standard it was applying. However, Appellant was able to demonstrate at hearing that the proponent of the amendment, Appellee Kathleen Robinson, in full knowledge of the purported amendment, ignored its existence and acted inconsistently with its terms—in spite of the fact that it was to her financial advantage to do otherwise. However, the Trial Court failed to even address this evidence in its ruling. This gives rise to the presumption that the Trial Court applied only a preponderance of the evidence standard.

Moreover, the Trial Court admitted duplicate copies of documents whose authenticity is in dispute; it did this over Appellant's objection and in violation of the "best evidence" rule. This rule was intended to address situations precisely like this one. A litigant who disputes the authenticity of a document is entitled to

either examine the original or to elicit information about its whereabouts. The Trial Court did not allow Appellant to do either of these things. Moreover, the Trial Court received what Appellee Kathleen Robinson maintains are the originals of these documents following the close of evidence. This effectively deprived Appellant of the right to examine these documents and appropriately cross-examine Appellant Kathleen Robinson about them, or to otherwise present appropriate evidence to dispute their authenticity.

Appellant maintains that either of these issues constitutes reversible error. Therefore, he respectfully requests that this honorable Court reverse the Trial Court's decision and remand the matter for rehearing.

DATED this 5th day of September, 2007

A handwritten signature in black ink, appearing to read 'H. Garner', written over a horizontal line.

HUNT W. GARNER
Attorney for Appellant, Robert Holman

PROOF OF SERVICE

I, the undersigned, do hereby certify, under penalty of perjury, that on this 6th day of September, 2007, I sent, via the U.S. Postal Service, with proper postage affixed, true and correct copies of the attached Appellant's Brief from Utah Court of Appeals case number 20060390 – CA to the following parties and addresses:

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Provo Department
Attn: Teri Anderson/Chris James
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Provo UT 84603



ADDENDA

- A. Findings of Fact (Judgment)
- B. Memorandum Decision
- C. Trial Exhibit 2
- D. Trial Exhibit 9
- E. Trial Exhibit 5

FILED
Fourth Judicial District Court
of Utah County, State of Utah
3 21-06 8:55 AM ^{KS} Deputy

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Our File No 23186

Attorneys for Central Bank

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

IN THE MATTER OF THE ESTATE OF INA C. HOLMAN FAMILY TRUST.	JUDGMENT Case No. 053400366 Judge Gary D. Stott Division #4
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An evidentiary hearing concerning the matter of the Ina C. Holman Family Trust was held before the Court on November 14, 2005, in which testimony was given by several witnesses and documents were marked and received into evidence. Counsel for petitioner and trustee Central Bank was John L. Valentine for Howard, Lewis & Petersen; Mark F. Robinson represented respondents Jenevieve Holman, Kathleen Robinson and the eleven Spencer grandchildren of Ina C. Holman (R. Henry Spencer, John Spencer, Cindy Riley, Pam Gondola, Jana Hay, Sue Frampton, Beth Jeppson, Edith Dunn, Andrew Spencer, Heather Spencer, and Allison Mack); Douglas T. Hall represented the interests of his wife, Phyllis Hall; and Donald W. Winters served as counsel for Robert Holman. At

the conclusion of the evidentiary hearing, the Court requested that counsel submit post-trial memoranda in lieu of hearing closing arguments. The Court has since received each party's post-trial memorandum, has reviewed the pretrial and other pertinent memoranda and the evidence presented at trial, has heretofore entered its Findings of Fact and Conclusions of Law and now makes and enters the following final judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Petitioner Central Bank has faithfully served as Trustee of the Trust and has attempted to administer the Trust according to the terms listed in its documents.

2. Petitioner Central Bank is awarded its attorney fees and costs in the amount of \$ 8060⁵⁰ to be charged against the assets of the estate.

3. The February 5, 2001 Update to Trust of Ina C. Holman is given full force and effect by this Court. Robert Holman shall not be a beneficiary of the Trust as he has received the benefit of an early disbursement pursuant to agreement between Ina C. Holman and Robert Holman. The Trust and the Trustor's intent shall be implemented to the effect that the Trust share of Marian Spencer (deceased) shall be distributed in eleven equal shares to the Spencer children.

4. The statutory interest rate of 10% shall be applied to the early distributions of \$44,000.00 each taken by Robert Holman and Phyllis Hall, from September 6, 2002, until repaid (Robert) or reconciliation is made (Phyllis).


5. Any documents executed after April 26, 2002, and prior to the death of Ina C. Holman are hereby declared to be void and without effect against the Ina C. Holman Trust.

6. Central Bank is to administer the Trust consistent with the foregoing provisions. The parties may by written notice request further hearing on the financial accounting issues if not resolved among them subsequent to this judgment.

7. To the extent that there remains any other claims among the parties not resolved by this judgment, this judgment is hereby certified as a final judgment for purposes of Rule 54 (b) of the Utah Rules of Civil Procedure as to all issues and claims decided in this judgment.

DATED this 16 day of ^{MARCH}~~February~~, 2006.

BY THE COURT:



GARY D. STOTT
DISTRICT COURT JUDGE *K. Sargeant*

APPROVED AS TO FORM:

MARK F. ROBINSON, for:
ROBINSON, SEILER & ANDERSON
Attorneys for Jenevieve Holman, Kathleen
Robinson and Spencer grandchildren

DOUGLAS T. HALL, ESQ.
Attorney for Phyllis Hall

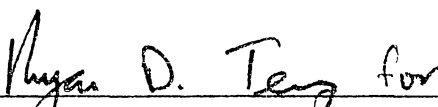
DONALD W. WINTERS, ESQ.
Attorney for Robert Holman

NOTICE TO PARTIES AND COUNSEL

TO: PARTIES AND COUNSEL

You will please take notice that the undersigned, attorney for Central Bank, will submit the above and foregoing Findings of Fact and Conclusions of Law to the Court for signature upon the expiration of the time permitted for the filing of a written objection pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 24 day of ^{Feb.} ~~March~~, 2006.



JOHN L. VALENTINE, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Central Bank

MAILING AND FACSIMILE CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following,
postage prepaid, this 24th day of February, 2006.

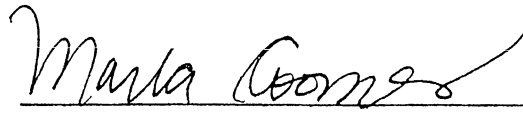
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SECRETARY

Fourth Judicial District Court
of Utah County, State of Utah
IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

12/23/05 Depu

IN THE MATTER OF THE
INA C. HOLMAN TRUST

MEMORANDUM DECISION

Case No. 053400366
Judge Gary D. Stott

An evidentiary hearing concerning the matter of the Ina C. Holman Family Trust was held before the court on November 14, 2005, in which testimony was given by several witnesses and documents were marked and received into evidence. Counsel for Petitioner and Trustee Central Bank was Mr. John L. Valentine. Mr. Mark F. Robinson represented Respondents Jenevieve Holman, Kathleen Robinson, and the eleven Spencer grandchildren of Ina C. Holman (R. Henry Spencer, Cindy Riley, Pam Gondola, Jana Hay, Sue Frampton, Beth Jeppson, Edith Dunn, Andrew Spencer, Heather Spencer, and Allison Mack) Mr. Douglas Hall represented the interests of his wife Phyllis Hall and Donald Winters served as counsel for Robert Holman. At the conclusion of the evidentiary hearing, the court requested that counsel submit Post-Trial Memorandum in lieu of hearing closing arguments. The court has since received each parties' Post-Trial Memorandum, has reviewed the pre-trial and other pertinent memoranda, the evidence presented at trial and is now prepared to issue the following decision.

BACKGROUND SUMMARY

On June 17, 2003, the court appointed Petitioner Central Bank to serve as Trustee for the Ina C. Holman Family Trust ("the Trust"). The Trust was created on July 27, 1990. Since the

date of appointment, Petitioner has faithfully served as Trustee of the Trust and has attempted to administer the Trust according to the terms listed in its document.

Subsequent to Petitioner's appointment, certain documents were discovered which Petitioner believed might significantly affect their administration of the Trust. These documents include: (1) Update to Trust of Ina C. Holman ("Trust Update"), dated February 5, 2001; (2) Determination of Incapacity, April 18, 2002 ("1st Incapacity Determination"); (3) Determination of Incapacity, April 26, 2002 ("2nd Incapacity Determination"); (4) updated instrument dated in August 2002, signed by the former trustees of the Ina C. Holman Trust ("Trustee Update"); and (5) Amendment of the Trust Agreement of Ina C. Holman signed by Kathleen Robinson, attorney-in-fact ("Amendment"), dated March 18, 2003.

Ina C. Holman, the Trustor and Lifetime Beneficiary, died on March 31, 2005. Since her death, her children, as beneficiaries of the Trust, have entered into a family conflict over the interpretation and validity of the foregoing documents and their impact, if any, on the division of the Trust assets. Additionally, there is in existence various Promissory Notes made to both Robert J. Holman (son and beneficiary) and Phyllis Hall (daughter and beneficiary) that may affect the division of the assets of the Trust. Both Mr. Robert J. Holman and Mrs. Phyllis Hall contest the true nature of the obligations.

In light of the various disputes concerning the Trust, Petitioner determined that it was unable to make an appropriate interpretation of the documents which may affect the trust and the determination of the nature or extent of objections concerning the documents. Petitioner asked assistance of the court pursuant to Utah Code Ann. §75-7-201 to interpret the trust and the subsequent documents and make a determination as to the division of the trust assets.

The interested parties at the time of the Petition included: Kathy Robinson, Jenny Holman, Phyllis Hall, Robert Holman, Henry Spencer, Cindy Riley, Pam Gondola, Jana Hay, Sue Frampton, Beth Jeppson, John Spencer, Edith Dunn, Andrew Spencer, Heather Spencer, Allison Mack.

A. Stipulation

At trial, the parties were able to enter into a stipulation concerning the amount of money Robert and Phyllis Holman each borrowed from the Trust. Pursuant to the stipulation, the amount owed to the Trust by Robert Holman is \$44,000.00, plus interest from September 6, 2002, until paid in full. The amount to the Trust by Phyllis is \$44,000.00, plus interest from September 6, 2002, until paid in full. The rate of interest was not stipulated to at that time.

B. Exhibits Received Since the Evidentiary Hearing

At the November 14, 2005 evidentiary hearing, the parties were unable to produce originals of the Update to the Trust. Copies of two versions of the Update were received into evidence as Exhibit 2 and Exhibit 9. Subsequent to the hearing Respondents Jenevieve Holman and Kathleen Robinson found the original of such exhibits, and filed a “Motion to Substitute Original Documents for Photocopies Received Into Evidence as Exhibit 2 and Exhibit 9, submitting the originals to the court along with additional testimony in the form of affidavits. The court will accept the originals and they will be marked as Exhibit 2A and Exhibit 9A to correspond with the exhibit numbers of the copied documents submitted at trial. The court declines to receive the additional proffered testimony as contained in the affidavits.

FINDINGS OF FACT

1. Ina C. Holman executed the Ina C. Holman Family Trust on July 27, 1990. Exhibit 1.
2. At the time Ina C. Holman created the Trust, she had four living children.

3. A fifth child of Ina C. Holman, Marian Spencer, died prior to the creation of the Trust. She left eleven children behind, referred to as the Spencer grandchildren of Ina Holman.
4. An “Update to Trust of Ina C. Holman” documents on February 5, 2001” was executed by Ina C. Holman before Lyle Gertsch, a Notary Public of the State of Utah. Exhibit 2, Exhibit 2A, Exhibit 9, Exhibit 9A.
5. In April of 2002 and after being seen by two independent physicians, Ina C. Holman was declared incapacitated.
6. Subsequent to the declaration of Ina C. Holman’s incapacitation, her children in their position as Successor Trustees of the Trust sold her home.
7. Ina C. Holman’s living children acting as Trustees of the Trust entered into an agreement in August 2002 to distribute \$44,000 of Ina C. Holman’s Trust funds to each child.
8. Kathy Robinson and Jenevieve Holman repudiated the August 2002 agreement Immediately after signing it.
9. Robert Holman and Phyllis Hall each have stipulated that they took distributions of \$44,000 from the trust fund in two installments of \$15,000 and \$29,000 each. Each signed “notes” to the Trust, copies of these notes were received into evidence as Exhibit 7 and Exhibit 8, respectively.
10. These distributions have not been repaid to the Trust.

CONCLUSIONS OF LAW

A. Validity of Update

In dispute at trial was the validity of the Update and whether the document represented Ina C. Holman’s true interests in distributing the Trust upon her death or whether it had been obtained by fraud, mistake, duress, or undue influence.

1. Agreement Between Ina C. Holman and Robert Holman

At some point prior to the creation of the Update, Mr Robert Holman borrowed money from his mother in an amount totaling \$124,000 *See* Paragraph 15, Exhibit 15 At the hearing, evidence was presented that Robert Holman and his mother entered into an understanding in which Mrs Ina C Holman would forgive the her son's debt in exchange for removing him from any wills or trust A letter written by Robert Holman to his mother in 1994 was received into evidence by the court Exhibit 15 Robert Holman authenticated the letter and testified that he did send it to his mother in 1994 The letter outlines his understanding at that time of the agreement entered into by him and his mother In the letter he stated, "If you died today my anticipation would be that each child would end up with one fifth or \$117,800" and that prior to disbursement, "I would want to trade my interest in the estate for the promissory note " Apparently based on the forgiveness of the \$124,000 Robert owed to his mother, he recognized that the remaining "assets are to be split 4 ways because I would be out of the trust This would leave \$117,800 each " *See* Paragraph 3, Exhibit 15

Robert Holman apparently provided his mother with various scenarios in an attempt to gain her support for his request Under a different scenario, one in which he would pay back his mother the \$124,000 owed, he determined "if you died under this scenario one fifth would be \$117,800 I illustrate this point, not to show that I was a good person not paying my debts, but to show that the amount distributed between your heirs would have been the same The decision to distribute like this is not a product of any current event, it is a decision that was made 5 years ago " Exhibit 15

There is no record that Mrs Ina C Holman received \$124,000 from Robert as repayment of his debt to her Instead, it appears for all intents and purposes that she forgave him his debt as

an early disbursement of funds from the estate in return for removing him from any will or trust she might create. This is written in a follow-up letter by Robert Holman dated October 21, 1994 to his mother, more specifically outlining his request:

1. Deliver to the Grantor (Robert J. Holman) the \$80,000 Promissory Note marked "Paid" and,
2. Remove from and not name Robert J. Holman in any wills or trusts now to be made.

See October 21, 1994 Letter, Exhibit 16.

2. *Memorialization of Agreement in Update*

An Update to the Trust was created and signed by Ina C. Holman on February 5, 2001. The Update contains language apparently implementing the understanding that Ina C. Holman entered into with her son Robert Holman pursuant to his written requests. The Update states, "Since my son, Robert J. Holman, has previously received real estate, loans and money from me equal to or in excess of his share of my estate, his name is to be removed from my previously written trust, and he is to be excluded from sharing in the proceeds of any of my estate after my death." See Exhibits 2, 2A, 9, and 9A.

Mr. Robert Holman contended in his memoranda and at the time of trial that his mother created the Update under the undue influence of his sister Kathy Robinson. This contention is refuted by Robert Holman's own correspondence with his mother. This correspondence shows that Robert Holman clearly understood the agreement that he and his mother were entering into that her forgiveness of the loan would be in exchange for his removal from the Trust. Additionally, the fact that his wife and his mother did not get along and that he had not communicated with his mother much, if at all, in the two years prior to the Update indicates that the Update was true to the agreement and understanding between Robert and Ina Holman.

Further, at the time the Update was created, Robert was not present in Utah and he was not in a position to testify that his mother lacked intent and was unduly influenced.

Each of Ina C. Holman's children, Robert Holman, Jenny Holman, Phyllis Hall, and Kathleen Robinson testified that their mother maintained independent control of her financial assets until she was declared incapacitated in 2002. Ina C. Holman was finally declared incapacitated after she insisted on living in her own home after a hospitalization for pneumonia in 2002. Her physical condition prevented her from being able to care for herself and live independently.

Generally, undue influence is deemed to have occurred when an individual wrongly influences the settler in a manner that "defeat[s] the manifest intent of the testator, interfere[s] with the general scheme of distribution, or work[s] an injustice to other heirs." 79 Am. Jur.2d *Wills* §397 at 555. The court finds that the Update was created pursuant to and consistent with the manifest intent of Ina C. Holman and Robert Holman's request. Robert Holman himself manifested the intent as memorialized in the Trust through his letters to his mother. Exhibits 14, 15, and 16. Having already received his equitable portion of the Trust, the February 5, 2001 Update did not work any injustice to Robert and was necessary to protect the equality of distribution to the remaining heirs. The distribution of the Trust as stated in the Update is consistent with the initial trusts 20% distribution of Ina C. Holman's assets. A repudiation of the Update would significantly disrupt any equality the Trust apparently intended to occur and would result in a huge inequity to the remaining trustees. Robert would receive a far greater amount than any of the other trustees. His claim that he should receive two shares and that the Spencer grandchildren should receive none is not equitable but instead simply greedy.

The court finds that the February 5, 2001 Update correctly implements the intent of Ina C. Holman pursuant to the agreement she entered into with Robert Holman at his request. Robert Holman has already received an early disbursement of his interest in the Trust. He is not entitled to any further receipt of monies from the trust.

B. Spencer Gr grandchildren as Beneficiaries of the Ina C. Holman Trust

At the time of trial, a dispute existed as to whether the children of the deceased Holman sibling, Marian Spencer, should be considered valid beneficiaries of the Trust. Robert Holman and Phyllis Holman asserted their belief that the Spencer grandchildren should not be considered beneficiaries under the language of the trust.

1. *Pleadings of Respondents*

Respondents Jenevieve Holman and Kathleen Robinson asserted in their post-trial brief and at the time of trial that both Robert Holman and Phyllis Hall had agreed in their pleadings that the children of the Spencer children should be considered beneficiaries of the Trust.

Mrs. Hall, in her responsive pleading, affirmatively asked the court to construe the Trust in such a manner as to give “one full share for each surviving child and one full share to the children of the deceased child. . . .” In his pleading, Robert Holman, relied on and asked the court to “construe the Trust as further elaborated in the Response of Phyllis Hall” Robert Holman Response, page 3. Neither Phyllis nor Robert attempted to remove the Spencer children as beneficiaries of the Trust through their pleadings.

The Trust Agreement itself states that division of the Trust should be as follows:

“ . . . one full share [of the Trust] for each group composed of the then living, lawful descendants for each deceased child of the Trustor’s, to be apportioned in partial shares among such descendants by right of representation.”

Agreement Establishing the Ina C. Holman Family Trust, Paragraph 6.1(b).

The court adopts the analysis of Respondents Jenevieve Holman and Kathleen Robinson to conclude that neither Respondent Hall nor Respondent Robert Holman denied any of the allegations set forth in paragraph 10 of the Petition. Failure to deny the allegations of paragraph 10 constitutes an admission of paragraph 10. According to Rule 8(d) of the Utah Rules of Civil Procedure,

“(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted, shall be taken as denied or avoided.”

Pursuant to Utah Code Annotated §75-1-304, the Rules of Civil Procedure apply in the Probate Court. It states, in its entirety:

75-1-304. Practice in court.

“Unless specifically provided to the contrary in this code or unless inconsistent with its provisions, the Rules of Civil Procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this code.”

The court finds that having failed to deny paragraph 10 of the Petition, Respondents Phyllis Hall and Robert Holman have admitted that Kathy Robinson, Jenny Holman, Phyllis Hall, Robert Holman, Henry Spencer, Cindy Riley, Pam Gondola, Jana Hay, Sue Frampton, Beth Jeppson, John Spencer, Edith Dunn, Andrew Spencer, heather Spencer and Allison Mack are beneficiaries of the Ina Holman Family Trust. Further, the court finds that the express language of paragraph 6.1 of the Trust includes the Spencer children as beneficiaries.

2. *The Trust document is clear and must be construed in favor of the Spencer children as beneficiaries.*

During her lifetime, Mrs. Ina C. Holman had five children. Four of these children survived their mother. Marian Spencer, Ina C. Holman’s daughter died prior to her mother and leaving behind eleven children.

In determining the beneficiaries and their interests to a trust, the settlor's intent, the settlor's circumstances and all the provisions of the trust instrument must all be considered. The Law of Trusts and Trustees, George Borgert, (1979) §182 p. 254.

Article Two of the Trust entitled, "Family Members" states: "At the time of the execution of this Trust, the Trustor is a widow and has four (4) children: KATHLEEN ROBINSON, JENEVIEVE OLSON, PHYLLIS HALL and ROBERT THOMAS."

In analyzing the construction of this article, the court finds that it was written so as to represent the living children at the time of the creation of the trust.

Article Six, however, is titled "Ultimate Distribution of the Trust Estate" and states in 6.1:

"(a) One full share for each then living child of the Trustors; and (b) one full share for each group composed of the then living lawful descendants of each deceased child of the Trustors, to be apportioned in partial shares among such descendants by right of representation."

Section 6.2 further provides that

"Any share or partial share, as set forth above in Paragraph 6.1 above, set aside for a beneficiary who predeceases the Trustor, such share or partial share shall be distributed as set forth in this Paragraph 6.2.

"Article Eleven, 11.2, As used herein, the terms "children," "issue," or "descendants" shall refer to lineal descendants of all degrees, including adopted persons."

No evidence has been provided to the court that would suggest that Mrs. Ina C. Holman did not intend that the children of Marian Spencer receive a portion of the Trust funds. On the contrary, evidence has been provided to clearly show that the Spencer children were considered by Ina C. Holman to be beneficiaries of their Trust. Mrs. Sue Frampton, Ina's granddaughter, testified that her grandmother told her that she and her siblings were included as beneficiaries of the Trust. As indicated by the briefings mentioned earlier, Robert Holman believed only until

recently that the Spencer children were entitled to a portion of his mother's money. All of the family members have stated that they believed the intent of the Trust to be read to include the Spencer children. It is clear to the court that Mrs. Ina Holman believed Marian's children were included within the language of the Trust. The court has been provided with no indication to believe otherwise.

Further, the law favors the inclusion of prior deceased children's issue as heirs. The Utah Supreme Court has held that the testator's failure to provide for a child or issue of a deceased child constitutes a rebuttable presumption that the omission was unintentional. In the Matter of the Estate of Jones, 759 P.2d 345 (Utah 1988) (quoting In re Newell's Estate, 78 Utah 463, 5 P.2d 230, 236-37 (1931)). The court finds that the eleven Spencer grandchildren are beneficiaries of the Trust and are entitled to a disbursement of funds from the Trust.

C. Interest Rate of Loans to Robert and Phyllis.

Prior to the commencement of the hearing, the parties were able to enter into a stipulation as to the amounts of the loans provided by the Trust to Robert Holman and Phyllis Hall. A dispute remained with respect to what interest should be applied to these loans. The court finds that the proper interest rate is the pre-judgment rate of interest for the State of Utah of 10%

Both Robert and Phyllis signed promissory notes in accordance with an August 2002 agreement among the children. Exhibit 5. Both asserted that they fairly represented themselves and the Trust during the negotiation and execution of the September 6, 2002 promissory notes which, as testified by Robert, were drafted by him. The Promissory Notes were executed as backups to the early disbursements of the Ina C. Holman Trust in the event they were improper. Prior to agreeing to disbursing the funds, the Ina's children consulted with Mr. Skabelund. Mr.

Skabelund was the original drafter of the Trust. Mr. Skabelund indicated to the siblings that the disbursements were improper.

The disbursement of the funds was not a disinterested action. None of the parties entering into the agreement were disinterested and none were assigned to specifically safeguard Ina's interests and future needs. Kathy and Jenevieve quickly repudiated the agreement, the Trustor never approved it, and the Spencer children never participated in the agreement. Furthermore, the loans contained a minimal if token interest of 2% or no interest on their face. Exhibits 7 and 8.

At the hearing, Robert tried to validate taking the portion of his mother's money by characterizing the withdrawn money as something that would somehow help him to be financially able to assist his mother in the future if financial need arose on her part. The court is not convinced that this reasoning is sound or accurate as it appears that his real intent was to once again obtain money prior to her death.

The court finds that the interest rates of 0% to 2% on each of the loans not appropriate. Rather, the appropriate interest rate for these two loans is 10% and should be applied to the Promissory Notes as outlined in Utah Code Annotated §15-1-1:

- (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
- (2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.
- (3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

The 10% interest rate applies to the loan to Robert Holman for \$44,000, the \$29,000 loan to Phyllis Hall and to the loan of \$15,000 to Phyllis Hall to which no promissory note was executed.

D. Bank's Fees and Costs.

The Court recognizes that Petitioner has incurred attorney fees and costs in preparation of the petition and in participating in the evidentiary hearing. Petitioner shall be awarded its attorney fees and costs to be charged against the assets of the trust. The court appreciates the good work of Petitioner in attempting to resolve this matter and in its presentation of the matter to the court.

CONCLUSION

The February 5, 2001 Update to Trust of Ina C. Holman shall be given full force and effect by this Court. Robert Holman shall not be a beneficiary of the Trust as he has received the benefit of an early disbursement pursuant to agreement between Ina C. Holman and Robert Holman. The Trust and the Trustor's intent shall be implemented to the effect that the Trust share of Marian Spencer (deceased) be distributed in eleven equal shares to the Spencer children.

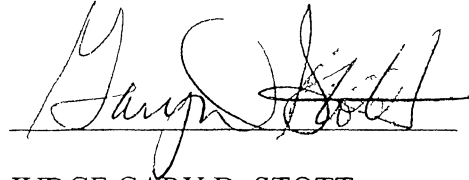
The statutory interest rate of 10% shall be applied to the early distributions of \$44,000 each taken by Robert Holman and Phyllis Hall, from the date taken until repaid (Robert) or reconciled (Phyllis).

Any documents executed after April 26, 2002 and prior to the death of Ina C. Holman shall be void and without effect against the Ina C. Holman Trust.

Central Bank is to administer the Trust commitment with the foregoing provisions. The parties may by written notice request further hearing on the financial accounting issues if not

resolved among them subsequent to this ruling Counsel for Central Bank shall prepare the appropriate order and submit it to the court for signature.

DATED this 23 day of December, 2005.

A handwritten signature in black ink, appearing to read "Gary D. Stott", is written over a horizontal line.

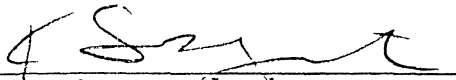
JUDGE GARY D. STOTT

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 053400366 by the method and on the date specified.

METHOD	NAME
Mail	DOUGLAS T HALL ATTORNEY 7321 S STATE ST STE A MIDVALE, UT 84047
Mail	MARK F ROBINSON ATTORNEY PET 80 N 100 E POB 1266 PROVO UT 84603-1266
Mail	JOHN L VALENTINE ATTORNEY PET 120 E 300 N POB 1248 PROVO UT 84603-1248
Mail	DONALD W WINTERS ATTORNEY 375 E 790 S PLEASANT GROVE UT 84062

Dated this 23 day of Dec, 2005.


Deputy Court Clerk

UPDATE TO THE TRUST OF INA C. HOLMAN

Be it known that I, Ina C. Holman, a resident of Orem, Utah, being of sound mind do make this change and update to my present trust.

I wish to make Kathleen Robinson and Phyllis Jean Hall the Co-Executors of my trust.

Since my son, Robert J. Holman, has previously received real estate, loans and money from me equal to or in excess of his share of my estate, his name is to be removed from my previously written trust, and he is to be excluded from sharing in the proceeds of any of my estate after my death.

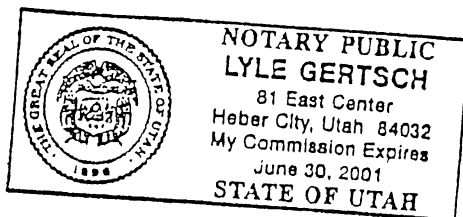
Dated: February 5, 2001

Signed: Ina C. Holman
INA C. HOLMAN

STATE OF UTAH)
 :SS
COUNTY OF WASATCH)

Subscribed, sworn to, and acknowledged before me by INA C. HOLMAN, the Trustor, this 5 day of February, 2001.

Lyle Gertsch
NOTARY PUBLIC



UPDATE TO THE TRUST OF INA C. HOLMAN

Be it known that I, Ina C Holman, a resident of Orem, Utah, being of sound mind do make this change and update to my present trust

I wish to make Kathleen Robinson and Phyllis Jean Hall the Co-Executors of my trust.

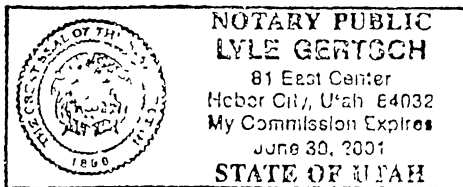
Since my son, Robert J. Holman, has previously received real estate, loans and money from me equal to or in excess of his share of my estate, his name is to be removed from my previously written trust, and he is to be excluded from sharing in the proceeds of any of my estate after my death

Dated: February 5, 2001

Signed Ina C Holman
INA C HOLMAN

STATE OF UTAH)
 :ss
COUNTY OF WASATCH)

Subscribed, sworn to, and acknowledged before me by INA C HOLMAN, the Trustor, this 5 day of February, 2001.



Lyle Gertoch
NOTARY PUBLIC

We the Trustees of the Irc C. Holman
trust ~~do~~ agree this ²⁰⁰² day of August that an
amount of \$125,000 shall be set up as a
and for the living expenses of Ima C. Holman.
~~Accounts~~ ^{Accounts} shall be set up in commercial banks and
redit unions as appropriate. Excess funds
ove ~~\$~~ \$125,000 are declared available for
isbursement, ~~according to~~ between the 5
miles according to the ^{portions} ~~provisions~~ in the trust.
in addition to the \$125,000 mentioned above, 80
acres of land in Hinsdale county is to be held
reserve should ~~the~~ the \$125,000 ~~now~~ become
sufficient to meet the needs and expenses
of Ima C. Holman. ^{When the \$125,000 above is reduced, the} ~~the account reaches~~ 35,000 or
less, marketing of the 80 acres must begin. In the
event disbursements are considered inappropriate ~~accounts~~
~~regarding~~ ^{regarding} they shall be declared loans bearing
interest at 2%, similar to current money market ~~accounts~~
Ima Holman Trustee ~~Kathleen~~ ^{Bollinger} Trustee