

2007

Ina C. Holman Family Trust : Brief of Appellee

Utah Court of Appeals

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IN THE MATTER OF THE INA C.

HOLMAN FAMILY TRUST.

BRIEF OF THE APPELLEES

Case No. 20060390-CA

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Holman, Kathleen, Robinson, & Spencer
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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code § 78-2(a)-3(2)(j) inasmuch as this case was transferred to this Court by the Utah Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

First Issue

Whether the evidence presented to the trial court was sufficient to establish that it was Ina C. Holman's intent to amend her trust with the Update to Trust of Ina C. Holman dated February 5, 2001?

The standard of review is the clearly erroneous standard articulated in rule 52(a) of the Utah Rules of Civil Procedure. Specifically, rule 52(a) provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." UTAH R. CIV. P. 52(a). According to the Utah Supreme Court, rule 52(a)'s clearly erroneous standard is applied in the following manner:

[T]he content of Rule 52(a)'s "clearly erroneous" standard, imported from the federal rule, requires that if the findings ... are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings ... will be set aside.

State v. Walker, 743 P.2d 191, 193 (Utah 1987). *See also In re Z.D.* 147 P.3d 401, 405–406 (Utah 2006).

Second Issue

Whether the trial court acted within its discretion by admitting into evidence the original and duplicate Updates to Trust of Ina C. Holman?

The standard of review is abuse of discretion. *See Vigil v. Div of Child & Family Servs.*, 107 P.3d 716, 718 (Utah Ct. App. 2005). This Court explained, “Trial courts are afforded broad discretion in determining the admissibility of evidence; thus we will not disturb a trial court’s ruling whether to admit or exclude evidence absent an abuse of discretion.” *Vigil*, 107 P.3d at 718. In *Gorostieta v. Parkinson*, the Utah Supreme Court explained that “[t]he admissibility of an item of evidence is a legal question. However, the trial court has a great deal of discretion in determining whether to admit or exclude evidence, and its ruling will not be overturned unless there is an abuse of discretion.” 17 P.3d 1110, 1114 (Utah 2000) (internal quotations omitted). *See also State v. Casias*, 772 P.2d 975, 977 (Utah Ct. App. 1989) (“In the absence of an abuse of discretion, the trial court’s ruling on the admissibility of evidence will not be disturbed.”)

DETERMINATIVE LAW

Rules:

UTAH R. APP. P. 24(a)(9) ·

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

UTAH R. CIV. P. 52(a)

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and

conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses

UTAH R. EVID. 1003

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

STATEMENT OF THE CASE

Nature of the Case

This case originally came before the trial court on the Petition for Construction of Trust Documents of Central Bank as trustee of the Ina C. Holman Family Trust (“Trust”).

R. 43. The petition sought the construction of documents potentially affecting trust administration, including an Update to Trust of Ina C. Holman, dated February 5, 2001 (“Update to Trust”), because a dispute had arisen among the children of Ina Holman (“Ina”) concerning the interpretation, effect, and validity of the documents. R. 42. By its language, the Update to Trust purported to remove Robert Holman (“Robert”), Ina’s son, from the Trust as both a beneficiary and a successor co-trustee on account of real estate, loans, and money Ina distributed to Robert in excess of his share of the estate. R. 14, Exhibits 2 & 9.

Course of Proceedings

Each of Ina’s then-living children responded to the petition. R. 67, 70, & 73. The trial court set a one day evidentiary hearing for November 14, 2005. R. 83. Prior to the evidentiary hearing, two motions in limine were filed by Phyllis Hall (“Phyllis”), R. 253

& 280, and one by Kathleen Robinson (“Kathy”), Jenevieve Holman (“Jenny”), and the Spencer Family (R. Henry Spencer, Cindy Riley, Pam Gondola, Jana Hay, Sue Frampton, Beth Jeppson, John Spencer, Edith Dunn, Andrew Spencer, Heather Spencer, and Allison Mack, individually the eleven children of Marion Spencer, Ina’s deceased daughter), R. 305. On November 14, 2005, the trial court conducted an evidentiary hearing in which it received testimony from David McBeth, Lyle Gertsch, Kathy, Phyllis, Robert, Jenny, and Sue Frampton. R. 525, Official Certified Transcript (“Trans.”), 2–4. Following the evidentiary hearing, Kathy, Jenny, and the Spencer Family filed with the trial court a Motion to Substitute Original Documents for Photocopies Received into Evidence as Exhibit 2 and Exhibit 9. R. 338. The parties provided the trial court with post-trial memoranda in lieu of closing arguments. R. 351, 458, & 464.

Disposition in Court Below

On December 23, 2005, the trial court filed a Memorandum Decision stating the trial court’s findings of fact and conclusions of law. R. 479. The trial court’s Memorandum Decision addressed the issues raised at the evidentiary hearing by the parties, namely the construction and enforceability of the Update to Trust as well whether the Spencer Family was a beneficiary of the Trust. R. 472, 476. With regards to the construction and enforceability of the Update to Trust, the trial court determined that the Update to Trust was valid and that it was Ina’s intent to create the Update to Trust. R. 472–476. Specifically, the trial court determined that the Update to Trust was consistent with communications between Robert and Ina concerning the forgiveness of a debt owed by Robert to Ina in exchange for Robert trading his interest in the Trust. R. 474–475.

Additionally, the trial court determined that Ina executed the Update to Trust without being unduly influenced by Kathy and that Ina had the requisite capacity to execute the Update to Trust. R. 473–474. The trial court also determined that the Spencer Family was a beneficiary of the Trust based upon the clear language of the Trust and the pleadings of the parties. R. 469–472. The trial court also admitted into evidence the original Updates without admitting into evidence the affidavits of Kathy and Jenny that accompanied them. R. 477. Counsel for Central Bank subsequently prepared a Judgment which the trial court signed on March 16, 2006. R. 512.

Statement of Facts Relevant to Issues Presented for Review

On July 27, 1990, Ina created the Trust. *See* Exhibit 1. At the time the trust was created, Ina had four living children: Kathy, Jenny, Phyllis, and Robert. *See* Exhibit 1, p. 2. The Trust was a revocable trust which provided for Ina’s maintenance during her life, and then distributed the trust estate to her children upon Ina’s death. *See* Exhibit 1, p. 2–4. Pursuant to the Trust document, Ina’s children were beneficiaries and successor co-trustees. *See* Exhibit 1, p. 5.

Before and after the creation of the Trust, Robert received real estate, loans, and money from Ina which were equal to or in excess of Robert’s share of Ina’s estate. *See* Exhibit 2, 9 & 15. Among other things, Ina loaned to Robert \$80,000. Trans. 181:17-21. Robert failed to make any payments on the loan, and the principal amount and interest eventually grew to more than \$120,000. Trans. 182:6-16. Ina eventually instructed an attorney to contact Robert to foreclose on a trust deed securing the debt in October 1994. *See* Exhibit 13.

To resolve the issues related to the debt he owed Ina, Robert discussed with Ina his participation in the Trust. Trans. 184:20-185:13. Around the time of the foreclosure, Robert sent a letter to Ina. *See* Exhibit 15, Trans. 187:17-23. In the letter, Robert outlines a plan in which he would “trade [his] interest in the estate for the promissory note,” which he calculated were nearly equivalent. *See* Exhibit 15 ¶¶ 2, 5; *see also* Trans. 189:17-190:3. On October 21, 1994, Robert sent to his mother a letter outlining an agreement by which Robert would deliver to Ina a deed for certain property with the understanding that Ina would then forgive his debt and remove Robert from any wills or trusts then made or to be made. *See* Exhibit 16, Trans. 195:9-196:14.

In January 2001, Ina was hospitalized after a fall. Trans. 98:9-99:5. After leaving the hospital, Ina lived with Jenny for ten to fourteen days. Trans. 258:19-22, 259:12-13. Ina then moved to Midway to live with Kathy. Trans. 101:1-2.

During January and February 2001, Kathy and Ina spoke often. Trans. 280:7-11. Ina often expressed to Kathy concern about the condition of her family and the Trust. Trans. 280:10-11. Ina was concerned that the Trust was unevenly distributed because of distributions she had provided to Robert. Trans. 120:6-15, 120:23-122:22. Consequently, Ina decided to amend her trust to remove Robert. Trans. *See* Exhibits 2, 2A, 9 & 9A, ¶ 3. With the assistance of Kathy, the Update to Trust was prepared. *See* Exhibits 2, 2A, 9, & 9A; Trans. 280:12-16. The Update to Trust provided, in part, the following:

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.

Exhibits 2, 2A, 9, & 9A, ¶ 3. Two original Updates to Trust were prepared for Ina's signature. Trans. 59:14–60:2.

On February 5, 2001, Lyle Gertsch, a public notary, went to the home where Ina was staying. Trans. 62:7-11. Mr. Gertsch spoke with Ina and witnessed her sign the Updates to Trust. Trans. 62:22-65:11. Mr. Gertsch said that Ina did not appear confused, was very coherent, and that they had a good conversation at the time Ina signed the Updates to Trust. Trans. 65:5-15. At the time the Update to Trust was signed, Ina could carry on a conversation, knew who her children were, and was aware of what property she owned. Trans. 119:6-18, 271:19-272:22.

Robert's relationship with Ina was strained in 2000 and 2001. Trans. 177:6-9, 15-22. Robert said that during that time period he did not talk to his mother much, if at all. Trans. 177:18-22. Robert learned of Update to Trust in the spring of 2002, Trans. 169:3-23, and received a copy in April 2002, Trans. 170:1-13.

In 2002, Ina was declared incapacitated. *See* Exhibits 3 & 4. The incapacitation resulted from Ina's inability to take care of herself. Trans. 141:19–142:5.

In August 2002, Ina's children prepared an agreement by which certain trust property would be sold off. *See* Exhibit 5. Even though Ina had removed Robert as a co-trustee and a beneficiary, he signed the agreement as a trustee. *See* Exhibit 5. While he and his sisters were aware that Robert had previously been removed as a trustee, they continued to attempt to work as a family and to avoid discord. Trans. 97:17-21, 109-10, 111:15-112:4, 135:6-20. In creating the August 2002 agreement, Ina's children were trying to figure out a way to manage things and get along. Trans. 201:24-202:4, 214:1-7.

However, on account of their discomfort with it, Kathy and Jenny repudiated the agreement immediately after signing it. 116:11-117:4, 125:15-126:8.

On March 31, 2005, Ina passed away. R. 42, ¶ 4.

SUMMARY OF ARGUMENTS

In response to Robert's Brief of Appellant, Kathy, Jenny, and the Spencer Family (collectively, "the Appellees") assert that Robert failed to marshal evidence as required by rule 24(a)(9) of the Utah Rules of Appellate Procedure. Instead of presenting in comprehensive and fastidious order every scrap of competent evidence introduced at the hearing which supports the trial court's findings concerning Ina's intent to amend the Trust and the evidence supporting the trial court's decision to admit the Update to Trust, Robert has simply presented those facts that militate against the trial court's findings. Given Robert's failure to marshal evidence as required by rule 24(a)(9), this Court should uphold the trial court's findings of fact concerning Ina's intent to amend her trust and find that the trial court acted within its discretion to admit the documents amending Ina's trust into evidence.

The Appellees further argue that the trial court's finding of fact that Ina intended to amend her trust is supported by the clear weight of the evidence. Robert attempts to challenge the sufficiency of the evidence supporting the trial court's finding of intent by arguing that the trial court applied the wrong evidentiary standard. However, given that the proper evidentiary standard was included in the parties' pleadings and that the court never stated that it was applying the wrong evidentiary standard, this Court should assume that the trial court applied the proper evidentiary standard of clear and convincing

evidence. Significantly, the trial court's findings of fact are supported by the clear weight of the evidence as is demonstrated in the trial court's Memorandum Decision, in which the bases for the trial court's finding of intent on the part of Ina to amend her trust are articulated and well supported.

Finally, the trial court acted reasonably and within its broad discretion when it admitted into evidence the duplicate and original Updates to Trust at the time of the hearing and following the close of evidence, respectively. Robert challenges the trial court's admission of the duplicate Updates to Trust as running contrary to rule 1002 of the Utah Rules of Evidence. However, the photocopies of the Updates to Trust qualify as duplicates under rule 1003, and, therefore, are admissible to the same extent as the originals. The determination that the duplicates are admissible is supported by the trial court's findings that no genuine question existed concerning the authenticity of the original Updates to Trust. Furthermore, following the completion of the hearing, the trial court acted reasonably and within its discretion when it admitted into evidence the original Updates to Trust without reopening the hearing for further testimony. By that time, the trial court had already received extensive testimony concerning the Updates to Trust, and, for that reason, additional testimony was not required.

ARGUMENT

I. The Court of Appeals Should Affirm the Trial Court's Judgment Because Appellant Robert Holman Failed to Marshal Evidence.

In his Brief of Appellant, Robert Holman ("Robert") completely failed to marshal evidence as required by the Utah Rules of Appellate Procedure. For that reason, the Court

of Appeals should affirm the trial court's judgment and refuse to disturb the trial court's findings of fact.

Rule 24(a) of the Utah Rules of Appellate Procedure addresses, in part, the content required in an appellant's brief. It requires that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." UTAH R. APP. P. 24(a)(9). The Utah Supreme Court explained that to meet the rule 24(a)(9) requirement, "parties protesting findings of fact must marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *United Park City Mines Co. v. Stitching Mayflower Mt. Fonds*, 140 P.3d 1200, 1206 (Utah 2006) (internal citations and quotations omitted).

In *West Valley City v. Hoskins*, this Court explained that marshaling requires the following:

[T]he challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

51 P.3d 52, 55 (Utah Ct. App. 2002) (emphasis in original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)). As this Court explained, the duty of an appellant to marshal the evidence is a "critical requirement of appellate advocacy." *West Valley City*, 51 P.3d at 54.

This Court also explained that a failure to marshal evidence as required by rule 24(a)(9) is often fatal to an appellant's case. *See, e.g., Houghton v. Miller*, 118 P.3d 293, 294 (Utah Ct. App. 2005). In *Houghton*, the Court explained, "Where a party fails to so marshal the evidence, we need not consider the challenge to the sufficiency of the findings." *Id.* *See also Macris & Assocs., Inc. v. Images & Attitude, Inc.*, 941 P.2d 636, 642 (Utah Ct. App. 1997) ("We will uphold the trial court's findings of fact if the party challenging the findings fails to appropriately marshal all the evidence."); *Saunders v. Sharp*, 793 P.2d 927, 931 (Utah Ct. App. 1990) (Burden of marshaling evidence "is a heavy one.... Accordingly, when an appellant fails to carry its burden of marshaling the evidence, we refuse to consider the merits of challenges to the findings and accept the findings as valid."). The Utah Supreme Court explained that "[i]f an appellant argues that no evidence supports a factual finding, the burden to marshal does not then shift to the appellee; rather, the appellee may prove that the appellant did not meet her marshaling burden by presenting a 'scintilla' of evidence supporting the district court's finding." *Parduhn v. Bennett*, 112 P.3d 495, 503 (Utah 2005) (citing *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 54 P.3d 1177 (Utah 2002)).

The case of *Parduhn v. Bennett* provides an excellent example of the consequences stemming from a failure to marshal. *See* 112 P.3d 495, 503–504 (Utah 2005). In *Parduhn*, two individuals entered into a partnership agreement ("Agreement") for the purpose of owning and operating a gas station. *Id.* at 498. The Agreement included a buy-sell provision that allowed for continuing the partnership in the event a partner died. *Id.* The Utah Supreme Court explained, "The buy-sell agreement

contemplated that each partner would purchase a life insurance policy designating the other as beneficiary. Upon the death of one of the partners, the surviving partner would use the proceeds from the insurance policy to purchase the deceased partner's interest in the partnership from the deceased partner's heirs." *Id.*

In 1997, the partners sold the gas stations comprising their business. *Id.* That same year, one of the partners passed away ("decedent"). *Id.* The decedent's heirs claimed the life insurance proceeds while the surviving partner claimed that he was entitled to the policy proceeds. *Id.* at 499. The trial court ultimately awarded the life insurance proceeds to the decedent's heirs. *Id.* It held that the decedent intended his heirs, and not his surviving partner, to receive the proceeds. *Id.* at 499–500.

The surviving partner challenged the trial court's subsidiary findings of fact related to the trial court's ultimate finding of fact concerning the decedent's intent. *See id.* at 502–03. Among other things, the surviving partner asserted that the trial court erroneously found that the partners sold their partnership and its assets, and that the partners treated the partnership casually. *Id.* at 503.

In addressing the surviving partner's challenge of the trial court's findings of fact related to the decedent's intent, the Utah Supreme Court explained, "To successfully challenge that ultimate finding [of intent], [the surviving partner] should have marshaled all of the remaining evidence supporting it and then demonstrated why that evidence 'is legally insufficient to support it even when viewing it in a light most favorable to the court below.'" *Id.* at 504 (quoting *Chen v. Stewart*, 100 P.3d 1177, 1195 (Utah 2004)). The Utah Supreme Court then continued by explaining that the surviving partner had not

marshaled the evidence. *Parduhn*, 112 P.3d at 504. The surviving partner simply had provided an addendum to his brief with “most of the documents on which the district court relied in making its finding of intent,” without explaining why the trial court “erred in interpreting the evidence as it did.” *Id.*

The Utah Supreme Court explained that the surviving partner’s attempt fell far short of the marshaling of evidence required by Utah appellate courts. *Id.* It explained:

To appropriately marshal evidence, parties must provide a precisely focused summary of all the evidence supporting the findings they challenge. This summary must correlate all particular items of evidence with the challenged findings and then convince us that the trial court erred in the assessment of that evidence to its findings. Indeed parties challenging factual findings must fully embrace the adversary’s position and play devil’s advocate.

Rather than meeting this high burden, [the surviving partner] simply presents those facts that militate against the district court’s finding of intent—a strategy we have previously found to be insufficient.

Id. at 504 (internal quotations omitted) (emphasis added). As a consequence of the surviving partner’s failure to marshal “the plenteous evidence supporting [the] finding” of intent, the Utah Supreme Court rejected the surviving partner’s arguments related to the findings of fact. *Id.*

Similar to the surviving partner in *Parduhn*, Robert has failed to marshal any evidence as required by rule 24(a)(9). Robert has asserted two issues on appeal. The first is a challenge to the sufficiency of the trial court’s factual findings that Ina Holman (“Ina”) intended to amend the Ina C. Holman Family Trust (“Trust”) with the Update to the Trust of Ina C. Holman dated February 5, 2001 (“Update to Trust”). *Appellant’s Brief*, 4. The second is that the trial court erred by receiving into evidence the originals

and duplicates of the Update to Trust because Robert disputes their authenticity.

Appellant's Brief, 5.

In laying out the facts that allegedly support the two issues identified in his appeal, Robert failed to identify the facts upon which the trial court relied to determine that Ina intended to amend her trust and that the Update to Trust was authentic. Instead, Robert simply identified for the appellate court the same arguments and facts previously identified in his pleadings and at the time of the hearing concerning alleged inconsistencies in the actions of Kathleen Robinson (“Kathy”) following Ina’s execution of the Update to Trust.

Robert marshaled none of the evidence identified in the trial court’s Memorandum Decision in support of the trial court’s finding that it was Ina’s intent to amend her trust. For example, Robert makes no mention of the nearly \$124,000.00 he owed to his mother that was discussed in a 1994 letter to his mother, see Exhibit 15 ¶ 15, and in his testimony at the time of the hearing, see Trans. 182:6-16. In its Memorandum Decision, the trial court discussed extensively the offers made by Robert in his 1994 letter to exchange his interest in Ina’s trust for the forgiveness by Ina of his debt. *See* R. 475; Trans. 189:17–190:3. Robert also fails to marshal for this Court a subsequent letter entered into evidence and discussed by the trial court in its Memorandum Decision in which Robert more specifically outlined his request for forgiveness of the debt owed by him to Ina in exchange for his removal from Ina’s trust. *See* R. 474; Exhibit 16; Trans. 195:9-196:14.

Robert also failed to discuss the actual language of Ina’s amendment, also relied upon by the trial court, which expressly states Ina’s reasons for amending the Trust. *See*

R. 474; Exhibits 2, 2A, 9, & 9A, ¶ 3. Specifically, the Update to Trust provides the following:

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, & 9A, ¶ 3.

The evidence presented by Robert to this Court in his brief does not describe the testimony of Lyle Gertsch, the public notary who witnessed Ina's execution of the two original Updates to Trust or his testimony that Ina was coherent, not confused, and carried on a good conversation with him at the time of the execution. *See* Trans. 62:7-11, 62:22-65:15. Robert also fails to identify testimony given that in 2001 Ina could carry on a conversation, knew who her children were, and was aware of what property she owned. Trans. 119:6-18, 271:19-272:22. However, as Robert testified, it would have been difficult for Robert to know his mother's capacity at the time she signed the Update to Trust because his relationship with Ina was strained in 2000 and 2001, and he talked very little with her, if at all. Trans. 177:6-9, 15-22.

In his brief, Robert focused extensively on agreements and actions following the Update to Trust in which Kathy and Jenevieve Holman ("Jenny") treated Robert as a co-trustee and/or beneficiary of the Trust. However, Robert provided this Court with none of Kathy's testimony in which she explained that the purpose of her actions following Ina's execution of the Update of Trust was to work with Robert and Phyllis Hall ("Phyllis") as family members and to avoid discord in the family, Trans. 135:6-20, or Robert's

testimony that he and his sisters were really trying to figure out a way to manage things and get along, Trans. 201:24-202:4, 214:1-7.

Given his failure to marshal, and the fact that the above evidence comprises much more than a “scintilla” of evidence in support of the trial court’s decision, this Court should uphold the trial court’s findings of fact concerning Ina’s intent to amend the Trust and concerning the authenticity of the Update to Trust.

II. Trial Court’s Findings of Fact Concerning Ina Holman’s Intent to Modify the Trust Are Supported by Clear and Convincing Evidence.

The trial court’s findings that the Update to Trust implemented Ina’s intent are not against the clear weight of the evidence presented to the trial court at the hearing. In his brief, Robert argues that the trial court applied the wrong evidentiary standard in finding that the Update to Trust reflected Ina’s intent. Specifically, Robert argued that the trial court applied a preponderance of the evidence standard rather than a clear and convincing evidence standard in finding that it was Ina’s intent to amend her trust. In support of this argument, Robert asserts that the trial court must have applied the preponderance of the evidence standard for the following reasons: 1) the trial court did not expressly state the evidentiary standard that it applied, and 2) the trial court did not expressly address in its Memorandum Decision Kathy’s actions following the execution of the Update to Trust.

However, the following demonstrates that in spite of Robert’s attempts to frame this issue as a question of whether the trial court applied the proper evidentiary standard, he is really challenging the sufficiency of the evidence supporting the trial court’s factual findings, and, as such, the trial court’s factual findings should not be overturned unless

they are against the clear weight of the evidence in the record. Furthermore, in the absence of any express statement by the trial court that it applied a specific evidentiary standard, the proper presumption is that the trial court applied the correct evidentiary standard. With regards to Robert's assertion that the trial court's findings are insufficient given that they do not specifically address certain actions taken by Kathy, the trial court met its burden by providing sufficient detail in its Memorandum Decision to make the basis of its decision clear. Significantly, the trial court's Memorandum Decision clearly illustrates that its findings concerning Ina's intent were supported by the weight of the evidence. Each of the above issues is addressed in turn.

A. Robert Holman's Appeal Challenges the Trial Court's Factual Findings and not the Evidentiary Standard Employed by the Court.

This Court should not overturn the trial court's finding that it was Ina's intent to modify her trust to exclude Robert because it is supported by the clear weight of the evidence. *See* UTAH R. CIV. P. 52(a). Robert presents his first issue on appeal to this Court as a failure on the part of the trial court to apply the correct evidentiary standard. *See Appellant's Brief*, 4. Specifically, in describing his first issue, Robert states the following: "Whether the Trial Court Erred in Applying an Improper Evidentiary Standard in Determining Whether the Purported Amendment was Indeed Part of Grantor's Trust." *Appellant's Brief*, 4. Robert then asserts that the trial court "applied a less-stringent preponderance of the evidence standard" because the trial court allegedly failed "to give proper consideration to provided testimony showing inconsistencies between [Kathy's] position towards the Amendment and her prior actions." *Id.*

However, Robert's suggestion that the trial court applied the wrong standard is in reality an attempt to attack the sufficiency of the trial court's factual findings. Robert explained that the burden of proof concerning Ina's intent to modify her trust was not preponderance of the evidence, but clear and convincing evidence. *See id.* at 16. He then states, "Unfortunately, the 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 suggest that it applied the lower preponderance standard." *Id.* at 16–17. In other words, Robert is arguing that while the trial court at no point states that it is applying the wrong evidentiary standard, it must have applied the preponderance of the evidence standard because the evidence does not support the trial court's findings of fact.

The fact that Robert is attempting to present a challenge to the sufficiency of the evidence argument to this Court as a failure of the trial court to apply the proper evidentiary standard is best illustrated by Robert's last paragraph in section I of his argument. *See Appellant's Brief*, 20. Robert concludes by asserting the following:

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.

Id. Given that Robert's appeal concerning Ina's intent to modify her trust is really a challenge of the sufficiency of the evidence upon which the trial court based its decision, this Court should review the trial court's factual findings pursuant to rule 52(a) of the Utah Rules of Civil Procedure.

Perhaps one of the most compelling arguments that the rule 52(a) clearly erroneous standard should be applied to this case is Robert's own assertion that it applies. Specifically, Robert told this Court that in determining "whether the trial court erred in applying an improper evidentiary standard in determining whether the purported amendment was indeed part of grantor's trust," that the appropriate "appellate standard of review ... is the 'clearly erroneous' standard." *See Appellant's Brief*, 4–5. Given that Robert is challenging the sufficiency of the evidence supporting the trial court's factual findings, the Court should affirm the trial court because its findings of fact are not against the clear weight of the evidence in the record.

B. The Trial Court's Finding of Intent on the Part of Ina Holman to Modify Her Trust Is Supported by Clear and Convincing Evidence.

While Robert suggests that Kathy's behavior following the creation of the Update to Trust does not support a finding of intent to amend the Trust on the part of Ina, the trial court was presented clear and convincing evidence supporting Ina's intent.

The standard for determining the sufficiency of factual findings by a trial court is set out in rule 52 of the Utah Rules of Civil Procedure. It provides, in part, the following:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

UTAH R. CIV. P. 52(a).

The Utah Supreme Court explained in *State v. Walker*, shortly after Utah adopted rule 52, how rule 52(a)'s clearly erroneous standard is applied in practice:

[T]he content of Rule 52(a)'s "clearly erroneous" standard, imported from the federal rule, requires that if the findings ... are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings ... will be set aside.

743 P.2d 191, 193 (Utah 1987). The Supreme Court recently reaffirmed its articulation of the clearly erroneous standard as explained in *Walker* in the matter of *In re Z.D.* See 147 P.3d 401, 405–406 (Utah 2006) ("We provided sound guidance to appellate courts regarding the scope of their authority to review factual findings under the clearly erroneous standard of rule 52(a) in *State v. Walker*").

The Utah Supreme Court also shed additional light on how to apply the clearly erroneous standard in its decision in *In re Z.D.* See 147 P.3d at 406. For example, the Supreme Court explained that when an appellate court is reviewing the sufficiency of evidence, it is unrealistic to expect the appellate court to do so without weighing the evidence. See *id.* The Court continued by explaining that "[t]he appellate court must, however, go about weighing the evidence with one eye on the scales and the other fixed firmly on its duty of deference to findings of fact." *Id.* With one eye firmly fixed on its deference to the trial court, the appellate court "may only disturb findings that offend the 'clear weight' of the evidence." *Id.* Significantly, "[a]n appellate court must be capable of discriminating between discomfort over a trial court's findings of fact—which it must tolerate—and those that require the court's intercession. It must forbear the 'close call.'" *Id.*¹

¹ The Utah Supreme Court also quoted Judge Richard Posner's decision in *Carr v. Allison Gas Turbine Div. Gen. Motors* to illustrate the "practical meaning" of rule 52(a). See *In*

The Utah Supreme Court explained two additional principles relating to the application of rule 52(a) to this case: (1) the required review of the record in determining whether findings of fact are clearly erroneous, and (2) the relationship of a heightened standard of proof as part of the clearly erroneous review. *In re Z.D.*, 147 P.3d at 406–07. First, concerning the review of the record, the Utah Supreme Court explained that in determining whether findings of fact are clearly erroneous it is the responsibility of the appellate court to review the record. *Id.* at 407. Specifically, the Court held:

It is, therefore, the responsibility of the appellate court to provide some indication that it performed its sufficiency of the evidence review in the context of the whole record, or at least that portion of the record to which its attention was drawn by the appellant’s marshaling obligation or the appellee’s response to the appellant’s marshaled evidence.

*Id.*²

Second, the Utah Supreme Court explained that “[i]t is also appropriate when evaluating whether a result was ‘clearly erroneous’ for the reviewing court to consider the standard of proof the prevailing party below was required to meet.” *In re Z.D.*, 147

re Z.D., 147 P.3d at 406 (quoting *Carr*, 32 F.3d 1007, 1008 (7th Cir. 1994)). The quote is as follows:

[The rule 52(a) standard] requires us appellate judges to distinguish between the situation in which we *think* that if we had been the trier of fact we would have decided the case differently and the situation in which we are *firmly convinced* that we would have done so. Our scrutiny of the district judge’s findings of fact thus is deferential, but it is not abject. As the Supreme Court pointed out in the *Concrete Pipe* case, we need not, to overturn a finding under the clear-error standard, adjudge the finding “so unlikely that no reasonable person would find it to be true.”

In re Z.D., 147 P.3d at 406 (quoting *Carr*, 32 F.3d at 1008) (emphasis in original).

² This requirement underscores the significance of Robert’s failure to marshal as required under Utah Rule of Appellate Procedure 24(a)(9) as explained above.

P.3d at 407 (citing *Lovett v. Cont. Bank & Trust Co.*, 286 P.2d 1065, 1067 (Utah 1955)).

The practical result of considering the standard of proof, clear and convincing evidence in this case, is that “[t]he amount and quality of evidence required to sustain a result based on a preponderance of evidence is, of course, less than that required to meet a clear and convincing standard.” *In re Z.D.*, 147 P.3d at 407. Consequently, it is less difficult to demonstrate the insufficiency of evidence where the trial court was to employ a clear and convincing evidence standard. *See id.* The Utah Supreme Court concluded its discussion of the relationship of the evidentiary standard applied by the trial court and the clearly erroneous standard used by the appellate court as follows:

Still, it is not the role of the appellate court to reverse a trial court merely because it is convinced that the evidence is inadequate to sustain the result under the standard of proof applied below. Walker demands more. The result must be against the clear weight of the evidence or leave the appellate court with a firm and definite conviction that a mistake has been made.

Id. (emphasis added).

One case that provides some insight into the application of the rule 52(a) clearly erroneous standard is the case of *In re Estate of Bartell*, 776 P.2d 885 (Utah 1989). In *Estate of Bartell*, a wife sued the estate of her deceased spouse seeking a declaration that she was an “omitted spouse” given that she married her deceased husband after the creation of his will. *Id.* at 885. Following a bench trial, the trial court determined that the deceased husband intended to provide for his wife through transfers outside his will. *Id.* The trial court received and examined evidence concerning the deceased husband’s intent concerning his wife. *Id.* at 885–86. The trial court examined the statements made by the deceased husband concerning his intent, the transfers made by the husband to the wife

prior to his death, the size of the estate relative to the transfers, and the husband's understanding that he was able to change his will. *Id.* Specifically, the trial court determined that the husband's statements concerning his intent were ambiguous, that he had transferred \$230,000 to his wife in the years immediately preceding his death, that his estate consisted of only about \$100,000, and that he was "sufficiently astute in business matters to have changed his will." *Id.*

The surviving wife attacked the trial court's findings. *Id.* at 886. In reviewing the wife's attacks, the Utah Supreme Court explained the applicable standard under rule 52(a) and *Walker*. *Id.* Furthermore, the Supreme Court explained that "great deference is given to the trial court's findings, especially when they are based on an evaluation of conflicting live testimony." *In re Estate of Bartell*, 776 P.2d at 886 (citing *Walker*, 743 P.2d at 192–93; UTAH R. CIV. P. 52(a)). The Utah Supreme Court explained that in attempting to demonstrate to the appellate court that the trial court was mistaken in its findings concerning the deceased husband's intent, the surviving wife "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." *In re Estate of Bartell*, 776 P.2d at 886 (citing *Walker*, 743 P.2d at 193) (internal quotations omitted).

In light of the marshaling requirement and the clearly erroneous standard, the Utah Supreme Court held the following:

In this case, [the surviving wife] has not even attempted to marshal the evidence in support of the trial court's findings, nor has she attempted to demonstrate that the trial court's findings are against the clear weight of the evidence, as required

by *Walker*. Instead, she has essentially reargued the factual case submitted below, construing all evidence in a light most favorable to her case and largely ignoring the evidence supportive of the trial court's findings.

In re Estate of Bartell, 776 P.2d at 886. Consequently, the Utah Supreme Court was left “to rely heavily on the presumption of correctness that attends [the trial court’s] findings under rule 52(a).” *Id.* In the end, the Utah Supreme Court held that it had considered the evidence and was “not persuaded that the trial court’s findings regarding the decedent’s intent was clearly erroneous.” *Id.*

While the instant case does not deal with an omitted spouse or the related statute, it does involve a son—Robert—who claims it was not his mother’s intent to omit him from her trust. However, as in the case of *In re Estate of Bartell*, the trial court in this matter pointed to specific evidence that supported its findings that it was Ina’s intention to amend her trust to remove Robert. R. 472–475. Similar to *In re Estate of Bartell*, the trial court in this case examined the statements made by Ina concerning her intentions related to her son, the transfers made by Ina to Robert prior to the Update of Trust, the size of the estate relative to the transfers, and Ina’s independent control of her finances until she was declared incapacitated in 2002. *See id.*

Intent is manifest in this case by something much more convincing than lack of action as in the case of *In re Estate of Bartell*. Specifically, Ina’s intentions are clearly spelled out in the Update to Trust. *See* Exhibits 2, 2A, 9 & 9A, ¶ 3. Furthermore, the evidence supports the trial court’s finding that Ina possessed the capacity to amend her Trust at the time, being very aware of her property and her family. Trans. 119:6-18, 271:19-272:22.

Robert's arguments concerning Ina's intent to amend her trust focus almost exclusively on the actions of Kathy, and not on Ina. Robert discusses extensively agreements and actions involving his sisters following the Update to Trust in which Kathy and Jenny arguably treated Robert as a co-trustee and/or beneficiary of the Trust. However, Kathy and Jenny testified that the purpose of their actions following Ina's execution of the Update of Trust was to work with Robert and Phyllis as family members and to avoid discord in the family, which is consistent with Robert's own testimony. *See* Trans. 97:7–21, 135:6-20, 201:24-202:4, 214:1-7. In presenting his appeal, Robert has “essentially reargued the factual case submitted below, construing all evidence in a light most favorable to [his] case and largely ignoring the evidence supportive of the trial court's findings” that Ina intended to amend her trust. *See In re Estate of Bartell*, 779 P.2d at 886.

In this case, the trial court had ample and clear evidence to provide a sufficient basis for its finding that Ina intended to exclude Robert from her trust based on, among other things, past distributions made by Ina to Robert.

C. The Trial Court's Memorandum Decision Adequately Demonstrates the Basis for Its Determination that Ina Holman Intended to Amend Her Trust.

In its Memorandum Decision, the trial court clearly stated its bases for finding that it was Ina's intent to amend her trust to remove Robert. Robert has asserted that the evidence did not support the trial court's factual findings because, in part, the trial court did not expressly address certain actions taken by Kathy following Ina's amendment of her trust. However, the Memorandum Decision provided a sufficiently detailed

description of the trial court's bases for ruling as it did, even though the Memorandum Decision did not negate each argument made by Robert point by point. Furthermore, Kathy's actions following the execution of the Update to Trust are irrelevant to Ina's intent at the time Ina executed the Update to Trust.

This Court explained that "[i]n a bench trial, the [trial] court must set forth the reasons for its decision in enough detail for the reviewing court to determine whether they are clearly erroneous." *Lysenko v. Sawaya*, 973 P.2d 445, 448 (Utah Ct. App. 1998). This Court continued by explaining that the "finding must be adequate to ensure the trial court's discretionary determination was rationally based." *Id.* (internal citations and quotations omitted). "To provide meaningful appellate review, the trial court's findings must be sufficiently detailed and include enough subsidiary facts to clearly show the evidence upon which they are grounded." *N.T. v. State*, 928 P.2d 393, 398 (Utah Ct. App. 1996).

However, "a trial court is not required to recite each indicia of reasoning that leads to its conclusions, nor is it required to marshal the evidence in support of them." *Id.* (quoting *In re Knickerbocker*, 912 P.2d 969, 979 (Utah 1996)). Furthermore, "a trial court is also not required to explain why it found certain witnesses less credible or why some testimony was given less weight or considered irrelevant." *N.T.*, 928 P.2d at 399. The Utah Supreme Court explained,

A trial court need not resolve every conflicting evidentiary issue, nor is the court required to negate allegations in its findings of fact. Rather, the trial court's factual findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood.

Consolidation Coal Co. v. Utah Div. of State Lands & Forestry, 886 P.2d 514, 521 (Utah 1994) (internal citations and quotations omitted) (quoted by *D.J. Invest. Group, LLC, v. DAE/Westbrook, LLC*, 147 P.3d 414, 422–23 (Utah 2006)). After determining that the trial court’s memorandum decision and findings in *Consolidation Coal Co.* were “well-reasoned and fully supported by the record,” the Utah Supreme Court held, “It was not necessary for the trial court to negate [appellant’s] version of the case point by point. The trial court needed to make only those findings necessary to its decision ...” *Id.*

In this case, the trial court articulated its factual findings with sufficient detail so as to leave no doubt as the basis for its ultimate conclusion that it was Ina’s intent to amend her trust to remove Robert. In its Memorandum Decision, the trial court made ten numbered factual findings. R. 476–477. Among those specific findings of fact, the trial court determined that Ina executed the Update to Trust. R. 476. The trial court also listed facts upon which it relied throughout its conclusions of law. R. 467–476.³

The trial court discusses specific facts that serve to provide sufficient detail to its basis for determining that it was Ina’s intent to amend her trust. For example, the trial court discusses the fact that Robert borrowed money totaling \$124,000 from his mother, that Ina and Robert entered into an understanding by which Ina would forgive the debt in exchange for removing Robert from the trust, and that Robert was sending

³ In applying the federal rule upon which Utah’s Rule 52(a) is based, the United States Court of Appeals for the Ninth Circuit explained that “to be adequate, factual findings need only be explicit enough to give this court a clear understanding of the basis of the district court’s decision and to enable us to determine the grounds on which the district court reached its decision.” *Toombs v. Leone*, 777 F.2d 465, 469 n. 5 (9th Cir. 1985) (responding to appellant’s assertion that findings of fact are inadequate because they are mixed with court’s conclusions of law).

communications to Ina consistent with this understanding. *See* R. 474–475. The trial court also identifies other relevant facts, such as the lack of any record that Robert ever repaid his debt to Ina and the specific language of the amendment. *Id.*

The trial court’s Memorandum Decision then specifically addresses Robert’s assertions that Ina’s amendment to her trust was a product of undue influence exercised by Kathy and/or a lack of capacity on the part of Ina.⁴ *See* R. 472–474. In so doing, the trial court specifically addresses those facts that refute Robert’s assertion that Ina was unduly influenced. For example, the trial court points out that the Update to Trust mirrored Robert’s own correspondence, that Robert’s wife and Ina did not get along, and that Robert had not communicated much, if at all, with Ina in the two years prior to the amendment. R. 474. In discussing the alleged lack of capacity, the trial court pointed out that Robert was not present in Utah and was not in a position to testify about Ina’s lack of intent, and that each of the children testified that Ina maintained control over her financial assets until she was declared incapacitated in 2002. R. 473–474. These factual findings identified by the trial court in its Memorandum Decision serve to provide sufficient detail to demonstrate to this Court that the trial court’s decision was well-reasoned and fully supported.

Significantly, as asserted by Robert, the trial court did not negate Robert’s version of the case point by point. For example, the trial court did not address interactions between Kathy and Robert following Ina’s the Update to Trust in which Kathy treated

⁴ Based on Utah law, Robert would have likely been required to prove undue influence by clear and convincing evidence. *See Russell v. Russell*, 852 P.2d 997, 999 n.2 (Utah 1993).

Robert as a successor co-trustee or that Kathy allegedly attempted to conceal the amendment from Robert. However, the Utah Supreme Court does not require the trial court to negate Robert's case point by point. More importantly, Kathy's actions following the execution of the Update to Trust are irrelevant in determining whether Ina intended to amend her Trust. Given their lack of relevance, the trial court understandably declined to comment on Kathy's actions. For those reasons, the trial court's Memorandum Decision more than adequately provides the trial court's basis and refutes Robert's arguments and should be affirmed.

D. Assumption that Trial Court Applied Correct Evidentiary Standard.

Where the trial court in this matter did not expressly state the evidentiary standard it was using, the proper assumption is that the trial court applied the correct evidentiary standard in finding that it was Ina's intent to modify her trust to exclude Robert. Robert has asserted, in part, that the trial court's failure to state the specific evidentiary standard lends itself to the presumption that the trial court applied the lower standard of preponderance of the evidence rather than the clear and convincing evidence standard. *See Appellant's Brief*, 13, 16–17. However, no grounds exist for creating that presumption.

Where a trial court does not expressly state the standard of evidence employed in reaching its decision, appellate courts generally assume that the trial court used the correct standard. *See, e.g., Anchorage Police & Fire Retirement Sys. v. Gallion*, 65 P.3d 876, 883–84 (Alaska 2003). For example, the Alaska Supreme Court was asked to review whether a “court failed to apply the reasonable doubt standard of proof.” *Id.* at 883. An

appellant challenged the Alaska trial court, in part, because it had failed to state the standard of proof it applied in a contempt proceeding. *Id.* The Alaska Supreme Court held the following:

We have held in other contexts that a trial court need not explicitly state all of its factual findings so long as its findings are adequate to reveal its reasoning process. Courts elsewhere have held that a trial court need not explicitly state the standard of proof it is applying if there is no dispute about the applicable standard. **We will normally assume that the trial court has applied the correct standard.**

Id. (emphasis added) (internal quotations and citations omitted). The Alaska ruling is consistent with decisions in other jurisdictions. *See, e.g., Johnson v. De Toledo*, 763 A.2d 28, 32 (Conn. Ct. App. 2000) (We must ... assume that the court applied the correct standard of proof in the present case.”); *In re C.T.*, 724 A.2d 590, 597 (D.C. Ct. App. 1999) (“Absent any indication to the contrary, we presume that the trial judge knew the proper standard of proof to apply and did in fact apply it.”); *Gluth Bros. Constr., Inc. v. Union Nat. Bank*, 518 N.E.2d 1345, 1350 (Ill. Ct. App. 1988); *Smith v. Bull Run Sch. Dist.*, 722 P.2d 27, 30 (Ore. Ct. App. 1986); *Ross v. Superior Court*, 569 P.2d 727, 737 (Cal. 1977); *People v. Tuschen*, 2007 Cal App. Unpub. Lexis 7251, 5–6 (Cal. Ct. App. 2007).

Furthermore, the discussion of the clear and convincing standard in the parties’ pleadings provides further evidence that the trial court knew the proper evidentiary standard and applied it. For instance, in an unpublished Minnesota Court of Appeals opinion, an appellant challenged a trial court’s decision by arguing “that the district court failed to require that [appellee] prove undue influence by ‘clear and convincing evidence’

because the standard of proof is not mentioned in the district court's order." *In re Estate of Reichenberger*, 2007 Minn. App. Unpub. Lexis 315, 9–10 (Minn. Ct. App. 2007).

However, the Minnesota Court of Appeals held, "But the failure of the district court to mention this standard of proof in its order does not, ipso facto, establish that the district court did not require it, particularly when it was briefed and argued by both parties." *Id.* at 10.

As in the case of *In re Estate of Reichenberger*, the parties in this case argued to the trial court that the applicable evidentiary standard for determining Ina's intent to modify the trust was the clear and convincing standard. For example, Phyllis filed her Motions in Limine with the trial court on November 10, 2005. R. 280. In her motion, Phyllis moved the trial court to apply the clear and convincing standard to Ina's intent to modify the trust. R. 280, ¶ 2. In reply, Kathy and Jenny, while opposing other portions of Phyllis's motion, did not oppose the portion concerning the clear and convincing evidence standard. *See* R. 298–303, at 299. Additionally, in two of the post trial memoranda requested by the trial court, the parties outlined the applicability of the clear and convincing evidentiary standard. *See* R. 358–384, at 377 (Phyllis); R. 385–458, 450 (Appellees). Given that the parties had briefed the trial court on the proper standard, this Court should assume the trial court knew and applied the clear and convincing evidentiary standard with regards to Ina's intent to modify her trust, and rule accordingly.

III. The Trial Court Was Within Its Broad Discretion to Admit Evidence When It Admitted the Duplicate and Original Updates to Trust of Ina C. Holman.

While he cites other issues, Robert's objection to Exhibits 2, 2A, 9, and 9A can be summarized as follows. First, Robert objects to Exhibits 2 and 9, the photocopies of the Update to Trust, because he disputes the authenticity of the original Update to Trust. Second, Robert objects to Exhibits 2A and 9A, the originals of the Update to Trust, because they were admitted into evidence following the close of the subject hearing.

Based on the extensive testimony received by the trial court concerning the Update to Trust, no genuine question existed as to the authenticity of the original Update to Trust that would have precluded admission of the photocopies, Exhibits 2 and 9, into evidence by the trial court. Furthermore, the trial court's decision to admit Exhibits 2A and 9A into evidence following the hearing without receiving additional testimony on the documents was within the trial court's discretion given the extensive testimony concerning the documents at the time of the hearing.

A. No Genuine Question Concerning Authenticity Exists that Would Merit Exclusion of the Updates to Trust from Evidence.

At the time of the hearing, no genuine question existed concerning the authenticity of the Update to Trust that would have precluded the trial court from admitting the duplicates and the originals of the Update to Trust into evidence. Robert has asserted that the trial court erred in admitting into evidence Exhibits 2 and 9 because the parties were "only able to produce photocopies of [the] documents" at the time of the hearing and because appellant's counsel "doubted the authenticity of the originals." *Appellant's Brief*, 21. Robert has based his objections upon rule 1002 of the Utah Rules of Evidence.

Rule 1002 of the Utah Rules of Evidence provides that “[t]o 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.” UTAH R. EVID. 1002. Rule 1003 then provides for the interchangeability of duplicates with originals. *See* UTAH R. EVID. 1003. It states that “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” UTAH R. EVID. 1003.⁵

In discussing the federal rule that is the equivalent of Utah’s best evidence rule, Weinstein’s Federal Evidence explains, “Duplicates may ordinarily be admitted to the same extent as originals. The concept of the ‘duplicate’ broadens the concept of the original to include mechanical reproductions produced by modern technology that further the goal of preciseness that is still paramount when dealing with writings”

WEINSTEIN’S FED. EVID. § 1002.04(3).⁶

⁵ In rule 1001, the Utah Rules of Evidence define “duplicate” as “a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.” UTAH R. EVID. 1001(4).

⁶ “Once authenticity and fairness issues are resolved, duplicates and originals are generally interchangeable for evidentiary purposes. For example, a duplicate is admissible when the opposing party concedes its accuracy. Even when accuracy is not conceded, courts routinely accept duplicates as a convenience to the court and the parties unless there are persuasive reasons for rejecting the evidence. Thus if there is no reason to believe that the duplicate is inaccurate or that a party is attempting to commit a fraud on the court, for example, by altering the proffered evidence, the duplicate will be admitted.” WEINSTEIN’S FED. EVID. § 1003.02[1].

In the context of the best evidence rule, this Court explained, “Trial courts are afforded broad discretion in determining the admissibility of evidence; thus we will not disturb a trial court’s ruling whether to admit or exclude evidence absent an abuse of discretion.” *Vigil v. Div. of Child & Family Servs.*, 107 P.3d 716, 718 (Utah Ct. App. 2005) (citing *Gorostieta v. Parkinson*, 17 P.3d 1110, 1114 (Utah 2000)). In *Gorostieta*, the Utah Supreme Court explained that “[t]he admissibility of an item of evidence is a legal question. However, the trial court has a great deal of discretion in determining whether to admit or exclude evidence, and its ruling will not be overturned unless there is an abuse of discretion.” 17 P.3d at 1114 (internal quotations and citations omitted). *See also State v. Casias*, 772 P.2d 975, 977 (Utah Ct. App. 1989) (“In the absence of an abuse of discretion, the trial court’s ruling on the admissibility of evidence will not be disturbed.”)

In its practical application, Weinstein’s Federal Evidence explained that parties offering evidence are “rarely precluded from producing significant relevant evidence because of the best evidence rule.” WEINSTEIN’S FED. EVID. § 1002.04(3). Instead of working as an inflexible bar to the entry of evidence, “[t]he function of the best evidence rule today is not to accord victory to the party who best follows the rules, but to ensure that the trier of fact is presented with the most accurate evidence practicable in those situations where informed legal judgment has concluded that precision is essential.” WEINSTEIN’S FED. EVID. § 1002.04(3).

How to apply rules 1002 and 1003 to the instant matter is best illustrated by this Court’s decision in *Nielsen v. Estate of Hefferon*, 1999 UT App 317. In *Nielsen*, the trial

court concluded that the best evidence rule “prevented consideration of extrinsic evidence to determine the parties’ intent and the scope and content” of an agreement entered into by the parties. *Id.* at 3–4. This Court overturned the trial court’s exclusion of the evidence and held that the trial court should have admitted the subject documents. *Id.* at 4. In so doing, this Court explained:

The best evidence rule provides that the original writing is required to prove the content of such writing. The trial court erred by relying on these provisions in that plaintiff does not dispute the content of the release produced by defendant. Rather, plaintiff claims that defendant either fraudulently induced her into signing the release or fraudulently altered the release. The best evidence rule has no application to the admissibility of plaintiff’s evidence supporting these claims.

Id. at 4 (emphasis added).

This case is similar to *Nielsen* because Robert is not contesting that the duplicates (exhibits 2 and 9) were inaccurate copies of the originals. At the time of the hearing, Robert’s attorney objected to the admissibility of exhibits 2 and 9 by saying that “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.” Trans., 57:17–19. *See also Appellant’s Brief*, 21. Robert’s attorney then stated that he would have to object if “it’s being submitted for the purposes of helping the court deal with the administration of this estate for interpreting the estate” because he thought that “we need the originals for the court to see what to interpret.” Trans. 57:19–23. Significantly, Robert’s attorney then explained that “if it’s simply establishing that at one point in time there were two now missing originals I have no objection to it being admitted for that limited purpose just establishing that at some point there were two.” Trans. 57:23–58:1. In other words, Robert did not, and apparently

does not, question that exhibits 2 and 9 are accurate duplicates of the original documents (exhibits 2A and 9A). In fact, exhibits 2 and 2A, as well as 9 and 9A, are exactly identical.

Significantly, based on *Nielsen*, Robert’s assertions that “a genuine question ... as to the authenticity of the original” are not addressable in the context of the best evidence rule. As in the case of *Nielsen*, Robert is questioning the events surrounding the creation of the Update to Trust. Robert has asserted that the subject exhibits are a result of undue influence or fraud on the part of Kathy. However, as in the case of *Nielsen* where assertions concerning fraudulent inducement did not preclude the admissibility of evidence, the best evidence rule does not preclude the admission of the original and duplicate Updates to Trust in this case because of assertions concerning undue influence, lack of capacity, or fraud. Given that the best evidence rule was not created to address with the admissibility of exhibits in this context and on these grounds, this Court should affirm the trial court’s decision to admit exhibits 2, 2A, 9, and 9A into evidence.

Furthermore, even assuming that a genuine question as to the authenticity of the exhibits related to undue influence and/or lack of capacity could preclude the trial court from admitting the subject exhibits into evidence based upon rules 1002 and 1003 of the Utah Rules of Evidence, the trial court received sufficient evidence during the course of the hearing to determine that no genuine question existed. For example, during the hearing, the trial court received evidence from the notary public —Lyle Gertsch⁷—who

⁷Mr. Gertsch was the only independent witness offered at the time of the hearing by the parties. David McBeth represented the trustee, Central Bank. The other parties all

witnessed Ina's signature of the original Updates to Trust. *See* Trans. 62:22-65:11.⁸

Among other things, Mr. Gertsch testified concerning his visit to the home where Ina was living and his interactions with her. *See id.* The trial court also received testimony from Kathy concerning conversations with her mother related to Ina's frustration with Robert and the amendment of the trust, and Kathy's preparation of the Updates to Trust pursuant to her mother's request. *See* Trans. 62:22-65:11, 120:6-15, 120:23-122:22.

Significantly, the trial court ultimately determined that Ina did not lack the capacity to create the Updates to Trust and that Ina was not unduly influenced to create the Updates to Trust. *See* R. 472–474. Given that the trial court received sufficient evidence to make an ultimate decision concerning the undue influence and capacity issues for the case as a whole, the trial court also received sufficient evidence to determine that no genuine question existed concerning authenticity that would preclude the admission of exhibits 2, 2A, 9, and 9A. For those reasons, this Court should affirm the trial court's holding to admit the subject exhibits into evidence.

B. Based Upon Information Received at Hearing, Trial Court Acted Within Its Discretion by Admitting Exhibits 2A and 9A into Evidence.

The trial court acted within its broad discretion when it admitted into evidence the original Updates to Trust following the hearing given the extensive evidence related to the duplicate Updates to Trust presented to the trial court at the hearing and because the admission does not prejudice Robert. Furthermore, this Court should affirm the trial

claimed some sort of interest in the Trust. Mr. Gertsch had no interest, beneficial or otherwise, in the outcome of the hearing.

⁸ *See* UTAH CODE § 78-25-9 (“Any writing may be proved ... (1) by any one who saw the writing executed.”)

court's decision to receive Exhibits 2A and 9A into evidence given Robert's failure to marshal the evidence supporting an abuse of discretion.

The Utah Supreme Court explained, "A trial court has broad discretion to admit or exclude evidence and its determination typically will only be disturbed if it constitutes an abuse of discretion." *State v. Whittle*, 989 P.2d 52, 58 (Utah 1999). Furthermore, "[a]lthough the admission or exclusion of evidence is a question of law, we review a trial court's decision to admit or exclude specific evidence for an abuse of discretion." *State v. Cruz-Meza*, 76 P.3d 1165, 8 (Utah 2003). An abuse of discretion takes place if the trial court acts unreasonably. *Whittle*, 989 P.2d at 58. *See also* *Glacier Land Co., LLC, v. Claudia Klawe & Assocs., LLC*, 154 P.3d 852, 858 (Utah Ct. App. 2006) (The trial court's decision should not be overturned "unless it is beyond the limits of reasonability.").

In this case, the trial court acted within its broad discretion to admit evidence when it admitted the originals of the Update to Trust following the close of evidence. During the course of the hearing, the trial court received extensive evidence concerning the execution and purpose of the Updates to Trust. *See, e.g.*, Trans. 77:7–78:9, 120:6-15, 120:23-122:22, 280:12-16. Among the evidence received by the trial court concerning the execution, the public notary who witnessed the execution of the Updates to Trust verified their authenticity. *See* Trans. 62:22-65:11. Additionally, the trial court received extensive evidence from both Robert and Kathy, as well as others, related to whether the Updates to Trust reflected Ina's intent. *See* Trans. 120:6-15, 120:23-122:22. *See also* Exhibit 15 ¶¶ 2, 5; Trans. 189:17-190:3.

Robert has asserted that admission of the original Updates to Trust following the close of the hearing was prejudicial because Robert did not have an opportunity to respond to the documents that purported to be originals, see *Appellant's Brief*, 14 & 23; because it deprived Robert of the opportunity to confront witnesses, examine documents, and object to out-of court statements, see *id.* at 23; and because Robert was not provided with the opportunity to cross-examine Kathy as to why the documents were not produced at the original hearing, see *id.* at 24. However, based on the extensive testimony previously received by the trial court concerning the duplicate Updates to Trust, the trial court did not act beyond the limits of reasonability by not providing Robert with an opportunity to question Kathy and Jenny concerning the originals. Furthermore, any prejudice caused by the trial court not permitting Robert to re-open the hearing was ameliorated by the trial court's own refusal to receive into evidence the additional affidavits provided by Kathy and Jenny that accompanied the original Updates to Trust. *See R. 477.*

In the end, the trial court simply had to compare the original Updates to Trust with the duplicates previously provided to it to determine whether the documents were identical. Upon determining that they were identical, and that sufficient evidence previously provided a foundation for admission of the duplicates, the trial court acted within its discretion to admit the originals. For that reason, the trial court acted within its broad discretion when it admitted the original Updates to Trust into evidence.

Significantly, even if the trial court acted beyond the bounds of reasonability in admitting into evidence the original Updates to Trust, Robert was not prejudiced by the

admission given that identical photocopies were previously admitted by the Court and extensive testimony was received by the trial court related to the Updates to the Trust of Ina C. Holman. This Court explained that “even if evidence is erroneously admitted, that fact alone is insufficient to set aside a verdict unless it has had a substantial influence in bringing about the verdict.” *Glacier Land Co., LLC*, 154 P.3d at 858. This principle is consistent with rule 103(a) of the Utah Rules of Evidence, which provides that error on a ruling on evidence “may not be predicated on a ruling which admits or excludes evidence unless a substantial right of the party is affected.” Given that the trial court had already received into evidence the identical photocopies of the Updates to Trust and corresponding testimony, the admission of the originals had no appreciable effect on the trial court’s ultimate judgment. For that reason, no prejudice has resulted from the admission that would require this Court to overturn the trial court’s admission of the original Updates to Trust.

Finally, Robert has failed to marshal the evidence necessary for this Court to determine whether the trial court abused its discretion in admitting exhibits 2, 2A, 9, and 9A. Consequently, because Robert “has failed to marshal the evidence supporting” the admission of the subject exhibits, this Court cannot “conclude that the trial court abused its discretion.” *United Park City Mines Co.*, 140 P.3d at 1209. For the reasons stated above, this Court should affirm the trial court’s admission of the original Updates to Trust into evidence in this matter.

C. Rule 1004 of the Utah Rules of Evidence Is Inapplicable to the Instant Case.

Robert has asserted on appeal that the trial court should not have admitted Exhibits 2 and 9 into evidence given that the exceptions listed in rule 1004 of the Utah Rules of Evidence were not satisfied. However, rule 1004 of the Utah Rules of Evidence does not apply in this case because the exhibits were not “other evidence of contents,” but duplicates as defined in rule 1001(4).

The purpose of rule 1004 is not to exclude duplicates, the admissibility of which is addressed in rule 1003, but to address the admissibility of “other evidence of the contents of a writing, recording, or photograph.” *See* UTAH R. EVID. 1003–1004. Rule 1004 allows for the admission of other evidence of the contents of writings under specific exceptions involving lost or destroyed originals, unobtainable originals, originals in the possession of the opposing party, or other collateral matters. UTAH R. EVID. 1004.

Duplicates as defined in rule 1001(4) of the Utah Rules of Evidence are not the “other evidence of the contents of a writing” that is the subject of rule 1004. Other evidence is typically things such as oral testimony to prove the content of a lost letter, see *Klein v. Frank*, 534 F.2d 1104, 1107–08 (5th Cir. 1976). For that reason, rule 1004 of the Utah Rules of Evidence are inapplicable in determining the admissibility of Exhibits 2, 2A, 9, and 9A.

IV. Robert Holman's Appeal Is Frivolous.

This Court should award the Appellees their attorney's fees given that Robert's appeal is frivolous. Rule 33 of the Utah Rules of Appellate Procedure provides the following:

Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damage be paid by the party or by the party's attorney.

UTAH R. APP. P. 33(a). Rule 33(b) defines frivolous appeal as "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." UTAH R. APP. 33(b).

In this case, Robert's appeal is not grounded in fact. As explained above, the trial court received and admitted into evidence extensive evidence of Ina's intent to amend her trust. Regardless, Robert has appealed this matter and failed to cite any of the evidence that served as the trial court's bases for finding intent. For that reason, Robert's appeal is frivolous and this Court should award the Appellees their attorney's fees incurred in responding to this appeal.

CONCLUSION

The Court should affirm the trial court's findings given that Robert completely failed to marshal the evidence necessary to contest the trial court's findings that the Update to Trust reflected Ina's intent and that no genuine question as to the authenticity of the Update to Trust exists.

Furthermore, this Court should affirm the trial court's finding that the Update to Trust reflected Ina's intent given that the clear weight of the evidence supports the trial court's finding. Specifically, the trial court properly found that the Update to Trust reflected Ina's intent because the Update to Trust states the reasons for which Ina executed it, Ina possessed the capacity to amend her trust and was not unduly influenced, and because her intent to correct the distributions to her family—namely Robert—was testified to at the time of the hearing.

The trial court acted reasonably when it admitted into evidence the duplicate and original Updates to Trust. No genuine question existed concerning the authenticity of the original Update to Trust that would merit the exclusion of the duplicates under rule 1003 of the Utah Rules of Evidence. The trial court received extensive evidence from the public notary who witnessed the documents execution, as well as Kathy, that outlined the Update to Trust's purpose, preparation, and execution. With regards to the admission into evidence of the original Updates to Trust following the conclusion of the hearing, the trial court acted reasonably in admitting the originals because of the extensive evidence before the trial court concerning the duplicates, because the trial court declined to receive testimony from any of the parties, and because the trial court could have determined that the originals were identical to the duplicates by simply comparing the documents. Finally, even if the trial court did not act reasonably in admitting the original Updates to Trust, Robert was not prejudiced by the admission because all of the information contained in the originals was previously admitted into evidence in the duplicate Updates to Trust.

For the stated reasons, the Appellees respectfully request that the trial court be affirmed in all respects. Furthermore, the Appellees respectfully request that the trial court award them their attorney's fees incurred in responding to Robert's frivolous appeal.

DATED this 21st day of October, 2007.

ROBINSON, SEILER & ANDERSON, LC

A handwritten signature in black ink, appearing to read 'Mark F. Robinson', is written over a horizontal line.

Mark F. Robinson
Morgan Fife
Attorneys for Kathleen Robinson,
Jenevieve Holman & Spencer Family

CERTIFICATE OF SERVICE

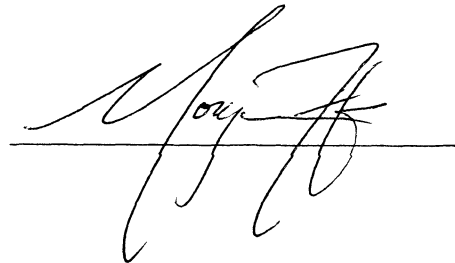
I hereby certify that on this 9th day of October, 2007, I caused eight copies of the Brief of Appellees, one of which contains an original signature, to be mailed to the Clerk of the Court of Appeals, by first class mail, postage prepaid, and 2 copies to be mailed, first class, with sufficient postage prepaid, to:

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ADDENDUM

1. *In re Estate of Reichenberger*, 2007 Minn. App. Unpub. Lexis 315, 9–10 (Minn. Ct. App. 2007).
2. Agreement Establishing the Ina C. Holman Trust dated July 27, 1990, Hearing Exhibit 1.
3. Letter from Robert Holman to Ina C. Holman, undated, Hearing Exhibit 15.
4. Letter from Robert Holman to Ina C. Holman, dated October 21, 1994, Hearing Exhibit 16.

Exhibit 1

In re Estate of Reichenberger, 2007 Minn. App. Unpub. Lexis 315, 9–10 (Minn. Ct. App. 2007).



Positive

As of: Oct 08, 2007

In re: Estate of Edward J. Reichenberger, a/k/a Edward Reichenberger, Deceased.

A06-653

COURT OF APPEALS OF MINNESOTA

2007 Minn. App. Unpub. LEXIS 315

April 10, 2007, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

SUBSEQUENT HISTORY: Review denied by *In re Estate of Reichenberger*, 2007 Minn. LEXIS 330 (Minn., June 19, 2007)

DISPOSITION: Affirmed in part and reversed in part.

COUNSEL: For Linda Soukup, Appellant: Mary R. Vasaly, Maslon, Edelman, Borman & Brand, LLP, Minneapolis, MN.

For Dale Hilk, Respondent: Patrick J. Neaton, Neaton & Puklich, PLLP, Minnetonka, MN.

JUDGES: Considered and decided by Minge, Presiding Judge; Stoneburner, Judge; and Dietzen, Judge.

OPINION BY: DIETZEN

OPINION

UNPUBLISHED OPINION

DIETZEN, Judge

Appellant challenges the district court order and resulting judgment which, inter alia, admitted a June 2001 will of testator to probate, but voided a competing will executed four months later due to undue influence upon the testator, and awarded attorney fees against appellant and a non-party. Appellant argues that the district court failed to apply the proper burden of proof to the evidence

and that the findings and conclusions of the district court were not supported by the evidence or law. We affirm in part and reverse in part.

FACTS

This is a contest involving competing wills executed by Edward Reichenberger [*2] (testator) on June 7, 2001 (the June will), in which respondent Dale Hilk is a residuary beneficiary, and a will executed on October 17, 2001 (the October will), in which appellant Linda Soukup and non-party Richard Blanchard, are residuary beneficiaries. Testator died on November 8, 2003. Each party filed a petition to probate the will under which that party was a residuary beneficiary.

Testator, who was born in July 1913, together with his older brother, John Reichenberger, inherited a 152-acre farm which they owned and resided on from April 1945 until their respective deaths. The Reichenberger farm (farm) is located in Carver County between Waconia and St. Bonifacius. Soukup and Blanchard lived near the Reichenberger farm, and their relationship with the Reichenbergers dates back to the mid-1980s when Soukup and Blanchard sought to purchase boulders from the Reichenbergers for their landscaping business. Hilk, born out of wedlock in July 1935, is the son of John Reichenberger. Although Hilk lived in the vicinity of the farm, he did not have any significant contact with either testator or John until the early 1980s.

The farmhouse, occupied by testator and John, was dilapidated and [*3] possessed no electricity, plumbing, running water, or heating system, other than a small wood-burning stove. Soot and grease covered the floor, walls, and ceiling, and numerous windowpanes were

broken, covered only in cardboard. The state of the farmhouse was not due to poverty, but rather the lifestyle choice of the two bachelor brothers.

In May 1988, the Reichenbergers signed a purchase agreement/option in favor of William and Suzanne Johnson. When the Reichenbergers refused to comply with the terms of the agreement, the Johnsons brought a lawsuit. In January 1994, the parties settled the lawsuit, which was approved by the district court. Later, the Reichenbergers, with the assistance of Soukup and Blanchard, hired a new attorney to set aside the settlement. Those efforts were unsuccessful.

Hilk retired in October 1997 and began a practice of visiting testator and John at the farm three days a week. Subsequently, Hilk began handling some financial matters for testator and John, who were 84 and 87 years old respectively, and arranging for the purchase of burial plots at the local cemetery. In April 1998, Hilk consulted with attorney Paul Melchert, who prepared a power of attorney [*4] (POA), and assisted testator in the execution of a will. The 1998 will provided, inter alia, that the residuary of testator's estate would go to his nephews--Hilk and Kay Berrigan--in equal shares and appointed Hilk as his personal representative.

In January 2000, Soukup and Blanchard convinced testator and John to commence a malpractice claim against their former attorneys arising out of the Johnson litigation. When Hilk discovered the existence of the malpractice lawsuit, he had Melchert send a letter to Soukup and Blanchard advising them that Hilk was the attorney-in-fact for testator and John, and urged them to stay away from the brothers and terminate the litigation.

But Soukup and Blanchard arranged a meeting with attorney John Choi to pursue the litigation. Following a meeting with the Reichenbergers, Choi had them execute revocations of Hilk's POA and name Soukup and Blanchard as their new attorneys-in-fact, but did not notify Hilk.

In April 2001, John was admitted to a Waconia hospital. In June 2001, testator met with Melchert to change his will. The will (June will) provided, inter alia, that the residue of his estate went to Hilk, and that he was intentionally omitting [*5] all other persons except for a relative, Joan Stoltman, who received three thousand dollars.

When Melchert became aware that Soukup was POA for testator and John, he contacted attorney Kerry Olson and, on the basis of a conflict of interest due to his dealings with Hilk, asked Olson to speak with testator. Attorney Olson met with testator at the farm on September 7, 2001, and observed the "appalling" living conditions. During the meeting, testator stated that he wanted Hilk to be his attorney-in-fact because Hilk was a rela-

tive who lived in Waconia and "looked out" for him. Testator also expressed his desire that attorney Choi continue to pursue the Johnson litigation.

Olson then prepared and had testator execute a POA appointing Hilk as attorney-in-fact, and sent a letter to attorney Choi. In his letter to Choi, Olson observed that testator was "clearly a vulnerable adult," but that he "retains mental alertness" and "expresses himself adequately," but "is 88 years old." Olson also instructed Choi that Soukup and Blanchard must cease interfering in testator's life decisions, but that Choi could continue to pursue the Johnson litigation.

Subsequently, a dispute arose in which Hilk [*6] accused Soukup and Blanchard of interfering with the lives and affairs of testator and John. Attorneys Choi and Olson agreed to visit testator at the farm on September 20, 2001, in an attempt to resolve the dispute. When Olson arrived, he was surprised to see Soukup and Blanchard at the meeting and requested that they leave. Olson believed testator's demeanor had changed considerably from his previous meetings with him in which testator was lucid, clear, and reasonably animated. But on this date testator was "like a deer in headlights" and "frozen in his chair." During the meeting, Blanchard asked testator, "You don't want him as your attorney any more, do you," and testator responded, "No." At that point Olson left the farmhouse considering himself to have been fired by testator.

Soukup and Blanchard then made arrangements for testator to meet with attorney William Koenig to execute a new will. At the meeting, testator requested that a will be completed immediately because he was going into the hospital that same day, which was not true. Because it was a relatively short will, Koenig prepared it, and contrary to his usual practice had testator execute it that same day. The October [*7] will made no reference to testator's desire to be buried in the local cemetery, and left the residuary of his estate in equal one-third shares to Soukup, Blanchard, and Joan Stoltman. Soukup and Blanchard then took testator to the Carver County Courthouse where he deposited the will at the probate department. The two court employees that spoke to testator made the following notation on the will jacket: "[Testator] did not know the day or year when he signed the back. We had to tell him. Don't think he was of sound mind."

At trial, the parties vigorously disputed each other's motivations, the validity of the October will, and whether it was the subject of undue influence by Soukup and Blanchard. Following a trial, the district court filed extensive findings of fact, conclusions of law, and an order and judgment admitting the June 2001 will to probate, appointing Hilk as personal representative, and concluding

ing that the October will was void and the product of undue influence by Soukup and Blanchard. In the main, the court credited the testimony of Hilk and discredited the testimony of Soukup and Blanchard. Also, the district court concluded that the estate is entitled to judgment [*8] against Soukup and Blanchard for attorney fees that the estate had incurred. This appeal follows.

DECISION

I.

Soukup argues that the district court erred in holding that the October will was invalid because it was the product of undue influence by Soukup and non-party Blanchard. The district court's findings of fact will not be set aside unless they are clearly erroneous. *Minn. R. Civ. P. 52.01*; *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. App. 1986). "Findings are 'clearly erroneous' only if 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *In re Estate of Congdon*, 309 N.W.2d 261, 266 n.7 (Minn. 1981)). The existence of undue influence is a question of fact. *In re Estate of Reay*, 249 Minn. 123, 124, 81 N.W.2d 277, 279 (1957).

Initially, Soukup argues that the district court erred by adopting verbatim Hilk's proposed findings of fact and conclusions of law. The verbatim adoption of a party's proposed findings and conclusions is "hardly commendable" as it raises the question of whether the district court "independently [*9] evaluated each party's testimony and evidence." *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002); *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), review denied (Minn. Feb. 12, 1993). But, standing alone, it does not constitute grounds for reversal. *Pederson*, 649 N.W.2d at 163; *Dukes v. State*, 621 N.W.2d 246, 259 (Minn. 2001).

When a district court adopts a party's proposed findings of fact and conclusions of law verbatim, a "careful and searching review of the record" is required. *Dukes*, 621 N.W.2d at 258. Here, the district court did adopt Hilk's proposed findings of fact and conclusions of law. Thus, our caselaw requires that we conduct a careful and searching review of the record to determine whether the district court's findings are clearly erroneous.

Soukup also argues that the district court failed to require that Hilk prove undue influence by "clear and convincing evidence" because the standard of proof is not mentioned in the district court's order. It is well settled that the will contestant must establish undue influence by clear and convincing proof. *Minn. Stat. § 52A.3-407* [*10] (2006); *In re Estate of Pundt*, 280 Minn. 102, 104, 157 N.W.2d 839, 841 (1968). But the failure of the district court to mention this standard of proof in its or-

der does not, ipso facto, establish that the district court did not require it, particularly when it was briefed and argued by both parties. Thus, our review necessarily focuses on whether clear and convincing evidence exists in the record to support the district court's finding that the will was the product of undue influence.

We will invalidate a will that is the product of undue influence if it is proven that another person exercised influence over the testator so that the will reflects the intent of the other person and not of the testator. *Estate of Reay*, 249 Minn. at 126, 81 N.W.2d at 280; *In re Estate of Torgersen*, 711 N.W.2d 545, 550 (Minn. App. 2006), review denied (Minn. Jun. 20, 2006). "Undue influence must be such as to substitute the will of the person exercising it for that of the testator, thereby making the written result express the purpose and intent of such person, not those of the testator." *In re Estate of Marsden*, 217 Minn. 1, 9, 13 N.W.2d 765, 770 (1944). [*11] "It must be equivalent to moral coercion or constraint overpowering the will of the testator," and "must operate at the very time the will is made and dominate and control its making." *Id.* Direct evidence of undue influence is generally not available and circumstantial evidence can be sufficient. *In re Estate of Olson*, 176 Minn. 360, 365, 223 N.W. 677, 679 (1929).

The supreme court has identified six factors to determine whether undue influence has been exerted upon a testator. *In re Estate of Wilson*, 223 Minn. 409, 413, 27 N.W.2d 429, 432 (1947); *In re Estate of Opsahl*, 448 N.W.2d 96, 100 (Minn. App. 1989). We turn to the six factors.

A. Opportunity to Exercise Influence

Soukup argues that she did not isolate testator or make him dependent upon her, and thus no "opportunity" existed for her to exercise undue influence. The district court concluded that Soukup and Blanchard "made [testator] dependent upon them for his continued ability to live at the Reichenberger Farm and Soukup had [testator]'s Power of Attorney."

During the period immediately before and after the execution of the October will, Soukup [*12] was testator's attorney-in-fact and frequently visited testator at the farm, at a time when because of John's hospitalization, testator was regularly alone. And Soukup and Blanchard made the appointment with attorney Koenig to draft the October will, transported testator to the office, and brought him to the county clerk's office to file it. Thus, clear and convincing evidence exists in the record that Soukup had the opportunity to exercise influence on testator.

B. Active Participation in the Preparation of the Will

Soukup argues that the evidence is insufficient to demonstrate Soukup's active participation in the preparation of the will. The district court found that Soukup and Blanchard "selected the attorney to draft the will, drove [testator] to the attorney's office, waited with him while the will was drafted and executed, then drove him to the Carver County courthouse where the will was deposited with the clerk's office." The district court also found that "it is a certainty that Blanchard and Soukup told [testator] what provisions to include in his October 17, 2001 will, and that Blanchard and Soukup read the October 17, 2001 will before it was deposited [*13] with the Carver County Probate Court."

Undue influence may be proven by circumstantial evidence. *Estate of Olson*, 176 Minn. at 365, 223 N.W. at 679. Here, Soukup was actively involved in every step of the process of selecting the attorney and arranging the meeting with testator, driving testator to the attorney's office and waiting for him while the will was drafted and executed, and driving testator to the courthouse to deposit the will. And Soukup was substantially benefited as a beneficiary under the new October will. Based on its observations of the witness and all of the circumstances, the district court concluded that Soukup was actively involved in the preparation of the will and its provisions. On this record, the circumstantial evidence supports the district court's finding by clear and convincing evidence.

C. Confidential Relationship

Soukup concedes she had a confidential relationship with testator because of her POA.

D. Disinheritance of Those Who Probably Would Have Been Remembered

Soukup argues that this factor does not militate in any particular direction because testator had a habit of changing his beneficiaries. [*14] "But an entire change from former testamentary intentions is a strong circumstance to support a charge of undue influence." *In re Estate of Olson*, 227 Minn. 289, 298, 35 N.W.2d 439, 446 (1948). "This is especially true where the effect of the change is to give the beneficiary charged with exercising

undue influence a "larger" share of testator's estate than she would have received otherwise." *Id.*

Here, the record contains evidence that Hilk maintained, along with his family, a familial relationship with testator; handled his financial affairs; did chores around the farm; "looked out" for testator's well-being; was the main beneficiary in each of testator's two prior wills; and that the October will exhibited an entire change from former testamentary intentions in favor of Hilk to Soukup and Blanchard.

E. Singularity of the Will Provisions

Soukup argues the October will was not "singular" because she was only one of three beneficiaries. Respondent argues that the October will was singular in eliminating him as a beneficiary. The district court found that "[t]he provisions of the [will] are 'singular' because Hilk is purportedly disinherited [*15] without being mentioned, and there is no mention of [testator]'s previously expressed burial preference."

Singularity of the will provisions focuses on the nature and extent of the changes in the will from the testator's previous will. Here, the residuary beneficiary designation was the most significant change in the will, and apart from the elimination of where testator desired to be buried, was the "singular" change in the October will. That provision replaced Hilk as a beneficiary with Soukup, Blanchard and Stoltman. On this record, it was not clear error for the district court to find that the October will provisions were "singular" in favor of Soukup and Blanchard.

F. Exercise of Influence or Persuasion to Induce the Testator to Act

Soukup argues that the district court failed to mention this factor in its "memorandum" and, therefore, that its conclusion regarding undue influence was flawed. But Soukup fails to provide any authority that such omission is dispositive, particularly when this factor is discussed extensively in the district court's order. Specifically, the district court found that Soukup and Blanchard "exercised undue influence over [testator]. [*16] "

Here, the district court found that prior to the September 20, 2001 meeting, testator had agreed to spend the winter at the nursing home. Testator stated to Olson that he could not stay at the farmhouse that winter because it was a "hovel." Soukup and Blanchard were able to exercise undue influence over testator at the meeting by convincing him that Hilk "was holding John as a pris-

oner" at the nursing home, and that he intended to do the same with him. Soukup admitted at trial that there was no factual basis to conclude that Hilk was holding John a "prisoner" at the nursing home. Based on Olson's testimony, the district court found that testator was "not himself" and that Soukup and Blanchard "definitely have him in control."

Soukup and Blanchard told testator that they would have gas heat and telephone installed at the farmhouse so that he could continue to live there, and that they would bring him drinking water and food.¹ The district court found that they did so to make testator "dependent upon them for his ability to continue to live at the Reichenberger farm."

1 Testator agreed to stay alone at the farm that winter.

[*17] Subsequently, Soukup and Blanchard arranged a meeting with Koenig so that testator could execute a new will. Attorney Koenig met with testator, prepared the will, and had the will executed the same day. Attorney Choi stated that he was not aware that Soukup and Blanchard had taken testator to a different attorney to prepare the October will. Two days after testator executed the October will, Soukup and Blanchard had a gas heater and telephone installed at the farm.

On conflicting testimony, the district court made credibility assessments which this court will not disturb absent an abuse of discretion. See *Tews v. Geo. A. Hormel & Co.*, 430 N.W.2d 178, 180 (Minn. 1988). And the district court's finding that the October will was the product of undue influence is supported by the findings and clear and convincing evidence in the record.

Soukup also argues that the district court erred by finding that the October will was void because it is a self-proved will, the issue was not raised in the district court, and the record contradicts the district court's finding. Hilk does not contest the argument. But because we find that the October will was the product of undue influence, [*18] the question of whether it is void is moot.

II.

Soukup argues that the district court erred by granting testator's estate a judgment against Soukup and Blanchard for attorney fees under *Minn. Stat. § 524.3-720* (2006). Hilk argues that no fee petition was submitted by attorney Eric Dammeyer,² no judgment for a specific amount of attorney fees was entered and, therefore, there is nothing for this court to determine. The district

court's order regarding attorney fees is generally subject to an abuse of discretion standard. *Torgerson*, 711 N.W.2d at 550. The court's findings will be set aside if they are clearly erroneous. *In re Estate of Balafas*, 225 N.W.2d 539, 541 (Minn. 1975). However, where the decision is based on the court's application of a statute to the uncontested facts, the construction and application of the statute is a question of law, and is reviewed de novo. *Torgerson*, 711 N.W.2d at 550.

2 Dammeyer represented Linda Soukup at the district court.

[*19] *Minn. Stat. § 524.3-720* provides in relevant part:

Any personal representative or person nominated as personal representative who defends or prosecutes any proceeding in good faith, whether successful or not, or any interested person who successfully opposes the allowance of a will, is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys' fees incurred.

Absent a finding of bad faith, a personal representative has a statutory right to recover attorney fees. Whether a person is acting in bad faith is a question of fact. *In re Estate of Evenson*, 505 N.W.2d 90, 91 (Minn. App. 1993) (reviewing district court's finding of good faith under the clearly erroneous standard).

The only finding made by the district court on the question of attorney fees provided: "Since Dammeyer's representation was for the benefit of [testator]'s estate, he is entitled to reasonable attorney's fees from the estate and the estate is entitled to judgment against Linda Soukup, and Richard Blanchard in the amount of attorney's fees awarded to Dammeyer."

But we have no underlying motion for attorney [*20] fees outlining the nature and amount of the fees requested, no finding of bad faith by Soukup, and no legal basis for an award of attorney fees against non-party Blanchard. Thus, we have no support in the record for an award of attorney fees. Thus, we reverse the finding regarding attorney fees without prejudice to any party.

Affirmed in part and reversed in part.

Exhibit 2

Agreement Establishing the Ina C. Holman Trust dated July 27, 1990, Hearing Exhibit 1.

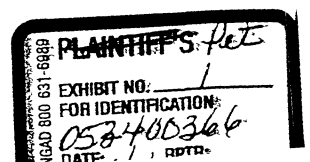
AGREEMENT ESTABLISHING THE
INA C. HOLMAN FAMILY TRUST

THIS AGREEMENT is made this 27th day of July, 1990, by and between INA C. HOLMAN, (hereinafter referred to as the "Trustor") and INA C. HOLMAN (hereinafter sometimes referred to as the "Trustee"). This Agreement establishes the INA C. HOLMAN FAMILY TRUST for the benefit of the Trustor and then her beneficiaries.

ARTICLE ONE

Property Transferred to the Trustees

The Trustor has paid over, assigned, granted, conveyed, transferred and delivered to the Trustee the property described in Schedule "A," which is, or will be attached hereto and made a part hereof. The Trustee hereby agrees to hold, administer, and distribute, in accordance with the provisions hereof, the property described in said Schedule and any other property acceptable to the Trustee which anyone may desire to add to the trust. All property initially or hereafter transferred to the trust, including property passing to the trust by the Trustor's Will, hereinafter sometimes is termed the "Trust Estate."



ARTICLE TWO

Family Members

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 HOLMAN.

ARTICLE THREE

Provisions for the Trustor During Her Lifetime

The Trustee shall hold, manage, invest and reinvest the Trust Estate for the exclusive benefit of the Trustor and shall collect and distribute the income and principal as follows:

3.1 Distributions Upon Request. During the Trustor's lifetime, the Trustees shall pay to or apply for the benefit of the Trustor as much of the net income and principal of the Trust Estate as the Trustor may request from time to time.

3.2 Distributions By the Trustee. During the Trustor's lifetime, the Trustee shall also pay to or apply for the benefit of the Trustor such sums from the income and principal of the Trust Estate as shall be necessary or advisable from time to time to provide for her medical care, happiness, comfort and welfare.

ARTICLE FOUR

Right Revoke or Amend the Trust

During her lifetime the Trustor may: (1) revoke part or all of this trust; (2) add other property to the Trust Estate; (3) change the beneficiaries, their respective shares and the plan of distribution; and (4) amend this Trust Agreement in any other respect.

ARTICLE FIVE

Trustee's Discretionary Provisions

After the Trustor's death, the Trustee, in the exercise of her sole and absolute discretion, may pay all or any part of the Trustor's funeral expenses, legally enforceable claims against the Trustor or her estate, reasonable expenses of administration of her estate, any allowances by court order to those dependent upon the Trustor, and any estate, inheritance, or similar taxes payable by reason of the Trustor's death.

ARTICLE SIX

Ultimate Distribution of the Trust Estate

Following the Trustor's death, the Trust Estate shall be held, administered and distributed as follows:

6.1 Division of Trust Estate. The Trustee shall divide the balance of the Trust Estate into equal shares and partial shares as follows: (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.

6.2 Distributions of Trust Shares. 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. The Trustees may pay to or apply to the benefit of any such Beneficiary such sums from the income or principal of her share as the Trustees, in the exercise of the Trustees' discretion, shall deem necessary or desirable from time to time for the Beneficiary's medical care, education, support and maintenance in reasonable comfort, taking into consideration, to the extent the Trustees deems advisable, any other income or resources of such Beneficiary known to the Trustees. The Trustees shall annually add to the principal of each share any undistributed income.

6.3 Mandatory Distribution of Beneficiary Shares. After division into shares pursuant to Paragraph 6.1, and when a Beneficiary attains the age of Twenty-one (21) years, the Trustee shall distribute to such Beneficiary all his or her share free of this Trust. If a Beneficiary has already attained the age of Twenty-one (21) as set forth above at the time the Trust Estate is divided into shares pursuant to Paragraph 6.1, the Trustee shall distribute to such Beneficiary all of his or her share, respectively, free of this Trust.

ARTICLE SEVEN

Appointment of Trustee

7.1 Appointment. Trustor hereby nominates and appoints INA C. HOLMAN as Trustee of this Trust.

7.2 Appointment of Successor.

(a) Upon the death, incapacity, resignation or discharge of the initial Trustee, the following individuals shall serve as Successor Co-Trustees: KATHLEEN ROBINSON, JENEVIEVE OLSSON, PHYLLIS HALL and ROBERT HOLMAN.

(b) Any Trustee or Successor Trustee may resign by instrument in writing.

(c) Any Successor Trustee shall have all the rights, powers, duties, and discretion conferred or imposed on the original Trustee. No Successor Trustee shall be obliged to examine the accounts and actions of any previous Trustee. No Trustee shall be liable for any act or omission unless the same be due to such Trustee's own default.

(d) Any Successor Trustee shall become responsible for the Trust Estate only when the same shall be received by said Trustee and shall only be responsible to make a reasonable inquiry from the records of the prior Trustee which are available.

7.3 Bond and Accountings. The Trustor specifically requests and directs that no bond or other security shall be required of any Trustee named hereunder. No Trustee hereunder shall be required to file any court accountings either during administration or at termination of any Trust created hereunder.

ARTICLE EIGHT

Incapacity of the Trustor or Trustee

8.1 Determination of Incapacity. The Trustor or any Trustee shall be deemed incapacitated upon the following events and upon the following evidences:

(a) A court order rendered by an appropriate court of the place of the subject individual's then residence, holding said individual to be legally incapacitated to act in her own behalf, or appointing a conservator or other protective; or

(b) Duly executed written certificates of two disinterested licensed physicians, each certifying that such physician has examined said individual and concluded that by reason of illness or physical or mental disability, he or she had, at the date of said certificate, become incapacitated to act efficiently or rationally and prudently in the management of property.

8.2 Deemed Release of Reserved Rights. If the Trustor is deemed incapacitated, she shall also be deemed to have released the rights and privileges reserved under Article Four above, except that she shall have the continued right of rent-free use and occupancy of any residential real property plus the continued right to receive as much of the Trust Estate as may be appropriate to provide generously for her comfort, support, maintenance, medical care and happiness.

8.3 Termination of Trusteeship. If a Trustee is deemed incapacitated, such incapacity shall cause her trusteeship to terminate and to pass to the remaining or successor Trustee, who shall have full and exclusive power to take any action permitted the Trustee under this Trust Agreement.

8.4 Examination into Trustor's Possible Incapacity. No Trustee (whether then acting or a designated successor) hereunder shall be under any duty to institute any examination into the Trustor's possible incapacity, but any such examination reasonably instituted by a Trustee (excepting all conditionally appointed Trustees) shall be deemed made at the Trustor's request, with waiver by the Trustor of all provisions of law relating to

disclosure of confidential medical information needed in connection therewith. The expenses of any such inquiry may be paid from the Trust Estate.

8.5 Objection to Physicians' Certification of Incapacity.

Should the Trustor, any Trustee or any adult Beneficiary object to such physicians' certifications, such objecting party may seek a legal determination of competency in any court of proper jurisdiction. During the period of such certification, unless and until a court of proper jurisdiction determines otherwise, any attempt by the Trustor to exercise the reserved rights and privileges or to exercise the authority and power of a Trustee shall be void and totally without effect.

8.6 Revocation of Physicians' Certification. Any one physician's aforesaid certificate may be revoked by a similar certificate executed either (1) by the originally certifying physician, or (2) by two other disinterested licensed physicians, to the effect that the Trustor or Trustee is no longer incapacitated.

8.7 Reassumption of Reserved Rights and Trusteeship. The Trustor or Trustee shall be deemed to have reassumed the reserved rights and the Trusteeship if the Trustee shall not at all times be in possession of at least two unrevoked physicians' certificates and the particular individual is not then subject to a conservatorship or other protective proceeding.

8.8 Disinterested Licensed Physician. The term "disinterested licensed physician" shall mean a physician certified by a recognized medical board who is not a beneficiary hereunder, nor related to the Trustor or any Trustee within the second degree, nor related to any Beneficiary of this Trust or of the Trustor's Will within the second degree.

ARTICLE NINE

Termination of Trust Estate

9.1 No Perpetual Trusts. All Trusts hereunder shall in all events terminate not later than twenty-one (21) years after the death of the last survivor of the group composed of the Trustor and those of her descendants living at her death (in the event these trusts shall not have previously terminated in accordance with the terms hereof). The property held in trust shall then be discharged of any trust, and shall immediately vest in and be distributed to the persons then entitled to the income; for this purpose only it shall be presumed: (a) that any person then entitled to receive any discretionary payments from the income or principal of any particular trust is entitled to receive the full income; and (b) that any class of persons so entitled is entitled to receive all such property, to be divided among them by representation.

9.2 Discretionary Termination by Trustee. If any trust hereunder has, in the Trustee's opinion, a fair market value of Ten Thousand Dollars (\$10,000.00) or less, the Trustee, in the Trustee's discretion, may terminate such trust and distribute the

entire remaining balance of the trust to the persons who are then entitled to receive income payments in the proportions in which they are at the time of term of termination entitled to receive the income. However, if the rights to income are not then fixed, distribution may be made in equal shares to such persons as are then authorized to receive income payments. Such payments may be made to a person regardless of the person's age, or to a person's guardian, conservator, or custodian under the Uniform Gifts to Minors Act.

ARTICLE TEN

Administrative Provisions

10.1 Broad Powers Granted to the Trustee. The Trustee is hereby vested with all of the powers now or hereafter conferred by law and all of those powers detailed in the Utah version of the Uniform Trustees' Powers Act, which are incorporated herein by this reference. The trustee is hereby vested with the power and authority to manage and control the Trust Estate in such manner as the Trustee may deem advisable; and, she shall have, enjoy, and exercise all powers and rights over and concerning the Trust Estate in the proceeds thereof as fully and amply as though the Trustee were the absolute owner of the same.

10.2 Establishing The Trustee's Authority. With respect to any asset of the Trust Estate, or any business or investment transaction of the Trust Estate:

(a) The assertion by any Trustee that she is acting either alone or with another as a qualified Trustee shall be sufficient on its face, and no person shall be put to further inquiry into the right of such Trustee to so act.

(b) No purchaser from or other person dealing with the Trustee shall be responsible for the application of any purchase money or thing of value paid or delivered to it, but the receipt of the Trustee shall be a full discharge; and, no purchaser or other person dealing with the Trustee and no issuer, or transfer agent, or other agent of any issuer of any securities to which any dealing with the Trustee should relate, shall be under any obligation to ascertain or inquire into the power of the Trustee to purchase, sell, exchange, transfer, mortgage, pledge, lease, distribute or otherwise in any manner dispose of or deal with any security or any other property held by the Trustee or comprised in the Trust Estate.

(c) Title to the assets comprising the Trust Estate shall vest in each successor Trustee by virtue of her appointment and acceptance without any further instrument of conveyance or transfer. Each successor Trustee shall have all the administrative rights, powers, discretions, obligations and immunities of the originally named Trustee.

(d) The certificate of the Trustee that it is acting according to the terms of the Trust Agreement shall fully protect all persons dealing with the Trustee.

10.3 Payments to Persons Under Disability. The Trustee, in the Trustee's discretion, may make payments for the benefit of a minor or other Beneficiary under disability by making payments to the Beneficiary or by applying payments directly for the Beneficiary's benefit. The Trustee may make payments directly to a minor if, in the Trustee's judgment, the minor is of sufficient age and maturity to spend the money properly. The Trustee shall not be liable for the misuse of any payments or applications so made. Further, the Trustee is authorized to reimburse the guardian, conservator, or other individual with whom a minor Beneficiary resides for reasonable expenses incurred in accommodating such Beneficiary to the extent that distributions could then be made directly to or for such Beneficiary. This authority shall be liberally construed to permit payments reasonably necessary to ease the financial burden on such person and such person's family resulting from the accommodations of such Beneficiary.

10.4 Spendthrift Provisions. Except as otherwise specifically provided herein, no interest in the principal or income of the trust shall be anticipated, assigned, encumbered, or subject to any creditor's claim or to legal process prior to its actual receipt by a Beneficiary.

10.5 Division of Trust Property. There need be no physical segregation or division of the trusts created hereunder, except as such segregation or division may be required by the express terms of this Agreement or by the termination of any of the trusts created hereunder, but the Trustee shall keep separate accounts for the different trusts. The Trustee may hold or invest the assets of any of the trusts as undivided common interests. In any case in which the Trustee is required to set aside, divide, transfer, or distribute any trust property, the Trustee is authorized, in the Trustee's discretion, to make the set aside, division, transfer, or distribution, on a pro rata or non pro rata basis, in kind, including undivided interests in any property, or partly in kind and partly in money, at fair market valuations at the date or dates set aside, division, transfer, or distribution. For this purpose, the Trustees may make such sales of trust property as the Trustee deems necessary.

10.6 Apportionment of Taxes. (a) The amount of any estate, inheritance, succession, death or similar taxes attributable to property, assets, or beneficial interests includible in the Trustor's gross estate for Federal or state estate tax purposes shall be apportioned against such property and paid by the beneficiaries, trustees, or recipients thereof.

(b) In making such tax apportionment, if any exception or deduction allowed under law because of the relationship of any person to the Trustor or the charitable gift, as the case may be,

shall be exonerated from paying any portion of such tax. Furthermore, in making such tax apportionment, if any property included in the Trustor's gross estate for tax purposes (that is included in the measure of the tax) does not come into the possession or control of the Trustee, the Trustee is authorized to recover the pro rata or incremental amount of the tax, as the case may be, including interest and penalties attributable thereto, from the persons benefitted, in accordance with the applicable provisions of the Internal Revenue Code and any applicable state apportionment statutes.

10.7 Representation of Unknown and Undetermined Beneficiaries.

In any controversy or proceeding involving the construction, operations, or modification of this Trust Agreement, the then living competent adult beneficiaries shall represent all minor, incapacitated, unknown, and undetermined beneficiaries; any agreement reached or order, judgment or decree rendered in such proceeding shall be binding upon all concerned, including those thus represented.

10.8 Applicable Law. This instrument is executed by the Trustor while residing in the State of Utah and shall be interpreted and applied in accordance with the laws of the State of Utah in force from time to time.

10.9 Severability. If any provision hereof is unenforceable, the remaining provisions nevertheless shall be carried into effect.

ARTICLE ELEVEN

Definitions

11.1 As used herein, the masculine, feminine, or neuter gender, and the singular or plural number of tense, shall each be deemed to include the others whenever the context so indicates.

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

11.3 As used herein, the term "adopted" refers to both legally and equitably adopted persons.

11.4 As used herein, the term "education" shall be construed to include vocational training, college, and postgraduate study, so long as pursued to advantage by the Beneficiary, at an institution of the Beneficiary's choice. In determining payments to be made for such training or education, the Trustee shall take into consideration the Beneficiary's related living and travel expenses to the extent that they are reasonable.

11.5 If any beneficiary hereunder should die within six months of the Trustor's death, or within six months of any other such determinative date, he or she shall be deemed to have predeceased the Trustor, etc., for all purposes under this Trust Agreement.

11.6 Whenever a distribution to descendants "by right of representation" is called for by this Trust Agreement, the assets subject to distribution are to be divided into as many equal shares as there are then living descendants of the nearest degree of

living descendants plus deceased descendants of that same degree who leave descendants then living; and each such living descendant of the nearest degree shall receive one share, and the share of each such deceased descendant of that same degree shall be divided among his or her descendants in the same manner.

ARTICLE TWELVE

Execution and Acknowledgements

INA C. HOLMAN, the Trustor herein, hereby acknowledge:

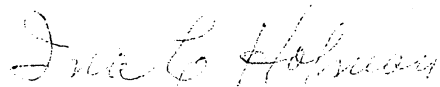
That she has read the foregoing Trust Agreement;

That it correctly states the terms and conditions under which the Trust Estate is to be held, managed, and disposed of by the Trustee;

That this Trust Agreement is approved in all particulars; and

That this Trust Agreement is accepted and effected as of the day and year first above written.

TRUSTOR AND TRUSTEE:



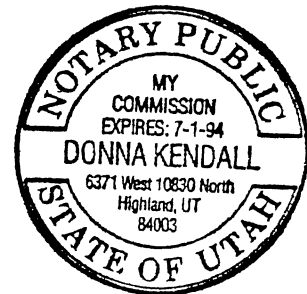
INA C. HOLMAN

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

On the 27th day of July, 1990, before me, the undersigned, a Notary Public, personally appeared INA C. HOLMAN personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same as Trustor and Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal.

Donna Kendall
Notary Public

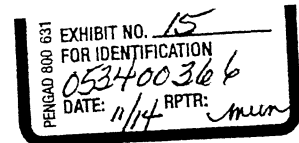


INA C. HOLMAN FAMILY TRUST

Schedule A

Exhibit 3

Letter from Robert Holman to Ina C. Holman, undated, Hearing Exhibit 15.



Dear Mom:

I'm writing this letter on lotus so that I can do some calculations at the same time. I'm going to illustrate two scenarios like I mentioned in our phone conversation this morning. First of all let's agree on some things that would be the same in each case. You indicated that at the present time your assets looked something like this:

Cash and Condominium	\$240,000
Lake City 80 acres	\$160,000
Promissory Note (\$80,000 face \$44,000 interest)	\$124,000
Attle	\$35,000
Other Assets	\$30,000
	=====
Total Assets	\$589,000

If you died today my anticipation would be that each child would end up with one fifth or \$117,800. Of course this would not be in cash but it would be one fifth of the value of the assets. I would want to trade my interest in the estate for the promissory note. That would leave the estate looking like this:

Cash and Condominium	\$240,000	
Lake City 80 acres	\$160,000	
Cash from Robert	\$6,200	(\$124,000-117,800)
Attle	\$35,000	
Other Assets	\$30,000	
	=====	
Total Assets	\$471,200	

If these assets are to be split 4 ways because I would be out of the estate. This would leave \$117,800 each.

Let's suppose I had paid the promissory note as agreed and had been able to pay it off by now. Your estate should look something like this now:

Cash and Condominium	\$240,000	
Lake City 80 acres	\$160,000	
Cash from Robert	\$124,000	Payment of Note
Attle	\$35,000	
Other Assets	\$30,000	
	=====	
Total	\$589,000	

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 debts, but to show that the amount to be distributed between your children 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. I think that at the time you were thinking clearly and felt

will honor their parents decisions and not let it cause problems in my family.

If this is not clear let me know.

Robert

Exhibit 4

Letter from Robert Holman to Ina C. Holman, dated October 21, 1994, Hearing
Exhibit 16

October 21, 1994

Enclosed is the item you requested. As per our phone conversation this day, this deed is made to and delivered to the Grantee (Ina C. Holman) with the understanding and the commitment from the Grantee that she will:

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 made or to be made.

