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Case No. 16-115032-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ESTATE OF GEORGE WAYNE PROBASCO, DECEASED.

E. LOU BJORGAARD PROBASCO, SURVIVING SPOUSE,
Appellant

v.

JEFFREY W. PROBASCO, KRISTI A. HELLMUTH, AND PAULA S. FREEMAN, DECEDENT'S CHILDREN,
Appellees

REPLY BRIEF OF APPELLANT E. LOU BJORGAARD PROBASCO

Appeal from the District Court of Shawnee County, Kansas
The Honorable Frank J. Yeoman
District Court Case No. 14PR12

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REPLY BRIEF OF APPELLANT

INTRODUCTION

Each of the four argument sections of Appellees' Brief introduces new material not previously addressed. Their first argument regarding interpretation of the Fifth Amendment to the Wayne Probasco Trust relies on a single case as authority they claim trumps all other authority. Accordingly, this reply will examine the holding of that case, which actually supports reversal of the district court judgment. Second, Respondents contend the district court's decision is entitled to deference and is supported by substantial evidence, but they cite not a single line of trial testimony to support this position. Accordingly, Mrs. Probasco will show that they cannot invoke this standard of review and cannot prevail if the extrinsic evidence is considered. Third, Respondents concede that evidence that Wayne considered his occupation or profession to have transitioned into "investor" was admissible but contend it was cumulative and its exclusion harmless. We will briefly highlight the significance of the evidence and prejudice involved. Fourth, Respondents confuse the failed bequest doctrine and its effect here, and their error will be succinctly corrected for the court's consideration.

REPLY TO STATEMENT OF FACTS

One assertion of "fact" by Respondents is new, erroneous, and relevant to the legal arguments made in this Reply. Respondents imply that Mrs. Probasco wrongly insisted on receiving a distribution of the residue of his estate that Wayne left to her, in spite of a "Corefirst trust officer's assurance [in an email to

Respondents' counsel not sent to Lou's counsel] that the Trust contained no residue." (Appellees' Brief pp. 4-5) But this is reframing the question asked. The question to CoreFirst's trust officer Ryan Hellmer was whether there were "assets" not in the Fifth Amendment that could make up a residue. The Fifth Amendment itself provided for Lou to receive the real estate and "all other assets." (R. 6, p. 623) The Settlement Agreement required that these provisions be followed. Hellmer conceded in his trial testimony that there were other assets, including a Waddell and Reed Securities account, valued at approximately $20,000, that went to Lou without dispute. (R.10, p. 47:2-13) On cross-examination, Mr. Hellmer also conceded he had not reviewed the trust instrument language and the three brokerage account statements before expressing his opinion. (Appellant's Brief, pp. 11-15) Hellmer readily agreed that a sophisticated investor like Mr. Probasco reasonably would be precise in his descriptions of what he was bequeathing to Respondents, and that any assets "not specifically enumerated in the Fifth Amendment . . . would flow to Mr. Probasco's wife." (*Id.*, pp. 12-13). Lou's claim for "all other assets" that belonged to her (and there were others not in issue here) was not a mere "assertion." It was supported by the evidence and was consistent with both the Fifth Amendment and the Settlement Agreement.[1]

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[1] Respondents in a footnote or "aside," mischaracterize Lou's position and misstate the facts. They purport to quote her brief, but change an "or" in the original to "and" thereby misstating the point, which Lou made directly and succinctly in the district court: "Never at any time from the origins of his Trust through his Restatement and the various amendments thereafter did Decedent's 'dispositive scheme' leave his Surviving Spouse with no assets that could easily be converted to cash." (R. 8, p.

ARGUMENT AND AUTHORITIES

I. *In re Blank* does not excuse the district court's failure to apply the rules of contract construction and interpretation.

Appellees' Brief in response to the errors alleged in the district court's application of Kansas law governing the interpretation and construction of written instruments begins by citing three cases for the proposition that an instrument is not ambiguous, unless the author's intention cannot be gleaned from the four corners of the agreement. This is not controversial, except for their convenient omission of a second important part of the rule: Ambiguity in a written instrument truly exists only when the rules of contract interpretation have *first* been applied and it remains genuinely uncertain which of two or more meanings is the proper meaning. *Catholic Diocese of Dodge City v. Raymer*, 251 Kan. 689, 693 840 P.2d 456 (1992).

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800). Wayne's 1998 Trust Agreement gave Lou the house and law office, plus $500,000 in marital trust, with income for life plus power to invade, the right to live in the house for 18 months, and the right to take $350,000 in cash outright in lieu of the house. (R. 6, p. 570 *et seq.*) The first restatement in 2006 *increased the outright cash option to $500,000*, and left other terms unchanged. (*Id.*, p. 594 *et seq.*) The first amendment to the restatement in March 2009 increased the cash option to $500,000. (*Id.*, p. 613 *et seq.*) The second amendment in July 2009 increased the cash option to $600,000 (*Id.*, p. 616 *et seq.*); the third amendment of the same date has no relevance. The fourth amendment in 2011 gave Lou real estate ***plus*** *¼ of the remainder of the trust estate* including an equal share with Respondents in *all* liquid accounts convertible into cash and real estate. (*Id.*, p. 613 *et seq.*) Respondents' request that the court interpret the fifth amendment to the restated trust in 2013 (leaving *all* of the other assets to Lou), to be a gag gift – intended by Wayne to be an empty sack rather than an actual bequest of significant liquid assets – is actually quite preposterous and utterly lacking in any evidentiary support.

The only case Respondents claim actually supports the district court's decision is *In re Blank's Estate,* 182 Kan. 424, 310 P.2d 775 (1958). In that case, the decedent owned a drug store that she operated with her stepson for more than twenty years. When she died, Mrs. Blank left the drug store to her stepson in the following clause of her will:

> I give, bequeath and devise to Merrill Blank of Altamont, Kansas, all my right, title and interest in and to my drug store located in Altamont including fixtures, merchandise and stock and accounts receivable owed to said store subject to the said Merrill Blank paying all outstanding debts and accounts owed by the store as of the date of my death. It is my will and desire that said Executor immediately deliver possession of said drug store to Merrill Blank and that *said store and the income therefrom shall not be administered in my estate but the same shall belong exclusively to Merrill Blank.*

Blank, 182 Kan. at 433 (emphasis added).

The Blank Drug Store was not incorporated and Mrs. Blank maintained a separate bank account which was used to deposit the drug stores' income and pay the debts of the drug store. Both Mrs. Blank and her stepson, Merrill Blank, were authorized signers. The residuary beneficiaries, however, claimed the drug store's bank account was theirs. The district court found, *inter alia*, that:

> The Testatrix, by the provisions of the will, gave to said Merrill Blank, all her right, title and interest in and to said Blank Drugstore, including the fixtures, stock and merchandise, accounts receivable *and the income therefrom, as shown by the cash on hand in the store, and the Blank Drug Store bank account*, requiring said Merrill Blank to pay all outstanding debts and accounts owed by said store at the time of the death of the testatrix, ordered immediate delivery of the possession of said drug store to said Merrill Blank, and provided that the same was to belong to said Merrill Blank exclusively, and that these properties were not to be administered in

> the estate; that testatrix intended to and did give to said Merrill Blank a solvent, 'going concern.' (*Id.*, emphasis added)

The six-justice majority of the Kansas Supreme Court affirmed the district court. The court applied the same rules of contract interpretation that Mrs. Probasco has advocated in this case. These rules require consideration of all words of the instrument and all parts thereof in light of the circumstances in which the instrument was executed. The fact that the Drug Store bank account was solely for drug store income and expenses was undisputed.

The dissenting justice in *Estate of Blank* focused on one term out of context – "accounts receivable" – concluding that "[a]s applied to a business such as this the words 'accounts receivable' have a well-defined and commonly-understood meaning -- money owed to the store by customers for merchandise purchased on credit," and did not include a bank account. *Estate of Blank*, 182 Kan at 437. The lone dissenter thus advocated disregarding the decedent's expressed intent to leave the "income" in the drug store account to the beneficiary, along with the "debts and accounts" left for the beneficiary to pay. Thus, the dissent, not the majority, advocated leaving out words and considering something less than the entire provisions of the instrument.

The majority opinion and the rules of construction stated in *Estate of Blank* provide no support for striking words from Wayne Probasco's trust instrument to accommodate a purported "interpretation." On the contrary, the court decisions, including *Estate of Blank*, unanimously support the interpretation of Wayne's trust

set forth in Mrs. Probasco's opening brief at pages 22-29. Respondents' attempt to present even this one case as support for their position fails. A proper application of the rules of construction and interpretation of written instruments resolves any ambiguity in favor of giving the words chosen their actual effect as applied to the facts of this case.

II. The "substantial evidence" standard of review does not apply because Respondents' argument and the district court's decision are based on an interpretation of the written documents that disregards the extrinsic evidence.

Respondents' contention that there is "substantial evidence" to support the district court's judgment is unfounded. They admit as much at the outset, stating that the district court concluded it was "*more logical than not*" that Wayne intended to pass all of the assets in the three brokerage accounts to his children. (Appellees' Brief, p. 12, ¶ II.B) Notably, Respondents do not say that the district court found, based on the testimony of the witnesses relating to Wayne's intent, that this conclusion was "*more probably true* than not true." Respondents acknowledge that all of the testimony is included in Volume X of the Record (Appellees' Brief, top of p. 6), but never cite that volume again. They point the court to not one single line of testimony as substantial evidence supporting the decision. The district court's decision was only an interpretation of documentary evidence – the language of the trust instrument itself and the brokerage account statements. The standard of review applicable to the interpretation of the written

instrument is *de novo*. *See, e.g.*, *Einsel v. Einsel*, 304 Kan. 567, 374 P.3d 612, Syl. ¶ 2 (2016).

The "substantial evidence" standard of review comes into play, as stated above, only if the rules of interpretation of the trust instrument have been applied and it remains genuinely uncertain which of two or more interpretations should be adopted. If the court finds that extrinsic evidence may be considered, then the judgment must be reversed because Respondents can cite no substantial evidence that Wayne intended to leave them anything more than the readily identifiable "stock fund" at Merrill Lynch, the "bond and stock fund account" with Oppenheimer, and the "bond account" at Edward Jones.

All of the witnesses who testified on the subject, including the witness called by Respondents, agreed that the "master account" with Merrill Lynch, for example, is *not* a "stock fund account." The witnesses all agreed that the term "stock fund" has a particular, well understood meaning, which was known to and used by Wayne in common parlance. The witnesses agreed the Merrill Lynch master account statement included a readily identifiable individual account invested in stock funds. Testimony to the same substantive point is in the record for each of the other two brokerage accounts. The evidence that Wayne Probasco paid attention to detail, he read his account statements carefully and was very familiar with the types of assets within the accounts was undisputed, as was the evidence that he knew the meaning of the terms he used in his trust and would have intended to use them as commonly understood in the investment industry.

Respondents' attempt to support the judgment under the substantial evidence standard of review fails completely.

Respondents rely only on the language of the trust and the account statements to support the district court's finding as to Wayne's alleged intent. They make only a legal argument based on *Estate of Blank,* suggesting there is rule in other jurisdictions that bequests should be "read inclusively to pass the maximum amount to the beneficiary rather than reading the bequests so that assets pass to the residuary beneficiaries." (Appellees' Brief, p. 14). They cite three cases, all of which, like *Estate of Blank*, involved bequests of a business, two giving all the assets of printing businesses and a third giving a one half-interest "in our business, real and personal property, 'Morning Glory Funeral Home.'" *Estate of Blank,* 182 Kan. at 435-36, quoting *Chavis v. Myrick*, 58 S.E.2d 881, Syl. para. 2 (Va. 1950).

There is no such inclusive bequest in this case. Respondents were not given all of Wayne's stocks, stock funds, money market accounts, bonds, or bond funds, or all of his brokerage accounts, followed by "and" or "including" an illustrative list. He did not give Respondents his "investor business" or all of his accounts with stock brokers (a Waddell & Reed account was not listed; the court found, without dispute, that it went to Lou as part of the other assets left to her). Quite the contrary, the Fifth Amendment to the Trust bequeaths to Respondents specifically identified items:

2. The following *items* shall be distributed equally to my three children, PAULA FREEMAN, JEFF PROBASCO, and KRISTI HELMUTH as follows:

a. Mutual fund account with Vanguard
b. Stock fund account with Merrill Lynch
c. Stock certificate with Glaxo Smith
d. Account with Stiffel Nickels
e. Wells Fargo stocks
f. Westar Energy stock
g. Bond and stock account with Oppenheimer
h. Bond account with Edward Jones
i. Two real estate contracts held by Kansas Secured Title Browning and Bylsma; and

Plaintiffs are, in effect, attempting to avoid the argument that the district court erred in excising language specifically describing the individual items, by adding an all-inclusive bequest of a "business" or other enterprise. This is not a fact-based argument supported by any extrinsic evidence. The "inclusive interpretation" argument is a misinterpretation of the case law, which simply stands for considering and giving effect to all of the language of the instrument in determining its meaning and intent. And more important, the analysis does not fit the language of this bequest.

Respondents ultimately concede that the language of Wayne's Trust is not amenable to such an interpretation without nullifying or excising the words chosen by Wayne in making the bequests at issue. To overcome the rules of interpretation requiring that all terms be considered and given effect (as well as the evidence proving Wayne purposefully and meaningfully used the language chosen), Respondents rely on the district court's conclusory assertion that the Fifth

Amendment to the Trust "did not *appear to be* drafted with any particular amount of care." (Appellees' Brief, p. 12, ¶ II.B.)

But after raising this argument, Respondents have to concede they cannot find any legal principle they can rely on to give this assertion relevance, substance, or legal consequence. Respondents claim they can make it up because there is no Kansas law addressing "the issue of poor draftsmanship as it relates to a testator's intent." (Appellees' Brief, p. 16). This is incorrect.

Kansas law directs that if the testator's intent is uncertain for any reason (most of which arguably include "poor draftsmanship"), it is to be ascertained applying the rules of interpretation and construction of written instruments. Respondents, however, do not want that body of law to apply because these rules direct the court to consider and give effect to all provisions and not take any out of context. Excision of words is disfavored and generally not permitted in the process of judicial interpretation. Nullifying words used is something different than interpretation. It is reformation of the instrument, which is also addressed in Kansas law.

> *Reformation is different from resolving an ambiguity*. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, *or the deletion of language originally included by mistake,* if necessary to conform the instrument to the settlor's intent.

Uniform Trust Code Comment to K.S.A. 58a-415 (2016).

Seeking reformation of any written instrument is a cause of action for an equitable remedy that has to be pleaded and is based on mistake or fraud. If it is not pleaded, the court cannot grant it. *See* 66 Am. Jur. 2d *Reformation of Instruments* § 100 (2016). There was no such claim in this case. It cannot be injected on appeal. And if it had been pleaded, "carelessness" would be grounds for a remedy only if it is "proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." K.S.A. 58a-415.

This simply is not, and could not be, a reformation action. Respondents' only witness never knew Wayne Probasco and had no knowledge of any extrinsic facts relevant to determining Wayne's intent. Thus, the only argument Respondents can make is limited by and to the law governing interpretation of written instruments. Any argument that the language of the instrument is a careless mistake that should be disregarded, as if it was never there, is not viable. Respondents' resort to such an argument only highlights the weakness of their case. They implicitly concede the trust cannot be interpreted as the district court did without additions or deletions on a "careless mistake" theory, which they concede has never been addressed or accepted in any Kansas case.

III. Exclusion of evidence of Wayne's designation of his profession as a professional investor is prejudicial error.

Respondents accuse Petitioner of being "half-hearted" about appealing the district court's exclusion of evidence that Mr. Probasco personally stated his

occupation had transitioned to the profession of "investor." This fact is obviously important in this case because of its bearing on Wayne's intent in the use of terms to describe his investment accounts. Respondents' contention that Wayne was a "careless" lawyer is key to their central theory of the case, which is their argument that the court should disregard the words expressing his intent. The district court erred in giving critical significance to minor mistakes in drafting or proofreading a document that reflect little or nothing about intent.[2] This excluded evidence should and would lead the court to give real weight and effect to the intent derived from appreciating Wayne's knowledgeable use of terms as a professional investor. When the court did not consider that evidence important, it demonstrated a fundamental misunderstanding of the issues and the evidence.

IV. Respondents' own contentions and the district court's findings invoke the alternative of bequest failure.

Mrs. Probasco always favored giving the bequests at issue a reasonable construction to mean what the trust instrument says for the benefit of Respondents *and* Petitioner. Respondents' contention, however, was found by the district court to render the bequests meaningless – the language of the bequests described things that did not exist and never had. (R 8, p. 900) Although the evidence demonstrated that the language was apt, descriptive, and enforceable in accordance with the expressed intent, the district court determined that it could

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[2] An oft repeated mistake in Appellees' Brief may illustrate the point. The brief repeatedly cites "Volume XIII," when the record consists of only twelve volumes. They mean Volume **V**III. This mistake does not mean their brief was prepared "with no particular care" or that their intent cannot be ascertained.

excise the words describing specific accounts, as shown in Mrs. Probasco's opening brief. On appeal, she has properly argued to this court that the effect of a bequest that describes something nonexistent (which is the district court's finding – erroneously "cured" by excising terms) is to cause the bequest to fail completely. Interpreting the trust instrument to give effect to all of its provisions in light of Wayne's understanding of the terms makes them clearly understandable and easily applied. It avoids bequest failure. But if the court can neither adopt this reasonable construction and cannot reasonably excise the words expressing Wayne's intent, then the bequest indeed fails by operation of law. Respondents' contention that they win even if the language of the bequest is construed to describe something that does not exist is not a viable analysis.

CONCLUSION

The arguments in Appellees' Brief do not support the district court judgment or effectively rebut Appellant's arguments and prayer for relief from this court. Conjecture about the language Wayne used to make *itemized* bequests to his children while also intentionally leaving a bequest of readily identified assets for his wife is not permitted. Every testator, when he uses language having a common and accepted meaning known to him, is presumed to use it in that sense and with the legal consequence that goes with it and should be assured the intent as expressed will be carried out. Introducing a vague discretionary determination based on no legal standard and no substantial evidence, then dismissing his words as a "mistake" and rewriting to suit the more vociferous beneficiaries was not a

permissible function of CoreFirst as trustee or of the district court. The judgment should be reversed with directions to enter judgment for Mrs. Probasco as requested in her Appellant's Brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **October 17, 2016**, I electronically filed the foregoing Reply Brief of Appellant with the Clerk of the Court by using the court's electronic filing system.

I further certify that two copies of Appellant's Reply Brief were served on counsel of record via U.S. Mail, first-class, postage-prepaid, to the following:

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