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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,
Petitioner/Appellant

v.

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

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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TABLE OF CONTENTS

Page

BRIEF OF APPELLANT

NATURE OF THE CASE

This is a probate case involving the will and trust of Topeka attorney G. Wayne Probasco. His wife of 28 years, E. Louise Bjorgaard Probasco, also a Topeka attorney, petitioned for probate after the trustee, with the concurrence and encouragement of Wayne's three adult children from a prior marriage, Jeffrey W. Probasco, Kristi A. Hellmuth and Paula S. Freeman, had failed to pay Wayne's obligations, including expenses of his last illness, funeral, and burial, or take any steps to quiet title to the homestead against a claim by Wayne's ex-wife, from whom he had been divorced for decades, of a 25% interest. Substantially all of Wayne's estate passed outside of probate through joint tenancy, beneficiary designations, and his Restated Trust Agreement, which directed the trustee, CoreFirst Bank and Trust, to pay his debts and obligations from certain trust, but the trustee would not act.

Therefore, Mrs. Probasco petitioned the court for allowance of demands, including repayment of substantial expenses she had advanced before and after her husband died and recovery of approximately $600,000 of her funds plus the investment returns from those funds that Wayne was investing for her but had not had occasion and opportunity to return to her before his short and unexpected final illness. Wayne's children responded in opposition to Lou's petition and asserted setoffs, including a claim for investment management fees and for rent on the

homestead where Wayne and Lou had lived for nearly thirty years, in addition to the ex-wife's claim against the homestead.

These disputes were resolved by a written Settlement Agreement filed with the court on June 15, 2015 (the "SA"). (R 6, p. 519 *et seq.*) The SA provided Lou would be paid a lump sum in settlement of "the claims asserted by her in the Second Amended Petition for Allowance of Demands filed in the Estate" which sought only return and repayment *of her own funds*. The SA also provided that the ex-wife's claim on the homestead would be dismissed. Consistent with Wayne's Restated Trust Agreement, the SA specified that no debts or expenses of the estate or the trust would be paid from assets distributable to Lou. After payment of debts and expenses, the SA provided distributions of trust assets to the beneficiaries (Mrs. Probasco and Wayne's adult children) would be made as provided by the Fifth Amendment to the Restated Trust Agreement as written.

Wayne's children thereafter filed a petition with the court, which the court found required it to decide a single issue: "the meaning to be accorded to the specific bequests to Decedent's Children under the provisions of Subparagraph (2) of the Subject Fifth Amendment to the First Restatement of the Trust." (R 8, p. 92) This Subparagraph lists nine items of specific property. Six describe a single asset or type of asset: a Vanguard mutual fund account (Item a), three individual stocks with stock certificates in Wayne's name (Items c, e and f), his "account with Stiffel Nickels" (Item d), and two specifically described real estate sale contracts

(Item i). These items were not in dispute. Thus, the court further found: "The parties now agree that the only disputed assets are the 'Stock fund account with Merrill Lynch,' the 'Bond and Stock Account with Oppenheimer,' and the 'Bond account with Edward Jones,'" (R 8, p. 886, ¶ 7).

The witnesses called by both parties agreed that the language Wayne used had commonly understood meanings that were well known to Wayne (*e.g.*, a "stock fund" is a mutual fund investing in stock and a "stock account" consists of individual stocks). By reference to the brokers' monthly account statements, which included "different types of assets" (R 8, 886, ¶ 8), the assets specifically bequeathed to Wayne's children could be readily identified by the plain meaning of the terms Wayne had used, and the specified assets could be readily distinguished from other types of assets, which were bequeathed to Lou as the residuary beneficiary.

The district court, however, found that Wayne's descriptions of these specific asset accounts were mistakes in expression that should be omitted in interpreting the trust agreement. The court excised the language Wayne used when making these specific bequests so they would read as follows: "~~**Stock fund**~~ [A]ccount with Merrill Lynch," "~~**Bond and stock**~~ [A]ccount with Oppenheimer," and "~~**Bond**~~ [A]ccount with Edward Jones." This decision gives Wayne's adult children *all* of the assets on account with each brokerage, totaling

more than $3.6 million, rather than the specifically described asset accounts in the sum of $3.2 million. Lou appeals this judgment.

ISSUES PRESENTED

1. Did the district court err as a matter of law by failing to follow Kansas law for interpretation of trust instruments, including: (a) failing to give the language of the trust its plain meaning as understood by the settlor, an acknowledged sophisticated investor, (b) failing to harmonize and give effect to all provisions of the trust, (c) straining to find an ambiguity where, in common sense, there was none, and (d) excising and deleting language to rewrite the trust agreement rather than following the expressed intent of the settlor?

2. Did the district court err in disregarding the uncontroverted evidence showing the circumstances in which the trust was made and clarifying any perceived ambiguity, and deciding the issues without any substantial evidence in support of the decision?

3. Did the district court commit reversible error by excluding evidence proving the settlor's knowledge and attention to detail as a professional investor?

4. In the alternative, did the district court err in failing to give the required legal effect to the court's conclusion that the three items in question described only things that did not exist, which makes those items of the specific bequest void?

STATEMENT OF FACTS

Background and Procedural History

E. Louise Bjorgaard Probasco and G. Wayne Probasco were married on December 28, 1985. At the time of their marriage, Wayne had three adult children, Jeffrey W. Probasco, Kristi A. Hellmuth and Paula S. Freeman, and Lou had a ten-year-old daughter, Jennifer Massengale. Wayne died on July 14, 2013, a few months before he and Lou would have celebrated their 28th wedding anniversary. (R 1, pp. 21-22; R 10, p. 109)

Wayne and Lou, both lawyers, shared offices as well as home life. (R 10, pp. 9-10) Over the years, Lou developed a successful law practice while Wayne came to devote less time to practicing law and more time on his investments. (R 10, pp. 112:14-113:6) At the time of their marriage, Wayne and Lou had entered into a prenuptial agreement that contemplated maintaining separate property. (R 5, p. 425, § III) Over time, Wayne relied increasingly on Lou to advance money for his expenses and their joint expenses, which she willingly did. (R 5. p. 425 *et seq.*) Wayne also assumed control over a significant amount of Lou's funds, given to him to invest for her in checks payable to "Lou's Savings," which he had invested along with his own funds. (R 5, p. 422 *et seq.*) Wayne's unexpected death on July 14, 2013 following sudden, catastrophic health crises, left no occasion or opportunity to settle accounts with Lou. The amount due Lou increased thereafter when she incurred the expenses of his last illness, funeral, and

burial. (R 5, p. 423) In addition, ten weeks following the death of Wayne, Lou was notified by the Successor Trustee to obtain counsel as Beverly J. Probasco, the Decedent's Children's mother by and through the Decedent's Children's mutual attorney filed an Affidavit of Legal Interest at the Shawnee County, Kansas Register of Deeds claiming a 25% interest in Lou's homestead. (R 6, p. 625) The Successor Trustee took no action to quiet the title to this previously unknown purported lien and failed to reimburse Lou for the funeral, last illness and other expenses of Wayne advanced by Lou.

To protect her rights of homestead and reimbursement, on January 10, 2014 Mrs. Probasco petitioned for probate in Shawnee County, *In the Matter of the Estate of George Wayne Probasco*, Case No. 14 P 12. (R 1, p. 9) When she submitted her claims as a creditor, Wayne's adult children responded with objections and asserted setoffs against her, including claims for rent and maintenance of the homestead and for management fees purportedly for Wayne's investment of her funds. (R 5, p. 475) The children's attorney also pursued the affidavit of .legal interest for Wayne's first wife, Beverly, for money allegedly due her, which she claimed was a lien for a 25% interest on the homestead that was bequeathed to Lou. (R 6, p. 538, ¶ 7; p. 625)

Nearly all of Wayne's assets passed outside the will, by means such as beneficiary designations on life insurance and annuities, and, in larger part, through the G. Wayne Probasco Trust dated December 10, 1998 (the "Trust"),

from which Wayne had directed payment of debts, taxes, and expenses. The original trust agreement was superseded by a Restated Trust Agreement dated April 21, 2006, which was subsequently amended five times – the fifth and last being dated April 15, 2013 (the "Fifth Amendment"). (R 6, p. 622; Appendix 1)

After conducting discovery, Lou and Wayne's adult children engaged in mediation and then entered into a written Settlement Agreement dated May 21, 2015 (the "SA"). The Trustee bank was not a party to this action and did not participate in mediation, but afterward signed the SA as a stakeholder who would be implementing the payments and distributions. (R 6, p. 552) The SA provided for the compromise and settlement of Lou's claims and the counterclaims of Wayne's children for offsets. To settle her claims, which totaled $2,516,016 (R 6, p. 434, ¶ 3), Lou agreed to accept $1,100,000. (R 6, p. 536-37, ¶ 6(c)). The settled claims were limited to restoring to Lou her own funds that had been in Wayne's custody, and repaying the money she had advanced to Wayne or for his benefit before and after he died, all of which was her money and *not* a distribution as a trust beneficiary. (R 6, p. 536, ¶ 6(c)), and R 5, p. 422)

The SA expressly confirmed, consistent with the provisions of the Restated Trust Agreement, that the settlement payment to Lou and all other remaining debts and expenses of the estate were payable solely from Trust assets distributable to Wayne's adult children, with no expenses to be borne by Lou which was consistent with Wayne's Trust. (R 6, p. 536, ¶ 6(a) & (b)). It was also agreed that

the first wife's lien claim on the homestead would be dismissed. (*Id.* p. 538, ¶ 7) The SA further provided that after payment of debts and expenses, the trust assets would be distributed to the beneficiaries, Lou and Wayne's adult children, as provided by the Fifth Amendment to the Restated Trust Agreement. (*Id.*, pp. 536-538, ¶ 6)

Wayne's Trust Agreement

The SA did not change the terms of the Restated Trust Agreement, but rather incorporated and required compliance with the provisions of the trust as stated in the Fifth Amendment as written and without modification. (R 6, pp. 531 *et seq.*, *passim*) Wayne's Trust Agreement and estate plan always provided, from the original through every amendment, for Lou to receive land, including their shared residence or homestead allowance and the law office they shared, plus significant liquid assets that could be readily converted into cash available to meet expenses, including the expenses of owning and maintaining illiquid real property. (R 6, pp. 570-624) From time to time, Wayne changed specific allocations of property among his beneficiaries, and his beneficiary designations on non-trust assets without changing the combination of illiquid real estate and significant liquid assets for Lou. The Fifth Amendment did not make specific bequests to charity, but as part of his modifications of his estate plan, Wayne changed the beneficiary on a $365,000 annuity to Washburn University School of Law

Endowment (his wife, Lou had been the beneficiary), and he gave another $70,000 to the Topeka YMCA via life insurance beneficiary designation. (R 7, p. 786)

The Fifth Amendment to the Restated Trust (R 6, pp. 622-24) provided for disposition of the assets held in the trust as follows:

(1) Wayne's wife, Lou, would receive three parcels of land described as follows in paragraph 1 on page 2:

a. Northeast Fractional Quarter of Section 6, Township 12 South, Range 15, East of the 6th P.M. in Shawnee County, Kansas (commonly known as 1431 SW Urish Road) [their residence and surrounding land]

b. Original Town, Topeka Avenue Lots 191, 193, 195, 197 and the North 4 feet of Lot 99, in the City of Topeka. Original Town, Section 31, Township 11, Range 16, in Topeka, Shawnee County, Kansas (commonly known as 615 SW Topeka Blvd.) [the law office valued at $138,000]

c. The Southwest Quarter of the Northwest Quarter of Section 25, Township 12, Range 13, East of the 6th P.M. in Shawnee County, Kansas [40 acres of unimproved land valued at $98,000];

(2) Wayne's three children were bequeathed in equal shares the intangible property listed in paragraph 2 on page 2.

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

(3) Paragraph 3 on page 2 directed the remainder or residuary be distributed as follows:

> All other assets remaining in the Trust shall go to my wife, E. LOU BJORGAARD PROBASCO.

The SA specifically and repeatedly referred to, and directed compliance with, these provisions of the Fifth Amendment as written. (R 6, pp. 531-546, and particularly ¶ 6, p. 536-38)

The Issue

The district court summarized the issue before it as follows: "[T]he court has only one issue to decide: 'the meaning to be accorded to the specific bequests to Decedent's Children under the provisions of Subparagraph (2) of the Subject Fifth Amendment to the First Restatement of the Trust . . .'" (R 8, p. 892) The court further explained that the issue was narrowed to three items: "[T]he parties now agree that the only disputed assets are the 'Stock fund account with Merrill Lynch,' the 'Bond and Stock Account with Oppenheimer,' and the 'Bond account with Edward Jones.'" (R 8, p. 886, ¶ 7).

The Evidence

The source of the dispute was revealed during the evidentiary hearing conducted on August 18, 2015. Mrs. Probasco and two expert investment advisors, who knew Mr. Probasco personally and were familiar with his investment practices and knowledge of the meaning of terms he used in the Fifth Amendment to the Restated Trust, testified in support of enforcing Wayne's

bequest of three designated accounts in accordance with the common understanding of the meaning of the terms he used. Ryan Hellmer, the most junior trust officer of the Trustee, CoreFirst Bank, initially had a different opinion on which Wayne's children relied (R 10, p. 24:19-22), but then on reflection admitted he was able to understand what assets Wayne was referring to in these three items. (R 10, p. 75:4-11)

Hellmer had graduated from law school in 2009 (R 10, 19:1) and engaged in private practice for less than five years. In March of 2014, eight months after Wayne died, Hellmer joined CoreFirst and was installed as the trust officer for the Probasco Trust. (*Id.*, 19:21-24) When Hellmer first assumed control of the Trust, nearly all of the assets had already been transferred from the financial institution in which Wayne had maintained them and instead liquidated and transferred to CoreFirst Bank and Trust. (R 10, 108:1-7)

Hellmer testified that he first read paragraph 2 of the Fifth Amendment a few months later. He described his casual first impression was as follows:

> When I read the subparagraphs under paragraph 2 of the Fifth Amendment I interpreted this language to be proverbial references to accounts at brokerage firms. (R 10, p. 24:19-22)

When Hellmer again used this nondescript reference to a "proverbial" account later in his testimony, the court interjected:

> THE COURT: I'm sorry, just what does proverbial mean to you?
> THE WITNESS: Just a common usage. (R 10, p. 255:1-3)

But on cross examination, Mr. Hellmer acknowledged that his "proverbial" assumption was imprecise and not in keeping with the common usage of the language describing the assets in the three items, which he agreed were distinguishable from the rest of the list.

> Q. Do you agree that the common usage of ***stock fund is a mutual fund investing in stock***?
> A. I would agree with that. (R 10, p. 74:16-18, emphasis added)

Hellmer further agreed that a mutual fund investing in stock is "not synonymous" with investing in an individual stock. (R 10, p. 75:1-4) Mr. Hellmer readily acknowledged that an investment in an individual bond describes something different than a bond fund:

> Q. . . . From the standpoint of describing an asset, an investment asset, is a bond different, an individual bond, or ***is a bond different than a bond fund***?
> A. It is. (R 10, pp. 83:25-84:4, emphasis added)

Hellmer, who was unaware whether Wayne Probasco was a sophisticated investor (R 10, p. 74:16-19), agreed it was reasonable to assume a sophisticated investor would use the more precise descriptions:

> Q. If you were being precise, and you were a sophisticated investor and were delineating the assets that you wanted to give in your trust to your children, and then to leave other assets that you weren't specifically delineating to the children in the residue to your wife, would it be reasonable to assume you would be precise in your descriptions?
> A. It would be reasonable. (R 10, p. 75:4-11)

With regard to the residuary bequest to Mrs. Probasco in numbered paragraph 3 of the Fifth Amendment to the Restated Trust, Mr. Hellmer freely acknowledged on direct examination the importance of being specific for purposes of this clause:

> Q. With regard to paragraph 3, how did you interpret that paragraph?
> A. That if there was ***any assets that were not specifically enumerated*** in the Fifth Amendment, that they ***would flow to Mr. Probasco's wife***. (R 10, pp. 24:23-25:2, emphasis added)

Mr. Hellmer was not yet working at CoreFirst when the assets of the Wayne Probasco Trust were collected. (R 10, p. 70:17-25) During his testimony he was shown broker's monthly statements for some accounts, including Merrill Lynch, Oppenheimer, and Edward Jones statements for the month immediately preceding Mr. Probasco's death (R 11, Exhibits A, B, and E). Helmer agreed that the only way to identify the assets listed in the Fifth Amendment was to look at statements from the various companies referred to in the list to identify the assets in the accounts at the time of death. (R 10, p. 70:11:25). Hellmer admitted he never consciously analyzed the specific delineations in the Fifth Amendment before forming his first impression of these bequests in 2014. (*Id.*, p. 79:16-21) He had first looked at the account statements after June 16, 2015, when Mrs. Probasco's counsel requested that the bank follow the directions of the Fifth Amendment in making distributions following the settlement of Mrs. Probasco's claims for allowance of demands. (*Id.*) (R 10, p. 68:17-25)

Hellmer then testified in detail that the monthly statements from the three brokerage firms included separate accountings by asset type--cash/money market

accounts, individual stocks or equities, bonds, and mutual funds that were stock funds and bond funds. (R 11, Ex. A, pp. 3-12 (Merrill Lynch June 2013 statement); Ex. B, pp. 13-18 (Edward Jones June 2013 statement); Ex. E, pp. 23-32 (Oppenheimer June 2013 statement)). Hellmer was able readily to identify the Merrill Lynch Assets properly defined and described as a "stock fund" and the assets that were not. (R 10, pp. 75:12-78:14). He identified assets that were individual stocks (*Id.*, p. 75:12-78:2), and to identify REIT shares, which are equities, but not stocks. (*Id*, p. 77:1-120) Hellmer readily identified the mutual funds in line item accounts that invested in stock – Fidelity Advantage and Invesco Select Companies – and agreed that each was a "stock fund." (*Id.*, p. 78:9-21) And he readily distinguished the account entry for a "bond fund" that was *not* a "stock fund." (*Id.*, pp. 78:25-79:8). Hellmer agreed that, from the standpoint of the precise language used by Mr. Probasco, except for the two stock funds he identified, there were no other assets "that could be considered 'stock funds.'" (*Id.*, p. 79:9-15)

Similarly, Hellmer readily identified the "bond account" with Edward Jones and distinguished it from "mutual funds" investing in bonds that were *not* part of the bond account. (R 10, pp. 85:14-86:15). Hellmer conceded he did not know Mr. Probasco's habit or custom with regard to reviewing his account statements and knowing the specific assets within them. (*Id.*, p. 86:16-24). Finally, Hellmer was able readily to identify the "stock and bond accounts" at Oppenheimer and to distinguish the money market account, which was *not* a stock or bond account. (R

10, pp. 99:2-100:10) With respect to every item of account in each statement, Hellmer agreed 100% with the commonly understood meaning of terms that a reasonable, sophisticated investor would have used to describe the specific assets to be distributed to Wayne's children.

The testimony of other witnesses established without dispute that Wayne Probasco was a knowledgeable, experienced, and sophisticated investor who knew and would have used the commonly understood meaning of "stock fund" and "bond fund" and other types of investment asset accounts which may not be descriptive of the entire account with a brokerage firm but can be identified by looking at the account statement, as Hellmer testified. Randy Clayton, the owner of a registered investment advisory firm, testified that he had met personally with Wayne to discuss investments and that Wayne was a sophisticated investor who met the SEC's regulatory definition of a sophisticated investor. (R 10, pp. 124:13-125:1, 126:6-13). Mr. Clayton testified based on his experience that in the investment industry the term "stock fund" is commonly used and understood to mean a publicly traded mutual fund that buys individual stocks. (R 10, pp. 121:3-10, 123:4-8; R 11, p. 33, Ex. H) Mr. Clayton was also shown the monthly broker's statements, Exhibits A, B, and E, and was able readily to identify the assets that were stock funds and bond funds and other types of investments such as individual stocks, REITs, and money market funds. (R 10, pp. 128:8-131:12) His testimony supported precisely the same identification of assets in the terms of the

Fifth Amendment to the Restated Trust asserted by Mrs. Probasco, just as the Trustee's witness, Mr. Hellmer, was able to do.

A second expert called by Mrs. Probasco, Mr. Don Schwart, is a registered investment advisor and was a personal friend of Mr. Probasco throughout his marriage to Lou. He and Wayne engaged in a number of activities together. They talked about investing, the state of the country, politics and "all of it combined." (R 10, p. 139:4-10) He was asked:

> Q. Did you, as a result of your contact with Mr. Probasco, are you able to reach a conclusion with respect to, or as a result of your contact with Mr. Probasco, discussions of investments with him, whether or not he knew what the phrase stock fund or stock funds meant?
> A. Oh, unquestionably he knew the difference between a stock fund, an individual stock, or individual bonds. He -- real estate, he was quite conversant about investments in general. (R 10, p. 141:8-17)

Indeed, Wayne considered himself a professional investor. In completing the description of his principal business or profession in his 2012 tax return, the accountant had filled in the form with "attorney," but Wayne added "–investor" in handwriting. (R 10, p. 113:1-6) Wayne's wife, Lou, produced a compilation of Wayne's worksheets of daily activities showing he checked the Dow and NASDAQ every day or every other day of the business week. He kept track separately of investments for "Lou," Wayne" and "Wayne 2" and whether they were up or down. (R 10, pp. 114:23-115-6) This exhibit was proffered but excluded as "irrelevant" because, the court said, Mr. Probasco's intent was "not the main issue here." (R 10, pp. 115:23-117: 3)

Mrs. Probasco also testified that Wayne was very meticulous about reading every monthly account statement, including Merrill Lynch and Oppenheimer. (R 10, p. 118:14-21)

> Q. And specifically, did he review them in detail or did he simply put them in a circular file or just file them away?
> A. All the history shows he reviewed them in detail. I've seen him underline them. He's questioned me about stuff, if I had money in a money market sitting there. He was very meticulous about that. (R 10, pp. 118: 22-119:6)

Wayne read books on investing, attended seminars on investing, spent hours reading the Wall Street Journal, and devoted the middle hours of the day every day to his investments and Lou's as well. (R 10, p. 119:4-25)

In sum, the evidence established without dispute that (i) the terms used by Wayne Probasco to describe assets listed in paragraph 2 on page 2 of the Fifth Amendment, had a commonly understood and plain meaning to sophisticated investors, (ii) that Wayne was a knowledgeable sophisticated investor; (iii) that Wayne would have used the language in the Fifth Amendment in its plain and commonly understood meaning, and (iv) that the language Wayne used describes in plain terms specific bequests made to his children, and do not include all investment assets, not the entire "account," but rather describe specific and readily identified asset accounts with Merrill Lynch, Oppenheimer, and Edward Jones. There was no evidence to the contrary, and the court found no material facts to the contrary. Indeed, plaintiff's only witness, Mr. Hellmer, agreed that specific bequests to Mr. Probasco's children were readily identified by reference to the

account statements. If all the language of the Fifth Amendment is interpreted together and given effect, the Fifth Amendment unambiguously directs distributions be made as follows (in date-of-death values):

Specific Bequests to Paula, Jeff, Kristi	
Mutual Fund Acct. with Vanguard	$1,349,890.01
Stock Fund Acct. with Merrill Lynch	36,820.32
Stock Certif. Glaxo Smith	21,085.00
Acct. with Stifel Nicolaus	1,334.60
Wells Fargo Stocks	34,316.00
Westar Energy Stocks	102,924.03
Bond and Stock Acct. with Oppenheimer	
a.) Bond account	795,053.46
b.) Stock account	179,982.76
Bond Account with Edward Jones	622,516.14
Two real Estate Contracts:	
Bylsma Contract	29,563.30
Browning Contract	37,886.45
TOTAL	$3,211,372.07

Residuary to Mrs. Probasco	
Money Market Acct. with Merrill Lynch	$ 39,639.99
Individual Stocks –Merrill Lynch	299,982.00
REIT –Merrill Lynch	13,508.75
AIM-Invesco–Merrill Lynch	13.51
Money Market Acct. with Oppenheimer	199.25
Mutual Funds with Edward Jones	81,245.30
Waddell & Reed Securities	19,861.43
TOTAL	$ 454,450.23

(Compilation from Exhibits A, B, and E; R 11, pp. 3-18, 23-32; *See* Appendices 2, 3 and 4)

District Court's Decision

The issue in dispute came before the court as a result of a petition by Wayne's children "to enforce the settlement." (R 7, p. 687) They first contended that the Settlement Agreement had superseded the language of the Fifth

Amendment to the Restated Trust and determined conclusively that they were entitled to all of the assets in a broker name regardless of whether they were "assets listed in numbered paragraph 2 on page 2 of the Fifth Amendment to the First Restatement of the Trust." (*Id.*) This argument was contradicted by the express terms of the Settlement Agreement, which preserved, and required compliance with, the terms of the Fifth Amendment in making distributions of Trust assets. The argument fell apart and was abandoned in the course of the briefing. (R 8, p. 886, ¶ 7, and p. 22)

To make the distributions required by the Settlement Agreement, by reference to the Restated Trust, as amended, Probate Court Judge Yeoman found that the court had to interpret and follow the Trust Agreement: "[T]he court has only one issue to decide: 'the meaning to be accorded to the specific bequests to Decedent's Children under the provisions of Subparagraph (2) of the Subject Fifth Amendment to the First Restatement of the Trust . . .'" (R 8, p. 892) The court also found that the parties now agree that the only disputed assets are the "Stock fund account with Merrill Lynch," the "Bond and Stock Account with Oppenheimer," and the "Bond account with Edward Jones." (*Id.*, p. 886, ¶ 7).

Judge Yeoman found as a matter of fact that: "Mr. Probasco was a practicing attorney and "sophisticated investor" who reviewed his brokerage account statements regularly. These statements set forth the nature of the investments held in each brokerage account." (R 8, p. 888, ¶ 12) He found that:

"The term 'stock fund' generally refers to a mutual fund that invests primarily in stocks." (*Id.*, ¶ 13)

The court found in legal analysis, however, that Wayne's descriptions of the three disputed assets as listed in Paragraph 2 of the Fifth Amendment were meaningless because Wayne had attempted to bequeath things that did not exist. According to the court, there was no "stock fund account with Merrill Lynch," no "bond and stock account with Oppenheimer," and "no Bond account with Edward Jones" and "never had been." (R 8, p. 900, carryover paragraph). But rather than find that a bequest of nonexistent assets must fail as a matter of law resulting in the children taking nothing (an interpretation contrary to law and common sense) which Lou sought to avoid by advocating for a reasonable interpretation giving effect to the modifiers Wayne used in stating his intent and, as further supported by the evidence, the court simply decided to delete them. With this change, the new paragraph 2 bequest became:

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

A principal factor affecting the court's decision was one neither party had argued. (R 8, p. 899, bottom of page) The court found it compelling that "Stifel

Nicolaus" had been erroneously transcribed phonetically as "Stiffel Nickels" in Paragraph 2.d of the Fifth Amendment and Wayne did not correct it. (*Id.*) While this spelling error in transcription had no actual effect or result in any ambiguity because the Account with Stifel Nicolaus was readily identifiable, it apparently was enough for the court to find that Mr. Probasco did not act "with a particular amount of care" when drafting the subparagraphs at issue, 2.b, 2.g, and 2.h (in which there were no misspellings). (R 8, p. 900, first full paragraph) Therefore, the court discarded Wayne's specifically expressed bequests that did not describe the entire "account with Merrill Lynch", or "account with Edward Jones" or "account with Oppenheimer", which could be easily and clearly stated if intended. The court found instead that Decedent's intent was to pass the entirety of his brokerage accounts with Merrill Lynch, Oppenheimer, and Edward Jones to the Decedent's children. (R 8, pp. 902-03) The effect of excising the language to the contrary that Wayne had chosen to express his intent is to increase the bequests to Wayne's children by $434,588.80 to the total of $3,645.960.67, and decrease the residuary bequest in liquid assets to Mrs. Probasco to only $19,861 (at date-of-death values).

ARGUMENT AND AUTHORITIES

I. The District Court erred as a matter of law by failing to follow the rules of law governing interpretation and construction of the Trust Agreement.

Standard of Review

The issue presented here is one of law reviewed de novo. Appellate courts exercise "unlimited review over interpretation and legal effect of written instruments and are not bound by the lower court's interpretation." *Born v. Born*, 2016 Kan. LEXIS 304, *24, __ Kan. __, __ P.3d __ (June 10, 2016).

Substantive Argument

The district court refused to enforce the Fifth Amendment to the Restated Trust as written. The court instead decided that specific language stating the settlor's intent to make specific bequests should be deleted from paragraph 2 of the Fifth Amendment to change it as follows:

> ~~**Stock fund**~~ account with Merrill Lynch
> ~~**Bond and stock**~~ account with Oppenheimer
> ~~**Bond**~~ account with Edward Jones

The court thus deleted language meaningful to the settlor in order to avoid giving it effect.

Is this something a court may do or should do? In response to this question, the law firmly says "no."

> ***"Words are never to be rejected as meaningless or repugnant if by any reasonable construction they may be made consistent and significant. Excision is a 'desperate remedy.'*** [Citations] It is only a last resort to be availed of when all efforts to reconcile the inconsistency by construction have failed. [Citations]."

In re Estate of Kline, 170 Kan. 496, 502, 227 P.2d 157 (1951), quoting *Regnier v. Regnier*, 122 Kan. 59, 61, 251 P. 392 (1926).

> "While courts, in order to make clear the intention of the testator sometimes transpose words or supply obviously omitted words, ***it is only with extreme reluctance that the process of excision is indulged in.***" (*Id.*) (Emphasis added.)

When interpreting a trust, "the court's primary function is to ascertain the intent of the settlor by reading the trust *in its entirety*." *Hamel v. Hamel*, 296 Kan. 108, 1068, 299 P.3d 278 (2013) (emphasis added). If the settlor's intent can be ascertained from the express terms of the trust within its four corners, "*the court must give those terms effect* unless they are contrary to law or public policy." *Id.*, citing, *inter alia*, *In re Estate of Haneberg*, 270 Kan. 365, 371, 14 P.3d 1088 (2000) (emphasis added). See also K.S.A. 58a-112 (same rules apply to interpreting wills and trusts).

Courts are required to "arrive at the intention of the testator from an examination of the whole instrument, if consistent with rules of law, *giving every single provision thereof a practicable operative effect . . .*" *In re Estate of Crawshaw*, 15 Kan. App. 2d 273, 279, 806 P.2d 1014 (1991), *quoting In re Estate of Porter*, 164 Kan. 92, 100, 187 P.2d 520 (1947) (emphasis added). The court should construe "all provisions together and in harmony with each other rather than by critical analysis of a single or isolated provision." *Iron Mound, LLC v. Nueterra Healthcare Mgmt., LLC*, 298 Kan. 412 (2013). *Amoco Production Co. v. Wilson, Inc.*, 266 Kan.1084, 1088 (1999).

The words used by the settlor are to be given their commonly understood meaning. *Duffin v. Patrick*, 212 Kan. 772, 778, 512 P.2d 442 (1973); *Smerchek v. Hamilton*, 4 Kan. App. 2d 346 606 P.2d 491 (1980) (emphasis added). And specific language controls over general. *Amoco Production v. Wilson, Inc.*, 266 Kan. 1084, 1089 (1999). "A court should not strain to find an ambiguity where, in common sense, there is none." *Iron Mound, supra*, 298 Kan. 412, Syl. ¶4.

The Fifth Amendment to Mr. Probasco's restated trust plainly identified the specific property to be distributed to his children in words that have a plain meaning commonly understood by investors like Wayne and even by junior trust officers such as Mr. Hellmer, who are charged with the duty of implementing trust instruments. A "stock fund" account is a mutual fund investing in stock and a "bond fund account" is a mutual fund invested in bonds. "Equities" are individual stocks, and "bonds" are individual bonds. Cash and money market accounts are cash and money market accounts. These terms do not describe the entire account with the brokerage firms in question, but describe specific categories and line item accounts within the global investment accounts at each firm and are unambiguous when applied to the accounts shown in the brokers' monthly statements.

The monthly statements for the three accounts involved in the dispute were in evidence as Exhibits A, B, and E. (R 11) Each statement is a compilation report of the financial transactions – debits, credits and balances – in a portfolio of different investment assets, each accounted for separately. The statement for the Merrill Lynch Edge global account, for example, included separate accounts, by

category and line-item, for "Cash/Money accounts" (R 11, p. 4) "Equities" (*Id.*, pp. 4-5), and "Mutual Funds" (*Id.*, pp. 6) with separate readily identifiable reporting of the stock funds by line-item account. (*Id.*; R 10, p. 78:9-21) The Edward Jones monthly statement likewise included separate accountings for a cash account, a federally insured bond account, and "mutual funds" that invested in bonds. And the global account with Oppenheimer included a money market account that plainly was not a stock or bond account.

The witness called by Wayne's children and the two investment experts called by Mrs. Probasco all agreed that "bond funds" and "stock funds" are not abstractions. They are concrete terms that have plain meaning when applied to the different types of accounts Wayne had with each of the three brokerage firms. The term "stock fund account" does not include bond funds, individual bonds, or individual stocks or equities. The terms "stock fund" and "bond fund" do not describe or include a money market account or cash account, and these accounts are described separately in the brokerage account statements. Had Wayne intended to include all these asset types in a bequest, he had but to say "account with Merrill Lynch," "account with Oppenheimer" or "account with Edward Jones" (as he did in the case of the "account with Stiffel Nickels"). The court could not delete the specific modifier "*stock fund* account" without changing the meaning of the language used.

In its legal reasoning, the court committed clear error by taking it as a "fact" that: there was *never* a "stock fund account" with Merrill Lynch, a "Bond

and stock account with Oppenheimer," or a "Bond account with Edward Jones," nor were there sub-accounts designated within each brokerage account. (R 8, pp. 899-901) After reaching this erroneous conclusion, the court reasoned that "Decedent's intent was to pass along the entirety" of the assets in each of these accounts. (*Id.*, p. 902) This conclusion apparently was the court's own interpretation of the legal meaning of terms, apart from the evidence of their actual, common usage, and apart from any finding of fact.

The account statements and the testimony of the witnesses clearly delineated separate accounts or sub-accounts for the different types of assets in the common meaning of terms used in Paragraph 2 of the Fifth Amendment without ambiguity or dispute. The court's findings of fact noted that these three accounts included multiple assets of different types, which were readily and separately identifiable. (R 8, p. 886, ¶ 8 et seq.) See, e.g., the Merrill Lynch account statement, (R 11, p. 6) That statement also included an entry for "cash/money accounts" (*Id.*, p. 4) plainly demonstrating that this brokerage account can and does include one or more subaccounts holding different types of assets, which is why a reference to a "stock fund account with Merrill Lynch" cannot reasonably be interpreted to refer to all assets invested with that firm. Such references are commonly used for "mutual funds investing in stock." (Hellmer testimony, R 10, p. 74:16-18) .Wayne's description was entirely appropriate and a clear reference to the stock fund line items of the account.

The language used by Mr. Probasco described without ambiguity exactly what he intended to go to his children. To reach a different conclusion, the court had to strain to create an ambiguity. The court was directed by law to adopt the interpretation that gives effect to all the language of the contract. The court could not, consistent with the rules of interpretation, isolate one word ("account") and strike others that clearly modify it and make it more specific. There is no inherent, unresolvable inconsistency in the words of the phrase "stock fund account." The general term "account," as applied to the brokerage statement, does not nullify, but is complimented and modified by the descriptive adjective, the meaning of which was well known to the settlor. The principles for interpretation of written instruments direct the court to harmonize and give effect to language that was used and not to strain to reach an interpretation that requires that the court nullify the plain meaning of the language in the trust agreement.

Finally, the district court based its ruling in large part on the inference to be drawn from the mistranscription and resulting misspelling of "Stifel Nicolaus" in Fifth Amendment paragraph 2, item d, "account with Stiffel Nickels." The district court found that this spelling error had grave consequences that had "escaped the parties" in arguing their disagreement. (R 8, p. 899) The district court held this "scrivener's error" indicated Mr. Probasco had been careless and therefore his language bespoke no particular intent. From this, the court concluded the terms of the specific bequests could be disregarded as meaningless and be excised from the trust agreement. (R 8, pp. 899-902).

But the case law clearly does not give such effect to spelling and technical errors when, as here, the misspelling of Stifel Nicolaus as "Stiffel Nickels" (clearly phonetic transcription readily understood by the parties without confusion) does not make the trust agreement ambiguous. *In re adoption of J.C.P.*, 871 So. 2d 83, 834 (Ala. Civ. App. 2002) (misspelling "not inherently ambiguous"; *Brown v. Lang*, 234 Kan. 610, 675 P.2d 842 (1984) (mathematical typographical error created resolvable inconsistency, not ambiguity). And even if it could have, resorting to the rules of construction resolves it. *Vass v. Gainesville Bank & Trust*, 480 S.E.2d 294 (Ga. App. 1997), (reference to claims "accurring" did not render insurance policy ambiguous, and if it did, rule of construction against drafter resolved it). Ambiguity in a written instrument "does not appear until the application of the rules of interpretation to the face of the instrument leaves it genuinely uncertain which one 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).

Here there can be no genuine uncertainty what the "account with Stiffel Nickels" refers to, just as there is no genuine uncertainty, after application of the pertinent rules of construction, that the "stock fund account with Merrill Lynch", "bond and stock account with Oppenheimer", and "bond account with Edward Jones" does not refer to all of the financial investments held at each firm. The court's first duty was to give effect to Wayne's expressed intent as the settlor of the trust. The district court wrongly labeled Wayne negligent and mistaken in

expression of his bequests, and thereby disrespected his specific, readily ascertainable instructions, which, if given effect, were clear and undisputed. As demonstrated further by the additional evidence in the record as set forth in the next section, Wayne was a competent and sophisticated investor who knew what he was saying. The district court had no authority to rewrite his trust agreement.

II. The district court's decision is contrary to the evidence and not supported by any substantial evidence.

Standard of Review

The argument presented here includes a question of law and one of fact. Mrs. Probasco contends that *all* of the evidence supports the interpretation of the Fifth Amendment to the Restated Trust to describe specific assets left to Mr. Probasco's children, as set forth above, and no substantial evidence supports a contrary interpretation. Moreover, the parol evidence rule, as a matter of law, precludes any interpretation that is so contradictory to the written instrument that it requires deleting terms from the document.

Review of the trial court's conclusions of law is unlimited. This trial court's findings of fact are reviewed to determine whether they are "supported by substantial competent evidence" and "are sufficient to support the conclusions of law." Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. *McCain Foods USA, Inc. v. Cent. Processors, Inc.*, 275 Kan. 1, 12, 61 P.3d 68 (2002).

Substantive Argument

The district court's decision here runs afoul of principles long considered "elementary."

> It is elementary that the primary, the supreme, test in the construction of a will is the intention of the testator. It also is elementary that such intention must be ascertained not from any single or isolated provision but from all provisions contained within the four corners of the instrument and from circumstances surrounding its execution if they are needed to clarify the testator's true purpose and intent. In other words, *courts are required to effectuate not their own desires or notions of what the testator wisely should have done but to give full force and effect to the testator's actual intent in the disposition of his own property.*

Shannep v. Strong, 160 Kan. 206, 211, 160 P.2d 683 (1945) (emphasis added).

> [E]xtrinsic evidence, attempting to show the real intention of the testator on the facts and circumstances here presented, *must be distinguished from evidence admitted to show the "surrounding facts and circumstances" at the time the will was executed.* ***Such evidence*** which tends to show the situation of the testator at the time the will was executed, the nature of his business, the extent of his property, his relations with his family or named beneficiaries, ***may be received if it assists in identifying property or beneficiaries, or to clarify language used in the will, but not to change the will.*** (*Phillipson v. Watson*, 149 Kan. 395, 87 P. 2d 567; *In re Estate of Schnack*, 155 Kan. 861, 130 P. 2d 591; and *In re Estate of Blank*, 182 Kan. 426, 320 P. 2d 775.)

In re Estate of Sowder, 185 Kan. 74, 84, 340 P.2d 907 (1959).

These statements of the law emphasize that the evidence offered by Mrs. Probasco could be considered without violating the parol evidence rule (a rule of substantive law, not of evidence). Extrinsic evidence could be considered to clarify the language used, but could not be used to contradict it or to show that

Wayne's "real" intention was different than that stated by the language of the written trust instrument.

As set forth in the statement of facts, four witnesses testified in this case. Three of them knew Wayne Probasco and were familiar with his knowledge of investing and the commonly understood meanings of terms used in investing, including particularly the language he used in the Fifth Amendment. These witnesses had actually talked to Wayne specifically about his investing. They were familiar with his detailed knowledge of his assets and regular review of monthly statements received from the firms with whom he had investments. They said Wayne certainly knew the meaning of the terms he had used in the Fifth Amendment to the Restated Trust and would have used them in their commonly understood meaning. The one other witness, the trust officer relied upon by Wayne's children as their sole witness, said he was first involved with the Wayne Probasco Trust about eight months after Wayne had died. Mr. Hellmer "couldn't speak intelligently" about Wayne's knowledge or intent. By the time Helmer went to work for the trustee, Wayne's brokerage accounts had already been closed and his assets transferred to the bank's account. Hellmer agreed that the language of the Fifth Amendment could only be given effect by applying it to the account statements for Merrill Lynch, Oppenheimer, and Edward Jones. He admitted he had not done so before jumping to the conclusion that the language of the trust bequeathed the entirety of these three accounts to Wayne's children. In over 15 months serving as the responsible trust officer, Hellmer had never thought to see if

there was a separately identifiable "stock fund account" at Merrill Lynch and other assets not included in that description and also had not examined the Oppenheimer or Edward Jones account statements. When confronted with the account statements, Hellmer agreed that the descriptions of specific bequests in paragraph 2 on page 2 of the Fifth Amendment were descriptive of particular assets within the account statements and were incompatible with, and described something different than other types of investment accounts shown. Hellmer further agreed that, assuming Wayne Probasco was a sophisticated investor, it would be reasonable for him to understand and use the more specific descriptions in making his bequests. (*See* Hellmer Cross-Examination (R 10, pp. 66-100)).

In sum, the evidence established without dispute that (i) the terms used by Wayne Probasco to describe assets listed in paragraph 2 on page 2 of the Fifth Amendment had a commonly understood plain meaning well known to Wayne as a sophisticated investor that he would have used and intended to use them in accordance with that commonly understood meaning; and (ii) that the language Wayne used describes in plain terms specific bequests made to his children that do not describe the entire accounts or all the investment assets in them, but rather describe specific and readily identifiable asset accounts with Merrill Lynch, Oppenheimer, and Edward Jones. There was no evidence to the contrary, and the court found no material facts to the contrary. Plaintiff's only witness, Mr. Hellmer, agreed that the specific bequests to Mr. Probasco's children could be readily identified by reference to the account statements.

In light of this evidence the court was able, and had the duty to, "place itself as nearly as possible in the situation of the testator when he made the will, and from a consideration of that situation, and from the language used in every part of the will, determine as best it can the purposes of the testator and the intentions he endeavored to convey by the language used." *Smyth v. Thomas*, 198 Kan. 250, 255, 424 P.2d 498 (1967). When all language of the Fifth Amendment is interpreted together and given effect, the Fifth Amendment unambiguously directs distributions be made as set forth in the Statement of Facts in the table at page 18 of Appellant's Brief.

Despite the absence of any supporting testimony, the court concluded instead that the terms Wayne used to state his intention were nonsense – that there was no such thing as a "stock fund account with Merrill Lynch", no "bond and stock account with Oppenheimer", and no "bond account with Edward Jones." (R 8, p. 900). If that were true, the specific bequests are meaningless and fail completely, as set out in Argument III below.

But, in fairness and in fact, it isn't true. The trust officer who had first asserted this misinterpretation of the Trust Agreement as amended, readily acknowledged that he hadn't done his due diligence before jumping to that conclusion. Hellmer did not know Wayne Probasco's understanding of the terms he used and he had not endeavored to apply them to the account statements. And when he did so while testifying, he agreed that the terms used described identifiable subaccounts for separately valued assets and excluded all others.

Wayne's plain language was not in fact ambiguous and could not be nullified. Further, even if there was a legal theory whereby the court could delete terms to reach a desired result, there was no evidence to support such a result.

The court's reliance on a single misspelling of "Stifel Nicolaus" in identifying the "account with Stiffel Nickels" is not grounds for concluding that Wayne Probasco was so careless that his directions could not be carried out. Indeed, that error is of no probative value for the court's inference. It is the equivalent of finding that a person who doesn't wash their car frequently likely was careless in his servicing the brakes and is probably a careless driver as well. There are limits to reasonable inferences, and inattention to proofreading of transcription or spelling errors does not raise a reasonable inference that the Settlor meant something he did not say or require deletion of what he did say. The case law rejects such an interpretation of the language of the instrument and also prohibits reliance on parol evidence to vary or contradict the written instrument.

Finally, the district court's reasoning at pages 25 and 26 (R 5, pp. 900-01) leaves it unclear whether the court is weighing evidence or purporting to interpret the language of the Fifth Amendment to the Restated Trust. The court seemed to think that the descriptions of stock in particular companies that were held directly in Wayne's name and not with a brokerage house in Subparagraphs G.2.c (Glaxo Smith stock), G.2.e (Wells Fargo stocks), and G.2.f (Westar Energy stocks) tended to prove that Wayne did not intend to leave his children just his stock fund account with Merrill Lynch, but rather intended to give them several individual stocks he

owned that were held by the brokerage firm that obviously were not a stock fund. Had Wayne wanted to leave his children "Boeing Company stocks with Merrill Lynch" or "Ford Motor Co. stocks with Merrill Lynch," he owned such stocks with that firm (See Merrill Lynch account statement, R 11, p. 4) and could have so stated by identifying the specific stocks by company name, as he did with the other specific stocks cited by the court as the non-"muddy" way to do so. Or, if Wayne had wanted to leave them every type of asset in his Merrill Lynch account, including individual stocks and stock funds, and REITs and money market accounts, he could have directed they be given the "account with Merrill Lynch," as he did in the case of Stifel Nicolaus. (Subparagraph 2.d) But the "stock fund account" clearly and unambiguously describes only mutual funds that invest in stock and not individual stocks, or money market funds or cash. There simply is no substantial evidence to support the court's decision to the contrary.

III. The district court erroneously refused to admit evidence proving Wayne Probasco's knowledge and attention to detail as a professional investor.

Standard of Review

When reviewing a district court decision to admit or exclude evidence, the appellate court first determines whether the evidence is relevant. *State v. Friday*, 297 Kan. 1023, 1043, 306 P.3d 265 (2013), citing *State v. Shadde*n, 290 Kan. 803, 817, 235 P.3d 436 (2010). Evidence is relevant when it has "any tendency in reason to prove any material fact." *Id.*, quoting, K.S.A. 60-401(b). "Accordingly, relevant evidence must be both probative and material." *Id.* "Whether evidence is

probative is reviewed under an abuse of discretion standard; materiality is judged under a de novo standard." *Id.* Errors in the admission or exclusion of evidence are reversible only if prejudicial. K.S.A. 60-261. The errors alleged here are the court's rulings excluding Petitioner's Exhibits F and G and testimony relating thereto. The issues were raised and ruled on at R 10, pp. 113-16.

Substantive Argument

The Settlor's descriptions of assets specifically bequeathed to his children were excised by the trial court based entirely, or almost entirely, on the ground that Mr. Probasco was careless and inattentive to details and did not use asset descriptions in the common understanding a knowledgeable investor would. During the presentation of her evidence, Mrs. Probasco offered Exhibit F, which was Wayne's edit of a form supplied by his tax return preparer in which Wayne specifically described his business or profession as "INVESTOR" in addition to attorney. (R 12, p. 3; R 10, pp. 113-14). This evidence was offered to prove that Mr. Probasco "as a principal business profession considered himself an investor." (R 10, p. 114:8-10) The district court responded: "And I cannot see how that is relevant to what we're here about today." (*Id.*, p. 114:11-12). The exhibit was formally proffered and objection to its admission sustained. (*Id.*, p. 114:13-15).

Exhibit G is a detailed list prepared by Wayne of financial market and investment tracking information covering approximately 11 years from 2002 to 2012 that Wayne kept on his desk by his computer. (R 12, pp. 4 *et seq.*; R 10, pp. 114-16). This exhibit and testimony about it were, or would have been, offered to

show that the settlor was "meticulous" in keeping track of his stocks and the indices that affected their values, and, together with other records would show, that when he described "stock funds at Merrill" he meant just that and not other things. (*Id.*, p. 115:13-22) The court ruled as follows:

> THE COURT: Well, I'm going to sustain the objection both on relevancy ground, and also on the grounds, no disrespect intended, but I don't think the witness understands what this is enough to be able to accurately describe it, according to the testimony I've heard so far.
> MR. THEIS: Well, may I lay some foundation for that purpose?
> THE COURT: No. It would still be irrelevant. (*Id.*, pp. 115:23-116-17)

After counsel further explained the relevance, and Mrs. Probasco's personal discussions with Mr. Probasco, the court reiterated that he would not accept it *even if it was relevant* because Mrs. Probasco's testimony (which he had not heard and would not listen to) "is not reliable." (*Id.* p. 116:15-18).

At this point in the transcript, Petitioner's presentation of evidence had barely begun. (See R 10, at 109-116), and the court gives every indication that he had already decided the case. This evidence was clearly relevant and material to Mr. Probasco's knowledge of the nature and extent of his property, his understanding of the terms he used to describe his property when he made his amended trust agreement, and to show he was habitually meticulous and careful in his affairs as an investor. This was admissible evidence under the authorities set forth above in Section II of the Argument.

The district court's exclusion of this evidence was arbitrary and capricious and denied substantial justice. Had the judge merely been open to receiving this

evidence, the difference between the willingness to be persuaded and his foreclosure of fair inquiry could have led to a different result. Because there is no substantial evidence to support the judgment made by the district court, it should be reversed and judgment entered for Mrs. Probasco as a matter of law. In the alternative, the case should be remanded for a fair hearing and consideration of her evidence.

IV. The district court's finding that three specific assets descriptions actually describe nothing, or something that does not exist, if correct, required the court as a matter of law to find that the specific bequests failed and the property passes under residuary clause.

Standard of Review

The issue presented here is one of law reviewed de novo. What is the legal effect of a conclusion by the court that the language of a specific bequest identifies something that "does not exist and never did"?

Substantive Argument

The district court concluded as fact that there was no "Stock fund account with Merrill Lynch," no "Bond and stock account with Oppenheimer," and no "Bond account with Edward Jones" and "there never had been." (R 8, p. 900) If this finding is a correct statement, then the bequest fails under the applicable rules governing specific legacies. This point is of great consequence here, because, as noted by the Respondent children's witness, Mr. Hellmer, "any assets that were not specifically enumerated in the Fifth Amendment . . . would flow to Mr. Probasco's wife. (R 10, pp. 24:23-25:2)

A specific bequest or legacy is "the bequest of a particular thing, or money, specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money. . . ." *Chalkwater v. Dolly*, 672 A.2d 673, 675 (Md. App. 1996). "To constitute a specific bequest, there must be 'a segregation of the particular property bequeathed from the mass of the estate, and a specific gift of a specified portion to the legatee.'" *Id.*, quoting two earlier cases. "A specific bequest includes only those items unambiguously designated in the bequest." 80 Am. Jur. 2d *Wills* §1288 (2016). The district court found that the specific bequests at issue are ambiguous and in fact describe nothing.

While Mrs. Probasco firmly believes the district court is wrong because the descriptions the "Stock fund account with Merrill Lynch," the "Bond and stock account with Oppenheimer," and the "Bond account with Edward Jones" do make a specific gift of a specified portion or subaccounts within the three segregated brokerage accounts, if this court should not set aside that finding, thus leaving in effect a determination the bequest is meaningless, or at the very least ambiguous unless specific terms are improperly struck and ignored, then it fails as a specific bequest.

The effect of this failure is to make the entire account part of the residuary of the trust estate – assets not otherwise disposed of by specific bequest. A lapsed or void bequest falls into the residuum and will be disposed of by the residuary clause, if one has been provided. *Trustees of Endowment Fund of Hoffman*

Memorial Hosp. Ass'n v. Kring, 225 Kan. 499, 506, 592 P.2d 438 (1979); *Taylor v. Hull,* 121 Kan. 102, 245 P. 1026 (1926). The district court distinguished the rule cited in these cases on the theory that it applies only when a thing that was in existence when bequeathed, ceases to exist. However, the principal involved applies any time a bequest fails, whether because the property never existed, ceased to exist or be owned by testator, or was so ambiguously described that it fails as a specific bequest. The law allows no such distinction as the trial court found.

And because the court cannot, in the guise of interpretation of the language of the settlor, add or delete language and rewrite a bequest of a thing that doesn't exist to describe something that does exist, the district court's finding of fact compels the legal conclusion that all three items in dispute must pass to Lou as the residuary beneficiary.

CONCLUSION

Based on the forgoing, the district court's decision should be reversed with directions to enter judgment directing the distribution of the items listed in ¶ 2 on Page 2 of the Fifth Amendment to the Restated Trust to Mr. Probasco's children as set forth in the Table on page 18 above, with those items not listed being distributed to Mrs. Probasco as also set forth in the Table. This will carry out Wayne's intent that his children receive all stock funds with Merrill Lynch, all

stocks and bonds with Oppenheimer and all bonds with Edward Jones[1] and that his wife receive as a part of the residuary those assets with Merrill Lynch that were not stock funds, those assets at Oppenheimer that were not stocks and bonds and those assets at Edward Jones that were not bonds.[2] That disposition will comply with the law, will rightly resolve all issues on the facts without dispute, and will conclude the case.

Respectfully Submitted,

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[1] See appendix 3
[2] See appendix 4

CERTIFICATE OF SERVICE

I hereby certify that on **June 27, 2016**, I electronically filed the foregoing 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 Brief were served on counsel of record via U.S. Mail, first-class, postage-prepaid, to the following:

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APPENDIX 1

The Fifth Amendment to Restated Trust
(R 6, p. 622-24)

FIFTH AMENDMENT
TO FIRST RESTATEMENT OF G. WAYNE PROBASCO TRUST

THIS AMENDMENT to the **G. WAYNE PROBASCO TRUST** is executed by G. WAYNE PROBASCO on the 15 day of April, 2013.

On the 10th day of December, 1998, a Trust Agreement was entered into between G. WAYNE PROBASCO of Topeka, Shawnee County, Kansas, as "Settlor" and G. WAYNE PROBASCO as "Trustee," establishing the G. WAYNE PROBASCO TRUST. Settlor subsequently restated such Trust Agreement on April 21, 2006, by a document entitled, "FIRST RESTATEMENT OF TRUST AGREEMENT," and amended such Trust Agreement on March 16, 2009, by a document entitled, "FIRST AMENDMENT TO FIRST RESTATEMENT OF G. WAYNE PROBASCO TRUST," and on July 17, 2009, by a document entitled, "SECOND AMENDMENT TO FIRST RESTATEMENT OF G. WAYNE PROBASCO TRUST," and on July 17, 2009, by a document entitled, "THIRD AMENDMENT TO FIRST RESTATEMENT OF G. WAYNE PROBASCO TRUST," and on February 15, 2011, by a document entitled, "FOURTH AMENDMENT TO FIRST RESTATEMENT OF G. WAYNE PROBASCO TRUST."

Paragraph XIV of such Restatement provides as follows:

"Revocability. Settlor may, during his lifetime, revoke the Trust created in whole or in part, or amend this Trust Agreement from time to time in any manner; provided, however, that any such revocation or amendment shall be in writing and signed by Settlor."

In accordance with the foregoing provisions, Settlor now amends such Trust Agreement by executing this document entitled, "FIFTH AMENDMENT TO FIRST RESTATEMENT OF G. WAYNE PROBASCO TRUST" as follows:

"Paragraph 5. Remainder." is hereby deleted in its entirety;

"Paragraph C. Specific Distributions to E. LOUISE BJORGAARD PROBASCO." as set forth in SECOND AMENDMENT TO FIRST RESTATEMENT... is hereby deleted;

"Paragraph G. Distribution of Trust Remainder." is hereby deleted in its entirety, and the following provisions are hereby inserted:

G. Distribution of Trust Remainder. Trustee shall pay all federal and state inheritance, succession and estate transfer taxes or charges due by reason of the death of Settlor from the remaining Trust estate of the G. WAYNE PROBASCO TRUST. After making such payments and after fulfilling the distributions of the specific bequests, Trustee shall

divide the remaining Trust estate as hereinafter set forth:

1. To be given to E. LOUISE BJORGAARD PROBASCO the following real estate:

   a. Property which is known as 1431 SW Urish Road, Topeka, Kansas, legal description: NE ¼ LESS ROW, SUBDIVISION: Sec: 06 Twn: 12 RNG: 15 QTR: NE

   b. Property known as 615 SW Topeka Blvd., Topeka, Kansas, legal description: TOPEKA AVE LTS 191-193-195-197 N 4' 199 ORIGINAL TOWN SUBDIVISION: ORIGINAL TOWN SEC: 31 TWN: 11 RNG: 16 QTR: NW

   c. Property on SW K4 HWY, Topeka, Kansas, legal description: SW1/4 NW ¼ LESS R/W SUBDIVISION: SEC: 25 TWN:12 RNG:13 QTR:

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

3. All other assets in the Trust shall go to my wife, E. LOU BJORGAARD PROBASCO.

Except as hereby amended and as previously restated and amended, Settlor declares that the provisions of the Trust Agreement dated on the 10th day of December, 1998, remain in full force and effect.

IN WITNESS WHEREOF, Settlor executes this FIFTH AMENDMENT TO FIRST RESTATEMENT OF G. WAYNE PROBASCO TRUST on the date first above written.

G. WAYNE PROBASCO

STATE OF KANSAS)
) SS
COUNTY OF SHAWNEE)

The foregoing instrument was acknowledged before me this 15th day of April, 2013, by G. WAYNE PROBASCO.

NOTARY PUBLIC

My Appointment Expires: May 18, 2016

Notary Public
State of Kansas
Alisia Colbert
My Appt. Expires 5/18/16

APPENDIX 2

Petitioner's Summary of Fifth Amend. ¶ 2 Bequests to Respondents and ¶ 3 Residuary Bequests to Petitioner (R 7, p. 786)

At the date of decedent's death his assets consisted of the following property, amounts and beneficiaries:

Real Estate held by Trust:
Homestead, Office ($138,000) & 40 acres of farm land in Dover ($98,000) to his surviving spouse and decedent's interest in office and household furnishings and 2013 Nissan Altima automobile

Life Insurance/Charitable Distributions outside of Trust: (*Date of Death Values)	**Others**	**Respondents Paula, Jeff, Kristi**	**Surviving Spouse, Lou**
Washburn University School of Law Endowment	$365,452		
YMCA Foundation	$ 60,598		
KPERS to the Respondents, Paula, Jeff & Kristi		$ 4,000	
Sun Life to the Respondents, Paula, Jeff & Kristi		$ 7,684	
Life Insurance to Respondents, Paula, Jeff & Kristi		$216,992.57	
And Step daughter, Jennifer	$ 70,676.67		
Joint Tenancy Property			
½ interest in 1 share of stock of Island House			$ 17,500
Joint Checking Accounts -100%			$ 41,968.39
Total Transferred outside of Probate	$496,726.67	$228,676.57	$59,468.39
Personal Property held by Trust transferring to Respondent Children under 5th Amendment			
Mutual fund account with Vanguard		$1,349,890.01	
Stock fund account with Merrill Lynch		$36,820.32	
Stock certificate with Glaxo Smith		$21,085.00	
Account with Stiffel Nickels		$1,334.60	
Wells Fargo stocks		$34,316.00	
Westar Energy stock		$102,924.03	
Bond and stock account with Oppenheimer		-	
a.)Bond account		$795,053.46	
b.)Stock account		$179,982.76	
Bond account with Edward Jones		$622,516.14	
Two real estate contracts held by Kansas Secured			
Bylsma Contract		$29,563.30	
Browning Contract		$37,886.45	
Total Respondents Under Par 2 of 5th Amend		$3,211,372.07	
Personal Property held by Trust transferring to Surviving Spouse under Remainder Paragraph of 5th Amendment- Date of Death Values			
Money Market account with Merrill Lynch			$39,639.99
Stock account with Merrill Lunch			$299,982.00
REIT Health Care REIT with Merrill Lynch			13,508.75
AIM - Invesco with Merrill Lynch			13.51
Money Market account with Oppenheimer			$199.25
Mutual fund account with Edward Jones			$81,245.30
Waddell & Reed Securities			$19,861.43
Total Surviving Spouse under Par 3 of 5th Amend			$454,437.46 *
Total Transferred at Death combined	$496,726.67	$3,440,048.64	$513,905.85

* Total corrected in text of Brief for math error: $454,450.23

APPENDIX 3

Detail of Fifth Amend. ¶ 2 Bequests to Respondents
(Petitioner's Trial Ex. D, R 11, pp. 19-22)

Exhibit 1

Property bequeathed to Decedent's Children (Paula Freeman, Jeff Probasco, and Kristi Helmuth) under Paragraph 2 of the Fifth Amendment to the G. Wayne Probasco Trust

Paragraph 2.a - "Mutual fund account with Vanguard", consisting of the following mutual funds:

Symbol	Name	Quantity of Shares
VHCAX	Capital Opportunity Adm	951.334
VEMAX	Emerging Mkts Stk Idx Adm	1422.472
VEXAX	Extended Mkt Index Adm	2129.982
VFIIX	GNMA Fund Investor Shares	1197.045
VGHAX	Health Care Fund Adm	1336.853
VWIUX	Inter-Term Tax-Exempt Adm	30450.75
VWIGX	International Growth Inv	1840.396
VPCCX	PRIMECAP Core Fund	3201.892
VMSXX	Tax-Exempt Money Mkt	9702.12
VTGLX	Tax-Managed Gr & Inc Adm	2239.724
VTMGX	Tax-Managed Intl Adm	9909.648
VFIAX	500 Index Fund Adm	1078.02

Paragraph 2.b - "Stock fund account with Merrill Lynch"

Symbol	Name	Quantity of Shares
FLSAX	Fidelity Adv Leveraged Company Stock FD CL A	278.831
ATIAX	Invesco Select Companies Fund CL A	1016.879

Paragraph 2.c - "Stock certificate with Glaxo Smith"

Paragraph 2.d - "Account with Stiffel Nickels"

Paragraph 2.e - "Wells Fargo Stocks" - WFC

Paragraph 2.f - "Westar Energy Stock"

WR	Westar Energy Inc.	500 shares (held in certificate form)

Paragraph 2.g - "Bond and stock account with Oppenheimer", consisting of the following individual bonds and stocks held in an account:

Symbol	Name	Quantity of Shares
T	AT & T INC	1,000
ABT	ABBOTT LABS	300
ABBV	ABBVIE INC	300
BA	BOEING CO	200
COP	CONOCOPHILLIPS	500

EXHIBIT D

Exhibit 1

MRK	MERCK & CO INC NEW	100
OKE	ONEOK INC NEW	1,370
PSX	PHILLIPS 66	50
BCSPRC	BARCLAYS BANK PLC ADS7.75%PFD S4 CALL 3/15/13 @$25 MOODYS BA2	1,000
RBSPRQ	ROYAL BK SCOTLAND GROUP PLC ADR PREF SHS 1 6.75% CALL 6/30/11 @$25 MOODYS B1	1,200
	KANSAS ST DEPT TRANSN HWY REV KS 3.5% DUE 09/01/13 B/E REV OID CALLABLE	25,000
	SHAWNEE CNTY KANS KS FSA 4.15% DUE 09/01/13 B/E UGO OID CALLABLE	50,000
	SHAWNEE CNTY KANS CTFS PARTN KS 4% DUE 09/01/14 B/E OID NON-CALL	25,000
	MICHIGAN ST HOSP FIN AUTH REV MI 4.375% DUE 11/15/15 B/E REV OID NON-CALL	25,000
	DERBY KANS KS 4.15% DUE 12/01/16 B/E UGO OID PRE-REF 12/01/13 @100	20,000
	KANSAS ST DEV FIN AUTH REV KS FGRMB 4% DUE 11/01/17 B/E REV OID CALL 11/01/16 @100	20,000
	KANSAS ST DEV FIN AUTH HEALTH KS 4.375% DUE 11/15/17 B/E REV OID NON-CALL	30,000
	KANSAS ST DEV FIN AUTH REV KS XLCA 4% DUE 04/01/19 B/E REV OID CALL 04/01/16 @100	25,000
	WASHBURN UNIV TOPEKA KANS REV KS AGC 3.4% DUE 07/01/20 B/E REV OID NON-CALL	25,000
	WICHITA KANS KS 4$ DUE 09/01/20 B/E UGO PRE-REF 09/01/15 @101	50,000
	SEDGWICK CNTY KANS UNI SCH DIS KS AGC 3.5% DUE 11/01/20 B/E UGO CALL 11/01/18 @100	35,000
	SEDGWICK CNTY KANS PUB BLDG CO KS 4.4% DUE 08/01/21 B/E REV OID CALL 08/01/14 @100	25,000
	TOPEKA KANS UTIL REV KS MBIA 4.25% DUE 08/01/21 B/E REV CALL 08/01/14 @101	25,000

Exhibit 1

KANSAS ST DEV FIN AUTH REV KS 4% DUE 01/01/22 B/E REV OID CALL 01/01/20 @100	20,000
WASHBURN UNIV TOPEKA KANS REV KS AGC 3.6% DUE 07/01/22 B/E REV OID CALL 07/01/20 @100	25,000
SHAWNEE CNTY KANS UNI SCH DIST KS 4.5% DUE 09/01/22 B/E UGO CALL 09/01/19 @100	20,000
MARAIS DES CYGNES PUB UTIL AUT KS AGC 4.125% DUE 12/01/22 B/E REV OID CALL 12/01/17 @100	25,000
JOHNSON CNTY KANS PUB BLDG COM KS 4% DUE 09/01/23 B/E CALL 09/01/19 @100	25,000
BUTLER CNTY KANS UNI SCH DIST KS FSA 3.5% DUE 09/01/24 B/E UGO OID CALL 09/01/14 @100	25,000
UNIVERSITY KANS HOSP AUTH HEAL KS 5% DUE 09/01/25 B/E REV CALL 09/01/16 @100	25,000
KANSAS ST DEV FIN AUTH REV KS 4% DUE 03/01/28 B/E REV CALL 03/01/19 @ 100	20,000
WAMEGO KANS POLLUTN CTL REV KS MBIA 5.3% DUE 06/01/31 B/E REV CALL 06/01/14 @100	50,000
WYANDOTTE CNTY KANS CITY KANS KS 3.8% DUE 10/01/32 B/E REV OID CALL 10/01/14 @100	25,000
KANSAS ST DEV FIN AUTH HEALTH KS MBIA 4.75% DUE 11/15/36 B/E REV OID CALL 11/15/17 @100	50,000
KANSAS ST DEV FIN AUTH HEALTH KS 5.125% DUE 03/01/39 B/E REV OID CALL 03/01/20 @100	20,000
GENERAL MOTORS ACCEPTANCE CORP B/E 6.25% DUE 04/15/19 MTN CALL 08/15/13 @100	30,000

Exhibit 1

Paragraph 2.h - "Bond account with Edward Jones"

Name
Wyandotte Cnty KS Uni Sch Dist - 4%
West St Paul Minn Indpt Sch - 4.5%
Eastampton Twp NJ 3rd Ed GO - 4.25%
Jasper Cnty MO Reorg Sch Dist - 5.25%
Dorchester Cnty S C Transn Pjs - 4.5%
Johnson Cnty Kans Uni Sch Dist - 4.5%
Shawnee Cnty KS COP Hlth Agy - 4.15%
Kansas St Dev Auth Rev - 4.375%
KS Dev fin Rev Adventist Hlth - 5.15%
Butler County - County Arpt - 4.25%
Regn School Unit #1 - 4.75%
FL Hsg Fin Corp Homeowner Mtg - 4.4%
Georgetown Texas General Oblig - 4.5%
Lake Dallas Tex Indpt Sch Dist - 4.625%
Little Elm Tex Indpt Sch Dist - 4.625%
Deer River MN Indpt Sch Dist - 4.35%
Provo UT City Sch Dist B GO - 4.25%
Troy TX Indpt Sch Dist Bldg GO - 4.6%
Junction City KS Rfdg GO - 5%
Mobile Al Ser A Rfdg Wts - 4.5%
Topeka KS Rfdg Ser A GO - 3.25%
Butler Cnty KS Usd GO Sch Bldg - 3.375%
Burlington KS Kans Gas & Elec - 5%
WI Hsg & Econ Dev Rev Ser C - 4.95%
San Antonio TX Arpt Sys Impt - 5%

Paragraph 2.i - "Two real estate contracts held by Kansas Secured Title Browning and Bylsma"

Note: Pursuant to the provisions of the Settlement Agreement, such property delineated above passing to Decedent's Children shall include any income therefrom, any proceeds resulting from the sale thereof, any reinvestment of such proceeds, and any income from any such reinvestment. However, all claims asserted against the Estate or the Trust, and any other debts, expenses and taxes of the Estate or Trust of any nature, and taxes of the Decedent shall be chargeable against and paid from such assets.

APPENDIX 4

Detail of Fifth Amendment ¶ 3 Residuary Bequests to Petitioner
(Respondents' Trial Ex. 9, R.11, pp. 73-75)

EXHIBIT 2

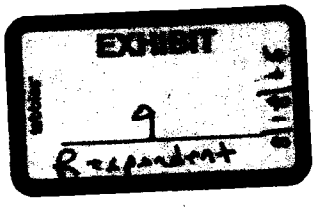

Exhibit 2

Property passing to E. Lou Bjorgaard Probasco pursuant to Paragraph 3 of the Fifth Amendment to the G. Wayne Probasco Trust

1) Assets in Oppenheimer account ***-*****98 at the time of G. Wayne Probasco's death which were not "Bonds and Stocks", which appear to be only the proceeds in the Advantage Bank account and any income generated from the Advantage Bank account thereafter.

2) Merrill Edge Trust Account ***-***33
Those assets that are not in a "stock fund" (stocks in a mutual fund) comprising the "remaining assets":

Symbol	Name	Quantity of Shares
	Cash/Money Account	63.59
	ML Direct Deposit Program	39,059
T	AT&T Inc.	1,300
AXS	AXIS Capital Holdings LTD	365
BAC	Bank of America Corp	600
BA	Boeing Company	400
CSCO	Cisco Systems Inc. COM	800
CMCSA	Comcast Corp New CL A	163
DFS	Discover Finl Svcs	83
ESRX	Express Scripts HLDG Co	38
XOM	Exxon Mobil Corp	400
F	Ford Motor Co	400
GE	General Electric	500
HCN	Health Care REIT Inc. Com	200
MRK	Merck and Co Inc. SHS	200
MSFT	Microsoft Corp	200
PEP	Pepsico Inc.	100
WMT	Wal-Mart Stores Inc.	200
WAG	Walgreen Co	400
WR	Westar Energy Inc.	1000
YUM	Yum Brands Inc.	40
ACTHX	Invesco High Yield Municipal Fund A	1.436

3) Edward Jones Account ***-*****-*-8
Those assets at Edward Jones that were not a "bond", i.e., the following mutual funds:

Name	Quantity
Opp Roch Ltd Term Mun CL C	1704.257
Oppenheimer Roch Natl Mun Fd C	8088.399

4) Proceeds from assets in Waddell and Reed account at the time of Wayne's death.

5) All other assets held in the G. Wayne Probasco Trust or payable to the G. Wayne Probasco Trust that were not specifically identified in Paragraph 2 of the Fifth Amendment to the G. Wayne Probasco Trust, and in addition all assets of the G. Wayne Probasco Estate that pursuant to the G. Wayne Probasco Will are directed to be distributed to the G. Wayne Probasco Trust, i.e., the "remaining assets".

Note: Pursuant to the provisions of the Settlement Agreement, such property passing to E. Lou Bjorgaard Probasco shall include any income therefrom, any proceeds resulting from the sale thereof, any reinvestment of

Exhibit 2

such proceeds, and any income from any such reinvestment. Such assets passing to E. Lou Bjorgaard Probasco shall not be subject to payment of any claims asserted against Decedent's Estate or Trust, or any other debts, expenses and taxes of the Estate or Trust of any nature, and no taxes of the Decedent shall be chargeable against or otherwise paid from, the foregoing assets.