

IN THE MISSOURI SUPREME COURT

SC 93679

C. DAVID ROUNER & ALISHA HUDSON,

Appellants,

vs.

CARI RENEE WISE & CARLI NICOLE CONKLIN,

Respondents.

Appeal from the Circuit of Adair County, Missouri

Case No. 11AR-CV00398

SUBSTITUTE BRIEF OF APPELLANTS C. DAVID ROUNER & ALISHA HUDSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 7

JURISDICTIONAL STATEMENT..... 15

STATEMENT OF FACTS 16

 A. PROCEDURAL POSTURE..... 16

 B. TRUST, SETTLOR, AND BENEFICIARIES..... 17

 C. THE AMENDMENT..... 19

 D. CONSTRUCTION OF THE AMENDMENT..... 19

 E. ADMISSION OF EXTRINSIC EVIDENCE OF SETTLOR’S INTENT AT
 TRIAL..... 20

 F. REBUTTAL EVIDENCE 29

 G. THE ERRANT JUDGMENT..... 35

POINTS RELIED ON..... 37

ARGUMENT 42

 I. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002,
 AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL
 UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE
 RESPONDENTS FAILED TO SUSTAIN THEIR BURDEN OF PRODUCING
 SUBSTANTIAL EVIDENCE THAT DECEDENT INTENDED THE NOVEMBER 1,
 2002, AMENDMENT TO BE EXPRESSLY CONDITIONED UPON DECEDENT

MEETING HIS DEMISE, IN THAT THE LANGUAGE RELIED ON BY THE TRIAL COURT TO FIND A CONDITION WAS MERELY AN EXPRESSION OF THE DECEDENT’S MOTIVATION AND DID NOT ARTICULATE A CONDITION..... 42

- A. STANDARD OF REVIEW 42
 - 1. The Case Law..... 42
- B. BURDEN OF PROOF..... 45
- C. The Language Is Not Conditional 47

II. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE RESPONDENTS FAILED TO SUSTAIN THEIR BURDEN OF PRODUCING SUBSTANTIAL EVIDENCE THAT DECEDENT INTENDED THE NOVEMBER 1, 2002, AMENDMENT TO BE EXPRESSLY CONDITIONED UPON DECEDENT MEETING HIS DEMISE, IN THAT THE LANGUAGE RELIED ON BY THE TRIAL COURT TO FIND A CONDITION FAILED TO CONSIDER THE ENTIRETY OF THE NOVEMBER 1, 2002, AMENDMENT BUT INSTEAD RELIED ONLY ON TWO SENTENCES FROM THE THREE PAGE AMENDMENT..... 56

- A. STANDARD OF REVIEW AND CONSTRUCTION 56
- B. CONSTRUCTION OF THE NOVEMBER 1, 2002, AMENDMENT 56
- C. APPLICATION OF CASE LAW 64

D. THE TRIAL COURT'S CONSTRUCTION OF THE AMENDMENT..... 69

III. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE IT FAILED TO CONSIDER THE FACTORS SET OUT IN THE CASE IT RELIED UPON TO ADMIT EXTRINSIC EVIDENCE, IN THAT HAD IT PROPERLY APPLIED THESE FACTORS THE TRUST AMENDMENT WOULD HAVE BEEN FOUND UNCONDITIONAL..... 72

A. STANDARD OF REVIEW..... 72

B. THE IRONY INHERENT IN THE TRIAL COURT’S CHOICE OF THE *DESMOND* CASE..... 72

C. THE *DESMOND* FACTORS 74

1. The Circumstances Surrounding Execution & Delivery Favor a Finding of Unconditional Disposition..... 75

2. The Execution and Delivery Favor A Finding of Unconditional Disposition..... 77

3. Dr. Conklin’s Health..... 77

4. Dr. Conklin’s Future Plans Favor a Finding of Unconditional Disposition..... 77

5. Preservation of the Document Favors Unconditional Disposition. 78

6. Instructions Upon Delivery Favor a Finding of Unconditional Disposition..... 79

7. Subsequent Declarations of Testator Do Not Favor a Finding of Unconditional Disposition..... 80

8. Lack of Another Subsequent Will Favors of Finding of Unconditional Disposition..... 81

9. Lack of Alternative Disposition Favors Unconditional Status..... 82

IV. THE TRIAL COURT ERRED IN ADMITTING EXTRINSIC EVIDENCE OF ORAL STATEMENTS MADE BY DECEDENT BEFORE, ON AND AFTER NOVEMBER 1, 2002,, TO DETERMINE WHETHER DECEDENT INTENDED TO MAKE THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST, CONDITIONAL OR ABSOLUTE, BECAUSE SAID EXTRINSIC EVIDENCE WAS INADMISSIBLE AS A MATTER OF LAW, IN THAT MISSOURI LAW DOES NOT PERMIT THE ADMISSION OF ORAL STATEMENTS MADE BY A DECEDENT TO DETERMINE DECEDENT’S INTENT AS TO THE ISSUE OF CONDITIONALITY..... 84

A. STANDARD OF REVIEW 84

B. THE HISTORICAL UNDERPINNING OF MISSOURI’S RULES ON EXTRINSIC EVIDENCE 85

C. INADMISSIBILITY OF EXTRINSIC EVIDENCE 90

D. The Plain Meaning Rule is Not Archaic..... 99

E. Perjury Remains a Concern and the Reason for the Statute of Wills103

F. § 456.1-103(27) RSMo. (2012) Does Not Change Missouri Law105

V. THE TRIAL COURT ERRED IN AUTHORIZING RESPONDENTS TO PAY THEIR ATTORNEYS’ FEES AND COSTS FROM THE CORPUS OF THE K.R. CONKLIN LIVING TRUST BECAUSE THE RESPONDENTS WERE NOT DEFENDING THE TRUST BUT INSTEAD WERE DEFENDING THEIR RIGHTS AS BENEFICIARIES OF THE TRUST AND ATTORNEY FEES ARE ONLY RECOVERABLE WHEN LITIGANTS ARE DEFENDING THE TRUST..... 107

A. STANDARD OF REVIEW 107

B. THE MOTION FOR FEES..... 107

C. STATUTORY LANGUAGE..... 108

D. THE CHALLENGE BENEFITTED ONLY THE BENEFICIARIES..... 109

VI. THE TRIAL COURT ERRED IN FINDING THAT RESPONDENTS DID NOT VIOLATE THE “NO-CONTEST CLAUSE” OF THE K.R. CONKLIN LIVING TRUST IN DEFENDING THIS CAUSE, BECAUSE RESPONDENTS ACTED IN CONJUNCTION WITH EACH OTHER AND CONTESTED IN THEIR PLEADINGS AND EVIDENCE THE VALIDITY OF THE NOVEMBER 1, 2002, WRITING AS A VALID AMENDMENT TO THE TRUST..... 114

A. STANDARD OF REVIEW 114

B. THE PLEADINGS SHOW A DIRECT CHALLENGE TO THE TRUST
INSTRUMENT..... 114

C. STRICTLY CONSTRUED, BUT VALID..... 117

CONCLUSION 119

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)..... 123

CERTIFICATE OF SERVICE..... 125

TABLE OF AUTHORITIES

Cases

Albright v. Albright, 901 S.W.2d 144 (Mo. App. W.D. 1995)..... 63

Atwater v. Meeks, 508 P.2d 866, 873 (Kan. 1973)..... 44, 85, 103

Aycock Pontiac, Inc. v. Aycock, 983 S.W.2d 915, 919 (Ark. 1998) 90

Blue Ridge Bank & Trust Co. v McFall, 207 S.W.3d 149 (Mo. Ct. App. W.D. 2006)
 52, 54, 70, 86

Boatmens First Nat. Kansas City v. Globus-Rodriquez, 887 S.W.2d 641 (Mo. Ct.
 App. 1994)..... 71, 87

Boone County Nat'l Bank v. Edson, 760 S.W.2d 108, 111 (Mo. banc 1988) 55, 71,
 87, 98

Born v. Clark, 662 So. 2d 669, 671 (Ala. 1995) 89

Bowles v. Bradley, 461 S.E.2d 811 (S.C. 1995) 88

Breckner v. Prestwood, 600 S.W.2d 52 (Mo. App. E.D. 1980)..... passim

Coates v. Coates, 316 S.W.2d 875, 878 (Mo.App.1958) 109

Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 443 (Mo. App. W.D. 2004)
 passim

County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487, 490 (Mo. banc 1995)..105

Crittenden v. Lytle, 253 S.W.2d 361, 363 (Ark. 1953)..... 90

Damon v. Damon, 90 Mass. 192, 197 (Mass. 1864) 64

DeHart v. Ritenour School District, 663 S.W.2d 332 (Mo. App. E.D. 1983)..... 47

Don King Equipment Co. v. Double D Tractor Parts, Inc., 115 S.W.3d 363 (Mo. Ct. App. 2003).....103

Eaton v. Brown, 193 U.S. 411, 414 (1904)57, 63, 64

Estate of Caplan, 31 Phila. 304 (1996);..... 88

Estate of Carter v. Carter, 404 S.W.2d 693, 695 (Mo. 1966) 55

Estate of Straube v. Barber, 990 S.W.2d 40, 44–45 (Mo. App. 1999) 55

Estate of Utterback, 521 A.2d 1184, 1188 (Me.1987) 88

Ferguson v. Ferguson, 121 Tex. 119, 45 S.W.2d 1096 (1931)64, 65, 68

Fine Arts Museums Fndn. v. First Nat’l, 633 So. 2d 1179 (Fla. Dist. Ct. App. 1994)..... 87

First Nat'l Bank of Kansas City v. Hyde, 363 S.W.2d 647, 653 (Mo.1962)... 55, 95,
96

First Nat'l Bank of Kansas City v. Stevenson, 293 S.W.2d 362, 366 (Mo.1956). 54

First Nat'l Bank v. Danforth, 523 S.W.2d 808, 823 (Mo. 1975), cert. denied, 421
U.S. 992, 1016, 95 S.Ct. 1999, 2424, 22 L.Ed.2d 483, 685 (1975) 109

Gardner v. Vanlandingham, 334 Mo. 1054, 69 S.W.2d 947, 950 (1934)..... 55

Gordon v. Georgetown Univ., No. 02A01-9709-CH-00218, 1998 Tenn. App.
LEXIS 325 (May 15, 1998) 88

Goulding v. Bank of America, 340 S.W.3d 114 (Mo. Ct. App. W.D. 2010).... 71, 87

Greenbriar Hills Country Club v. Dir. of Revenue, 47 S.W.3d 346, 352 (Mo. banc
2001)..... 105

Hamerstrom v. Commerce Bank of Kansas City, N.A., 808 S.W.2d 434, 438-39
(Mo. App. W.D. 1991) 109, 110

Helmer v. Voss, 646 S.W.2d 738 (Mo. banc 1983)..... passim

Hillyard v. Leonard, 391 S.W.2d 211, 224 (Mo. 1965)..... 117

Houston v. Crider, 317 S.W.3d 178 (Mo. App. S.D. 2010)..... 47

In re Bowlers Trust, 56 Wis. 2d 171, 201 N.W.2d 573 (1972)..... 88

In re Carl McDonald Revocable Trust, 942 S.W.2d 926 (Mo. Ct. App. S.D. 1997)
..... 71, 87

In re Desmond’s Estate, 223 Cal. App. 2d 211 (Cal. 1st DCA 1963) passim

In re Estate of Beck, 649 N.E.2d 1011 (Ill. App. Ct. 1995) 87

In re Estate of Brown, 559 N. W.2d 818 (N.D. 1997) 88

In re Estate of Campbell, 655 N.Y.S.2d 913, 920 (N.Y. Surr. Ct. 1997)....44, 85, 86

In re Estate of Ellis, 683 N.Y.S.2d 113 (N.Y. App. Div. 1998) 87

In re Estate of Elmer, 959 P.2d 701 (Wash. Ct. App. 1998) 88

In re Estate of Eversole, 885 P.2d 657 (Okla. 1994)..... 88

In re Estate of Frietze, 966 P.2d 183 (N.M. Ct. App. 1998)..... 87

In re Estate of Jenkins, 904 P.2d 1316 (Colo. 1995); 87

In re Estate of Kirk, 907 P.2d 794 (Idaho 1995); 87

In re Estate of McPeak, 534 N.W.2d 140 (Mich. Ct. App. 1995) 87

In re Estate of Pouser, 975 P.2d 704 (Ariz. 1999)..... 87

In re Estate of Shepherd, 2012 Wis. App. 116, 344 Wis. 2d 440, 452, 823
N.W.2d 523, 529, review dismissed (Oct. 17, 2012)..... 88

In re Estate of Smith, 591 N.W.2d 898 (Wis. Ct. App. 1999) 88

In re Estate of Strick, 934 S.W.2d 312 (Mo. Ct. App. 1996)..... 87

In re Gene Wild Ins. Trust, 340 S.W.3d 139 (Mo. Ct. App. S.D. 2011)..... 70, 86

In re Gene Wild Revocable Trust, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009) 71, 87

In re Lanart’s Estate, 9 Alaska 535, 542 (D. Alaska 1939)..... 90

In re Taylor’s Estate, 119 Cal. App. 2d 574, 581 (Cal. App. 2d 1953)....68, 69, 73,
79

In re Tinsley’s Will, 187 Iowa 23, 174 N.W. 4, 7 (Iowa 1919)65, 66, 68

In re Welter’s Estate, 598 S.W.2d 618, 619 (Mo. App. S.D. 1980) 57

Ittner v. United Missouri Bank of St. Louis, 924 S.W.2d. 40 (Mo. Ct. App. E.D.
1996)..... 71, 87

Kempton v. Dugan, 224 S.W.3d 83 (Mo. Ct. App. W.D. 2007)..... 71, 87

Lowell v. Lowell, 240 P. 280, 282 (Ariz. 1925)..... 90

Matter of Estate of Wendl, 37 Wash. App. 894 (1984) 88, 89

Mercantile Trust Co. v. Hardie, 39 S.W.3d 907 (Mo. Ct. App. S.D. 2001)..... 70, 86

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)..... 43

Nicolai v. City of St. Louis, 762 S.W.2d 423, 426 (Mo. banc 1988) 105

Poelker v. Jamison, 4 S.W.3d 611, 613 (Mo. Ct. App. 1999) 104

Roberts v. United States, 182 F. Supp. 957, 959 (S.D. Cal. 1960) 89

Robertson v. United States, 310 F.2d 199, 202 (5th Cir. 1962) 89

Ross v. Everhart, 185 S.W.3d 720 (Mo. Ct. App. S.D. 2006)..... 71, 87

Rossi v. Davis, 133 S.W.2d 363, 373 (Mo. 1939)..... 116

Rumberg v. Rumberg, No. 96 CA 156, 1998 Ohio App. LEXIS 6195 (Dec. 16, 1998);..... 88

Sammons v. Elder, 940 S.W.2d 276 (Tex. Ct. App. 1997)..... 88

Scarlett v. Hopper, 823 P.2d 435 (Or. Ct. App. 1992) 88

St. Louis Union Trust Co. v. Conant, 499 S.W.2d 761 (Mo. banc 1973)..... 110, 111

St. Louis Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W.2d 578, 583 (1945) 109

State ex rel. Nothum v. Walsh, 380 S.W.3d 557 (Mo. Banc 2012) 105, 106

Succession of Neff, 716 So. 2d 410 (La. Ct. App. 1998) 87

Theodore Short Trust v. Fuller, 7 S.W.3d 482, 488 (Mo. App. 1999)..... 55

Trautz v. Lemp, 334 Mo. 1085, 72 S.W.2d 104, 108 (banc 1934)... 110, 111, 112

Westmoreland County Volunteer Rescue Squad v. Melnick, 414 S.E.2d 817, 818 (Va. 1992)..... 90

Williams v. Daus, 114 S.W.3d 351 (Mo. App. S.D. 2003) 47

Willis v. Robinson, 237 S.W.2d 1030, 1037 (1922) 43

Wilson v. Rhodes, 258 S.W.3d 873 (Mo. Ct. App. S.D. 2008) 70, 86

Winkel v. Streicher, 365 Mo. 1170, 295 S.W.2d 56, 56 (Mo. banc 1956) 93, 95

Wooley v. Hays, 285 Mo. 566, 576-77 (Mo. 1920)..... 93, 95

Wright v. Kenney, 746 S.W.2d 626, 631 (Mo. App. S.D. 1988)..... 47

Zaharopoulos v. Sprenger, 605 S.W.2d 143, 146 (Mo. App. E.D. 1980) 43

Statutes

§ 456.10-1004, RSMo. (2012)..... 108

§ 456.1-103(27) RSMO. (2012)105, 106

§ 491.010 RSMo. (2012)103, 104

§ 513.380 RSMo. (2012)105

Other Authorities

A. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J., 811 (2001)100, 102

David A. Thomas, *Restatements Relating To Property: Why Lawyers Don’t Really Care*, 38 REAL PROP. PROB. & TR. J. 655 (2004).....101, 102

Determination Whether Will Is Absolute Or Conditional 1 A.L.R.3d 1048 (1965,
with Cuml. Suppl.)..... 64

John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the
Ground of Mistake: Change of Direction in American Law?* 130 U. PA. L. REV.
521, 525 (1982)..... 89

Treatises

4C MO. PRAC., TRUST CODE & LAW MANUAL, SECTION 456.10-1004 (2012 Ed.) 109

RESTATEMENT OF THE LAW THIRD, PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS)
(2011) 100

JURISDICTIONAL STATEMENT

This appeal is taken from a decision of the Circuit Court of Adair County, Missouri denying the *Petition for Declaratory Judgment and Specific Performance* filed by Appellants, C. David Rouner and Alisha Hudson, concerning a revocable living trust created by Appellants' step-father, Keith R. Conklin on October 26, 1996, and a written Amendment to the Trust on November 1, 2002,.

Appellants timely filed their Notice of Appeal with this Court pursuant to Supreme Court Rule of Civil Procedure 81.04. After a decision favorable to Appellants in the Western District, Respondents sought transfer to this Court. This Court ordered the case transferred on November 26, 2013.

STATEMENT OF FACTS

A. PROCEDURAL POSTURE

On May 19, 2011, in the Circuit Court of Adair County, Missouri, Appellants, C. David Rouner and Alisha Hudson, filed a two count *Petition* against Respondents, Cari Wise and Carli Conklin, individually, as Co-Trustees of the K.R. Conklin Living Trust, dated October 24, 1996 (the "Trust"), and as Co-Personal Representatives of the Estate of Keith R. Conklin. (Legal File at 10, hereafter: LF___). On June 14, 2011, Appellants filed their *First Amended Petition*. (LF0002). The *First Amended Petition* dismissed claims previously filed against Respondents as Co-Personal Representatives of the Estate of Keith R. Conklin. On the day of trial, April 17, 2012, Appellants were granted leave of court to file their *Second Amended Petition*. (LF009).

Appellants' *Second Amended Petition* contained three counts of relief, including: (1) Declaratory Judgment, wherein Appellants allege that a writing by Dr. Keith R. Conklin ("Decedent") dated November 1, 2002, effectively amended the Trust; (2) Specific Performance requiring the Trustee to distribute assets pursuant to the Trust and its Amendment; and (3) Declaratory Judgment concerning the applicability of a "No-Contest Clause" in

the Trust. (LF0084-92). The case was tried to the court sitting without a jury. The trial court concluded the amendment was conditional and was of no effect because Dr. Conklin did not die on the trip. (LF0117) Appellants took an appeal to the Western District and that Court granted them relief. This Court took transfer.

B. TRUST, SETTLOR, AND BENEFICIARIES

On October 24, 1996, Decedent executed a Revocable Living Trust, the validity of which was not an issue before the trial court. (LF0018-61). On that date, Decedent was single, having previously been divorced; Decedent had two children from a prior marriage, Cari Renee Wise (“Cari”) and Carli Nicole Conklin (“Carli”) (or collectively “Respondents”). Decedent and Diana Jo Conklin (“Mrs. Conklin”), married in April 2000. (Transcript at 6; hereafter: TR__).

Mrs. Conklin is the natural mother of the Appellants, C. David Rouner (“David”) and Alisha Hudson (“Alisha”) (or collectively “Appellants”). (TR006-7).

Decedent was the Trustor and Trustee of the Trust. (LF0020). The Trust granted Decedent certain rights during his lifetime including but not limited to, the right to add and remove property and the right to amend or revoke the Trust. (LF0027). The Trust required that any amendment be made

in writing. (LF0027). “The power to amend, revoke or terminate” the Trust “is personal” to the Decedent “and may not be explained by any person or entity.” (LF0027). Article Six of the Trust prohibited the Trustee from making specific distributions of trust property except and unless “a memorandum for Distribution of Tangible Personal Property, letter, or other writing” executed by Trustor was in existence at the time of the Trustor's death. (LF0035).

Article Twelve, Section 6, the "No-Contest Clause" provided that, in the event any person...directly or indirectly, contests in any court the validity of “this trust agreement, including any amendments thereto, then the right of that person or entity to take any interest in trust property shall cease.” (LF0054). Cari and Carli were named as sole beneficiaries under the original Trust (LF0037); and they were also named as Successor Trustees pursuant to the terms and conditions of the Trust. (LF0025). Appellants were not named as either beneficiaries or Successor Trustees in the original Trust document. (LF0018-61).

Decedent and Mrs. Conklin lived together as husband and wife from the date of their marriage in April 2000, until Decedent's death on May 21, 2009. (TR006, 124). Mrs. Conklin and David began living with Decedent in May 1990. (TR00123-24). Alisha periodically lived with Decedent and Mrs. Conklin when she was not residing with her natural father. (TR00124).

C. THE AMENDMENT

On November 1, 2002, Decedent created, signed and dated a three page, handwritten document, which Appellants alleged in their *Petition* effectively amended the Trust. (LF0084-92). The November 1, 2002, writing named Appellants as beneficiaries of the Trust and disposed of the entirety of Decedent's assets, including real and personal property, as well as interests in insurance policies. (See Plaintiffs' Exh. 2 in Appendix). At the time of the November 1, 2002, writing, only Cari was married, though she later divorced. (TR007). Neither Respondents nor Appellants had children at the time Decedent created the November 1, 2002, writing. The November 1, 2002, writing begins with the following:

"Cari, Carli, David & Alisha,

Am writing this in the car on the way to KC, MO so excuse the penmanship.

If you are reading this it means that Jo and I have met our demise either going to or coming back from Phoenix.

The trust has not been updated for several years so I will express my desire on how I wish everything to be handled."

(LF00117).

D. CONSTRUCTION OF THE AMENDMENT

The November 1, 2002, writing was not brought to the attention of Appellants until April 2011. (TR00160-61). Appellants contend that Decedent's writing on November 1, 2002, was an amendment to the Trust. (LF0084-92). Conversely, Respondents contended at trial that the November 1, 2002, writing was not a valid amendment to the Trust, but if found to be a valid amendment, Respondents argued that it was conditional upon Decedent's demise going to or coming back from Phoenix, Arizona on or about November 1, 2002. (LF0074-83; Appendix Exh. 2).

On November 1, 2002, Decedent and Mrs. Conklin traveled by car from their home in Kirksville, Missouri to Kansas City, Missouri to board an airplane to Phoenix, Arizona. (TR007, 033). The purpose of Decedent and Mrs. Conklin's trip was to deliver Decedent's mother's car from Arizona to Iowa. (TR0033). Decedent and Mrs. Conklin were then "driving straight back" the following day. (TR0034).

E. ADMISSION OF EXTRINSIC EVIDENCE OF SETTLOR'S INTENT AT TRIAL

Over repeated and continuing objections by counsel for Appellants throughout the trial, the trial court permitted Respondents to adduce extrinsic evidence concerning Decedent's alleged intent in preparing the November 1, 2002, writing through hearsay statements of Decedent. (TR0026, 27).

Respondents' first witness was attorney Kenneth Conklin ("Kenneth"), the older brother of Decedent. (TR0013). Over objection of the Appellants, Kenneth Conklin was permitted to testify as to a conversation with Decedent in Phoenix, Arizona on November 1, 2002,, as follows: "When we started out, 'he said' Jo -- we were no sooner out of the driveway than Jo started complaining about the -- that -- that there -- what if we were killed? 'He said', I didn't intend to listen to 2,000 miles of bitching. 'So he said', I pulled over, stuck her behind the wheel. 'And he said,' 'I wrote out - -.'" (TR0034). This hearsay testimony was in direct conflict with that of Mrs. Conklin, who testified that Decedent did not "ever operate that motor vehicle on that trip"; Mrs. Conklin testified that she drove the entire trip, from her residence to Kansas City. (TR0033). Mrs. Conklin also denied that any conversation between her and the Decedent occurred regarding their death on the trip. (LF0135)(testimony that she did not force Dr. Conklin to write the amendment).

Despite the foregoing exchange that Kenneth claims occurred between he and Decedent, Kenneth testified that Decedent told him "very little about the document" when they were on the deck of his mother's home. (TR0036). Kenneth testified that he had no knowledge of the contents of the writing. (TR0051). Kenneth claimed that he told Decedent that this writing was not

something Decedent would normally do, and in response to this, Decedent replied “What are the odds of me -- of this -- of me being -- of us being killed -- of us being killed? And he said ‘A million to one.’ And that pretty much was the end of that particular conversation.” (TR0036).

Kenneth testified that approximately one week later, after Decedent returned home, Kenneth told Decedent that Decedent had “dodged a bullet.” (TR0036). Per Kenneth’s testimony, Decedent responded, “Well, what did I tell you? The odds were a million to one. It's over and done with.” (TR0037).

Kenneth was also permitted to testify that sometime after November, 2002, he and Decedent continued to discuss estate planning issues. Kenneth testified: “Keith had a major concern from the day he met Jo – he said to me so many times, ‘She’s a financial disaster.’” (TR0040). Kenneth testified further that during these discussions, Decedent “had a real concern how he could provide for Jo without -- without disturbing anything and making sure that she was comfortable.” (TR0041). Per Kenneth’s testimony, Decedent believed “that putting assets in her [Mrs. Conklin's] name was the best way to do that.” (TR0041). Kenneth testified that in the month prior to Decedent’s death, he and Decedent again discussed estate planning matters and Decedent told Kenneth that he had protected Mrs. Conklin and she was to get “near \$1,000,000.00 worth of assets.” (TR0054).

Kenneth testified that Decedent was a very successful person and businessman; that he “was happy at his station in life”; he “was worth a great deal of wealth upon his death”; and that he “was a strong-willed individual.” (TR0052-53). Per Kenneth, Decedent was smart enough to know the language of the Trust, he knew how to deal with his assets, and he was competent and of sound mind on November 1, 2002. (TR0054). Kenneth testified that Decedent was “fairly close” to David and Alisha. (TR0041). Additionally, Kenneth testified that Decedent had a “very close” relationship with Respondents. (TR0043).

Over objection of counsel for the Appellants, Respondents were also permitted to adduce testimony from Adam Davis (“Adam”), a friend and former employee of Decedent, as to events involving Decedent and Mrs. Conklin before they left for their trip to Phoenix, Arizona. (TR0059). Adam testified that on the evening before the trip, Decedent drafted a letter on a surgery table in his clinic; the letter was referred to by Decedent as the “shutting Jo up” paper. (TR0062). Adam testified further: “I threw the paper away at the end of the surgery.” Per Adam’s trial testimony, he threw the letter away because “it was just trash.” (TR0061-62).

Adam acknowledged that Decedent did not talk to him about the November 1, 2002, writing. (TR0064). Adam also testified that Decedent was

“competent” and of “sound mind” on October 31, 2002, the night before the trip to Arizona; he further testified that Decedent “was a very good businessman”; that Decedent “knew what he was doing with his assets”; that he “was a very good money manager”; that he “obtained his assets on his own”; he “did everything on his own”; and he “was a very strong-willed individual.” (TR0065). When asked “It was Keith’s way, wasn’t it Adam,” Adam responded, “His way or no way.” (TR0064-65). Adam also acknowledged that he was not in the vehicle with Decedent and Mrs. Conklin on November 1, 2002, when they left for their trip, that he was not on the plane with them and that he did not recall ever speaking to Decedent on November 1, 2002. (TR0063). Adam further claimed that Decedent contacted an attorney in Columbia, Missouri sometime in 2004, 2005 or 2006, but that Decedent told Mrs. Conklin that he was going to see a dentist rather than an attorney. (TR0060-61). Adam stated that Decedent gave him an “idea” of why Decedent “was going to see a lawyer in Columbia,” which he believed to be “for his planning of his estate.” (TR0061).

Over objection of counsel for the Appellants, Respondents were also allowed to adduce evidence from Ronald Conklin, the younger brother of Decedent, as to alleged comments made by Decedent after Decedent and Mrs. Conklin returned from their trip from Phoenix. (TR0071). Ronald testified

that he never saw the November 1, 2002, writing, but that he was involved in a conversation with Decedent about it. (TR0072). Ronald testified further: “My brother has testified what was said during a family reunion that the reason that he wrote this, he wanted some peace and quiet. And the only way he was going to have it is to fill out a document that Jo insisted on. And so he wrote that so he could have peace and quiet on the trip out and back from Arizona.” (TR0072).

On cross-examination, Ronald admitted that Decedent never told him of the contents of the November 1, 2002, writing, nor did he ever see the November 1, 2002, writing. (TR0073). In fact, the day of trial was the first time Ronald ever saw the November 1, 2002, writing. (TR0073). Ronald was asked in cross-examination if there was any reason that he could “give the court that he [Decedent] couldn’t have destroyed [the November 1, 2002, writing] in the ensuing ... years while he was alive.” (TR0066-67). Ronald testified, “He [Decedent] probably thought like I think and everybody else that he didn’t have to destroy it. It was conditional.” (TR0077). Ronald’s testimony was offered despite the fact that the “first time” he saw the writing was “just a few minutes” before he testified. (TR0074).

Ronald testified that Decedent was “very close” to Respondents and that he loved them. (TR0072). When asked about the relationship of Decedent

with the Appellants, Ronald testified: "I can't really say whether I could classify it as saying mediocre, warm. I mean, it was nothing like what he had with his daughters; that's for sure." (TR0072).

Additionally, Ronald testified that pursuant to conversations he had with Decedent, that Decedent wanted Ronald to take possession of the guns upon Decedent's death. (TR0076). Ronald further testified that Cari and Carli requested Ronald to take possession of the guns and that he in fact did. (TR0076).

Over objection of counsel for the Appellants, Carli, a law professor at the University of Missouri-Columbia, was permitted to testify as to her knowledge of Decedent's intent when preparing the November 1, 2002, writing. (TR00113). Carli testified at trial that her law license in the state of Arkansas was placed on "inactive status." (TR00113). Carli had previously asserted in her discovery deposition attorney-client privilege in response to questions by Appellants' counsel, at a time when her license was on "inactive status." (TR0096-97).

Carli testified at trial that while she was in law school she received a telephone call from either Decedent or Mrs. Conklin; the substance of the telephone communication was: "If anything happens to us on the trip to Phoenix, there's *something* in the glove box for you." (TR0080) (*emphasis*

added). Carli later testified that Decedent “told me that he wrote it in case something happened on the way to Phoenix and they didn't make it back.” (TR00111).

Carli also testified that she saw the writing in December 2003 when she and Mrs. Conklin were cleaning out the vehicle that Decedent and Mrs. Conklin used in their trip to Kansas City on November 1, 2002. Carli testified that Mrs. Conklin “came into the house with a bunch of stuff that she was cleaning out to throw away. And she said, ‘Hey, you’ll never believe what I found in the glove box.’ And I said what? And she said, ‘That letter from the trip to Phoenix.’” Carli further testified that the envelope containing the November 1, 2002, writing had not been opened and Carli declined an invitation to open the letter. (TR0081).

On cross-examination, Carli acknowledged that she had previously testified at a discovery deposition on March 29, 2012, that she received the alleged telephone call from Decedent or Mrs. Conklin on November 1, 2002, while they “were in the car...when they were on the way to Phoenix.” (TR00102-03). Between the discovery deposition and the trial, counsel for Appellants procured the cell phone records of Decedent and Mrs. Conklin, which were marked as Appellants’ Exhibit 5 and 6 and admitted in to evidence. (TR00112). Carli acknowledged in cross-examination that the cell

phone records “show no phone call” to her. (TR00102). This question and answer followed:

“Q. So we know that Jo--neither Jo nor your father called you from a cell phone, don’t we?”

A. On that day, it does not show a call to—our Virginia would probably be 434, I think. It does not show that.”

(TR00102).

Carli also acknowledged in cross-examination that the last paragraph of the November 1, 2002, writing corresponded with the “No-Contest Clause” of the Trust. (TR00109). The last paragraph of the November 1, 2002, writing states:

“Above all, I wish to have no fighting or bickering between the four of you – you will all do well in life if you crawl before you walk, use your common sense, plan, manage and be patient.”

(LF0073).

Carli testified that Decedent was a “very good businessman” who “accumulated a lot of assets in his lifetime”; she testified that Decedent was a “strong-willed man” and “he would set aside what he wanted for the needs of others frequently.” (TR00110-11).

Additionally, Carli testified that Decedent “had always told us to take the guns to Uncle Ron when he died.” (TR0088). After Decedent’s death, the guns were split; “Uncle Ron came to take our portion because that’s what Dad [Decedent] had always told us to do with them.” (TR0089).

F. REBUTTAL EVIDENCE

In rebuttal, Appellants presented testimony from Mrs. Conklin. Mrs. Conklin testified that she began to live with Decedent in May 1990 when David was eleven-years old and Alisha was five-years old. (TR00123). Mrs. Conklin testified that David and Decedent had a “good” relationship, “as close to a father and son as possibly you could get under the circumstances.” (TR00124-25). David’s biological father was not involved in his life; Decedent was David’s “only father figure.” (TR00125). Decedent entrusted David with keys to the vehicles, Decedent’s residence and veterinary clinic and with combinations to Decedent’s safes. (TR00126). Mrs. Conklin testified that Decedent and Alisha got along “really well”; Decedent “teased” Alisha and gave her nicknames. (TR00134).

Mrs. Conklin denied in testimony that she forced Decedent to prepare the November 1, 2002, writing.

Q. Jo, prior to Keith writing the November 1, 2002, writing, did you force him to write that?

A. No.

Q. Were you able to force him to do anything?

A. Oh, no.

Q. During your entire relationship?

A. I - - I didn't want to.

Q. Why not?

A. He just had a good head on his shoulders. He made good decisions. He was the head of the household.

(TR00135).

Mrs. Conklin testified that before going to Phoenix, she was not "bitching" at Decedent about his estate planning; she denied that she ever "bitched" to him about his estate planning. (TR00135).

Mrs. Conklin testified that Decedent had a "ritual" in the way that he opened his mail. The manner in which he opened his mail was consistent with the way that Exhibit 3, the envelope that contained the November 1, 2002, writing, was opened. (TR00130). David also testified in rebuttal; David testified that he and Decedent had "a very strong father-son relationship" at the time of Decedent's death. (TR00143). He further stated, "Keith treated me like a son. There's no question about it. He helped me out as a son. He called

me his son. And I strive to be the father that he didn't have to be towards me, I mean, because he - - he was. And that - - from ten years of age, that was my father figure." (TR00143).

David testified that he "never had a relationship" with his biological father. (TR00143-44).

"Q. So is Keith the only adult male that's been -- was the majority part of your life before he passed away?

A. Yes."

(TR00144).

David further testified that Decedent "entrusted" him with keys to his house, clinic, and gates to his properties, as well as access to both his home safe and clinic safe. (TR00144).

On the day of his death, Decedent became ill and attempted to contact Mrs. Conklin but was unsuccessful. Decedent then called David on his cell phone and asked David to come get him at a farm he owned, known as the Glidewell Farm, because he was sick. (TR00144). David drove out to the Glidewell farm, put Decedent in his vehicle, and "headed back to town." (TR00145). David eventually met up with Mrs. Conklin, transferred Decedent

to her vehicle, and Mrs. Conklin took Decedent to the hospital where he later died. (TR00144-45).

David testified that Carli “took a big lead” in making funeral arrangements. (TR00146). Carli asked David’s best friend Kevin, who raised “white birds and doves [sic],” to bring them to the grave site and to say a couple of words; Carli then requested that Kevin invite David “forward as Keith’s only son and release these two birds into the air simultaneously.” (TR00146).

David testified that he had no knowledge of the November 1, 2002, writing until April 2011. (TR00160). David further testified that he later learned that Cari had discovered the November 1, 2002, writing on the day after Decedent's death but that she did not tell anyone about it. (TR00161).

Cari was not called in Respondent’s case-in-chief. In rebuttal, Appellants called Cari to the stand. Cari testified that she had knowledge of and actually saw the November 1, 2002, writing prior to April 2011. (TR00162). Cari testified that on the day after Decedent’s death, she “was at the house at 406 Suburban Drive.” (TR00162). Cari further testified: “Jo handed me a hanging file folder with a bunch of papers and information in it. She had asked me to call the life insurance company. And I had [sic] flipped through to find the information, and there was a letter there with my dad's

handwriting.” (TR00162). Cari acknowledged that she testified in her deposition that the envelope containing the November 2002 writing was addressed to all four children; she testified at trial that after “having seen the letter during my deposition or afterwards” the envelope was only addressed to her. (TR00163). The relevant testimony at trial is as follows:

“Q. And you pulled the paper out and looked at it?

A. I did.

Q. And you put it back in the envelope and stuck it back in the papers; isn’t that right?

A. I did.

Q. And after you did that, who did you tell about the letter?

A. I didn’t tell anybody; I forgot all about it.

Q. But at the time, this was a letter that had – was clearly in your father’s handwriting; isn’t that correct?

A. It was.

Q. And it was addressed to not only you, but to Carli, your sister, to David, and Alisha; isn’t that correct?

A. The writing, it did, yes.

Q. And you felt, apparently – certainly correct me if I’m wrong – that they did not need to see this writing, did they?

A. I did not feel they did.”

(TR00163-64).

Cari acknowledged in her testimony that Decedent “had not destroyed” the November 1, 2002, writing. (TR00165). Cari testified that the November 1, 2002, writing was “familiar” to her; she stated, “I recognized it when I read it. And it was consistent with a previous conversation with my father.” (TR00165).

At trial, Cari testified that she could not recall if the envelope was open or not when she found it the day after her father died; however at her deposition she admitted, “I looked at it. It was already open. But I flipped it over, I saw it was open. I opened the top. I saw the name of it, like, our names on it. I saw what it was. I read the first sentence, and I thought, ‘I didn't realize this was around.’ And I closed it back up. And I went on -- I went back and found what Jo had asked me to find.” (TR00170).

Cari also testified that she received a telephone call from Decedent on November 1, 2002. (TR00169). Like her sister, at her discovery deposition, Cari testified that the phone call originated from either her father's cell phone or Mrs. Conklin's cell phone. (TR00165). In her deposition, Cari testified that she knew the call came from Decedent's cell phone because the call had

“popped up” on her phone as Keith. (TR00165). Of course, as above stated, Plaintiffs’ Exhibits 5 and 6 show that there was no phone call from either Decedent’s or Mrs. Conklin’s cell phone to Cari or Carli on November 1, 2002,. (See Plaintiffs’ Exhibits 5 and 6).

Counsel for Respondents had no questions for Cari in cross-examination. (TR00171).

Alisha testified that she is the natural daughter of Mrs. Conklin and the step-daughter of Decedent. (TR00171). In discussing her relationship with Decedent, Alisha testified that she met Decedent when she was five years of age and that she could not “recall a bad time in that relationship.” (TR00172). Alisha further testified: “He treated me like a daughter; he called me his daughter.” (TR00172). She also testified: “I would describe it as awesome and [he] treated me more than just a stepdaughter, more than what he had to.” (TR00172). Alisha testified that Decedent would introduce her as his daughter; “when he was introducing me, ‘this is our daughter. This is my daughter.’” (TR00172).

G. THE ERRANT JUDGMENT

After hearing the evidence, Judge Karl DeMarce took the matter under advisement. On May 7, 2012, the Court entered its *Judgment*, including “*Findings of Fact*” and its “*Discussion and Conclusions of Law.*” (LF0093-126).

In the court's *Judgment*, Judge DeMarce concluded that the November 1, 2002, writing (hereinafter the "Amendment"), created by Decedent was in fact a valid amendment to the K.R. Conklin Living Trust. (LF00117). Upon making this finding, the Court was left to determine whether or not the Amendment was conditional in nature. The Court held that the Amendment was "conditioned upon" Decedent and Mrs. Conklin meeting their "demise either going to or coming back from Phoenix" in November 2002. (LF00118-19).

In its holding, the Court stated: "Taken together, all these facts lead the Court to firmly conclude that although the language of the 2002 writing itself is ambiguous, Decedent's intent is not. Decedent intended the 2002 writing to be contingent in nature, conditioned upon the occurrence that both 'Jo and I have met our demise either going to or coming back from Phoenix.' That condition never having been satisfied, the 2002 writing never became, and is not now, operative as an amendment to the K.R. Conklin Living Trust." (LF00121).

This appeal followed.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE RESPONDENTS FAILED TO SUSTAIN THEIR BURDEN OF PRODUCING SUBSTANTIAL EVIDENCE THAT DECEDENT INTENDED THE NOVEMBER 1, 2002, AMENDMENT TO BE EXPRESSLY CONDITIONED UPON DECEDENT MEETING HIS DEMISE, IN THAT THE LANGUAGE RELIED ON BY THE TRIAL COURT TO FIND A CONDITION WAS MERELY AN EXPRESSION OF THE DECEDENT'S MOTIVATION AND DID NOT ARTICULATE A CONDITION.

Helmer v. Voss, 646 S.W.2d 738 (Mo. banc 1983)

Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 443 (Mo. App. W.D. 2004)

Blue Ridge Bank & Trust Co. v McFall, 207 S.W.3d 149 (Mo. Ct. App. W.D. 2006)

II. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE RESPONDENTS FAILED TO SUSTAIN THEIR BURDEN OF PRODUCING SUBSTANTIAL EVIDENCE THAT DECEDENT INTENDED THE NOVEMBER 1, 2002, AMENDMENT TO BE EXPRESSLY CONDITIONED UPON DECEDENT MEETING HIS DEMISE, IN THAT THE LANGUAGE RELIED ON BY THE TRIAL COURT TO FIND A CONDITION FAILED TO CONSIDER THE ENTIRETY OF THE NOVEMBER 1, 2002, AMENDMENT BUT INSTEAD RELIED ONLY ON TWO SENTENCES FROM THE THREE PAGE AMENDMENT.

Eaton v. Brown, 193 U.S. 411, 414 (1904)

Helmer v. Voss, 646 S.W.2d 738 (Mo. banc 1983)

Ferguson v. Ferguson, 121 Tex. 119, 45 S.W.2d 1096 (1931)

Determination Whether Will Is Absolute Or Conditional 1

A.L.R.3d 1048 (1965, with Cuml. Suppl.)

III. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE IT FAILED TO CONSIDER THE FACTORS SET OUT IN THE CASE IT RELIED UPON TO ADMIT EXTRINSIC EVIDENCE, IN THAT HAD IT PROPERLY APPLIED THESE FACTORS THE TRUST AMENDMENT WOULD HAVE BEEN FOUND UNCONDITIONAL.

Helmer v. Voss, 646 S.W.2d 738 (Mo. banc 1983)

Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434 (Mo. App. W.D. 2004)

Breckner v. Prestwood, 600 S.W.2d 52 (Mo. App. E.D. 1980)

In re Desmond's Estate, 223 Cal. App. 2d 211 (Cal. 1st DCA 1963)

IV. THE TRIAL COURT ERRED IN ADMITTING EXTRINSIC EVIDENCE OF ORAL STATEMENTS MADE BY DECEDENT BEFORE, ON AND AFTER NOVEMBER 1, 2002,, TO DETERMINE WHETHER DECEDENT INTENDED TO MAKE THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST, CONDITIONAL OR ABSOLUTE, BECAUSE SAID EXTRINSIC EVIDENCE WAS INADMISSIBLE AS A MATTER OF LAW, IN THAT MISSOURI LAW DOES NOT PERMIT THE

ADMISSION OF ORAL STATEMENTS MADE BY A DECEDENT TO DETERMINE DECEDENT'S INTENT AS TO THE ISSUE OF CONDITIONALITY.

David A. Thomas, Restatements Relating To Property: Why Lawyers Don't Really Care, 38 REAL PROP. PROB. & TR. J. 655 (2004)

Breckner v. Prestwood, 600 S.W.2d 52 (Mo. App. E.D. 1980)

State ex rel. Nothum v. Walsh, 380 S.W.3d 557 (Mo. Banc 2012)

Greenbriar Hills Country Club v. Dir. of Revenue, 47 S.W.3d 346, 352 (Mo. banc 2001)

§ 456.1-103(27), RSMo. (2012)

§ 491.010 RSMo. (2012)

V. THE TRIAL COURT ERRED IN AUTHORIZING RESPONDENTS TO PAY THEIR ATTORNEYS' FEES AND COSTS FROM THE CORPUS OF THE K.R. CONKLIN LIVING TRUST BECAUSE THE RESPONDENTS WERE NOT DEFENDING THE TRUST BUT INSTEAD WERE DEFENDING THEIR RIGHTS AS BENEFICIARIES OF THE TRUST AND ATTORNEY FEES ARE ONLY RECOVERABLE WHEN LITIGANTS ARE DEFENDING THE TRUST.

Trautz v. Lemp, 72 S.W.2d 104 (Mo. 1934)

St. Louis Union Trust Co. v. Conant, 499 S.W.2d 761 (Mo. banc
1973)

Hamerstrom v. Commerce Bank of Kansas City, N.A., 808
S.W.2d 434, 438-39 (Mo. App. W.D. 1991)

§ 456.10-1004, RSMo. (2012)

VI. THE TRIAL COURT ERRED IN FINDING THAT RESPONDENTS DID NOT VIOLATE THE “NO-CONTEST CLAUSE” OF THE K.R. CONKLIN LIVING TRUST IN DEFENDING THIS CAUSE, BECAUSE RESPONDENTS ACTED IN CONJUNCTION WITH EACH OTHER AND CONTESTED IN THEIR PLEADINGS AND EVIDENCE THE VALIDITY OF THE NOVEMBER 1, 2002, WRITING AS A VALID AMENDMENT TO THE TRUST.

Rossi v. Davis, 133 S.W.2d 363, 373 (Mo. 1939)

Hillyard v. Leonard, 391 S.W.2d 211, 224 (Mo. 1965)

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE RESPONDENTS FAILED TO SUSTAIN THEIR BURDEN OF PRODUCING SUBSTANTIAL EVIDENCE THAT DECEDENT INTENDED THE NOVEMBER 1, 2002, AMENDMENT TO BE EXPRESSLY CONDITIONED UPON DECEDENT MEETING HIS DEMISE, IN THAT THE LANGUAGE RELIED ON BY THE TRIAL COURT TO FIND A CONDITION WAS MERELY AN EXPRESSION OF THE DECEDENT'S MOTIVATION AND DID NOT ARTICULATE A CONDITION.

A. STANDARD OF REVIEW

1. The Case Law

It is well settled in Missouri law that the principles of interpreting a will are applicable in interpreting a trust. *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 443 (Mo. App. W.D. 2004) and the standard of review in this case is governed by that case and *Helmer v. Voss*, 646 S.W.2d 738 (Mo. banc 1983).

The standard of review in declaratory judgment cases is the same as in any other court-tried case. The court will affirm the decision of the trial court “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Commerce Bank N.A.* at 442 (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). “Questions of law are matters reserved for *de novo* review by the appellate court, and we therefore give no deference to the trial court's judgment in such matter.” *Id.*

In *Helmer*, Judge Blackmar, writing for the Missouri Supreme Court, summarized the standard of review as follows:

“We reach our conclusion almost entirely on the basis of our reading of the will. Factual matters play a very small part. When the factual disputes are minimal, furthermore, an appellate court is as capable of interpreting and construing a written instrument as is the trial court.”

Helmer at 742 (citing *Willis v. Robinson*, 237 S.W.2d 1030, 1037 (1922); *Zaharopoulos v. Sprenger*, 605 S.W.2d 143, 146 (Mo. App. E.D. 1980)).

2. This Court's Analytical Approach

This Court must first read and construe the language of the trust instrument, before analyzing any of the issues regarding extrinsic evidence. *Helmer* at 742. The settlor of the trust at issue here spent time and money in obtaining a trust instrument to provide for his loved ones. He is entitled to have his words construed in accord with the settled law applicable at the time the amendment was drafted. *Id.*

This rule of construction is predicated on the law's concern for predictability and certainty. When a settlor prepares a trust according to established formalities, that settlor expects that the language he has employed will mean the same thing fifty years from now as it does today. *Atwater v. Meeks*, 508 P.2d 866, 873 (Kan. 1973) ("If courts should indulge an unlimited latitude of forming conjectures on wills by continually placing themselves in the positions of the testator to ascertain his intentions, instead of attending to their grammatical and legal construction, the consequences must be endless litigation."); *In re Estate of Campbell*, 655 N.Y.S.2d 913, 920 (N.Y. Surr. Ct. 1997). ("A Will is a document of signal importance, expressive of an individual's last wishes regarding the disposition of the property he has worked a lifetime to accumulate. A testator has a right to expect . . . that only true expressions of the wishes of an individual possessing testamentary

capacity and executed in accordance with the proper statutory formalities will be given effect by the courts of this state.”).

The three questions posed by Respondents in their Application for Transfer to this Court deal exclusively with the admission of extrinsic evidence to remove ambiguity. However, as noted *infra*, footnote 1, p. 39; the Respondents agreed that the document was not ambiguous in their brief to the Missouri Court of Appeals. Thus, before this Court can reach any of the issues in this case dealing with extrinsic evidence, this Court must first determine, from its own construction and interpretation of the Amendment, and using Missouri’s longstanding rules of construction for trusts, whether the language used in the November 1, 2002, writing is in fact a latent ambiguity of the type that requires the admission of extrinsic evidence. If so, then and only then should the Court address the issue of extrinsic evidence.

B. BURDEN OF PROOF

The trial court found that the November 1, 2002, writing, created by Decedent was a valid amendment to the K.R. Conklin Living Trust dated October 24, 1996. (LF0117). The trial court added that this amendment was “subject to its own limitations.” In so finding, the trial court should have found that Appellants were now beneficiaries under the Trust and the Amendment

would control distribution of Decedent's assets that were still a part of the corpus of the Trust. (LF00114-17). Instead, the Trial Court made a finding that:

The heart of this case turns upon the interpretation of the following language in the 2002 writing:

If you are reading this it means that Jo and I have met our demise either going to or coming back from Phoenix.

The trust has not been updated for several years so I will express my desire on how I wish everything to be handled."

(LF00117).

At trial, Appellants contended that the Amendment is absolute on its face and is not conditional in nature. Respondents contended the 2002 writing was not a valid Trust Amendment, but if so held, that it was conditional and never became operational because Decedent returned from his trip to Phoenix, Arizona and lived for seven (7) more years.

Once the court found that the November 1, 2002, writing was a valid amendment to the Trust, the burden of proving that the Amendment was conditional in nature shifted to Respondents. The shifting of the burden of proof from the proponent of a trust to the opponent of a trust is similar to the shifting of the burden of proof in a will contest. See *Wright v. Kenney*, 746

S.W.2d 626, 631 (Mo. App. S.D. 1988). Respondents were required to come forward with substantial evidence that Decedent intended the Amendment to be conditional in nature. “Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case. *Houston v. Crider*, 317 S.W.3d 178 (Mo. App. S.D. 2010) (citing *Williams v. Daus*, 114 S.W.3d 351 (Mo. App. S.D. 2003)).

C. THE LANGUAGE IS NOT CONDITIONAL

Generally speaking, conditions are created by statements that show an intention to effect a transfer of property only when a subsequent event or action occurs. The classic statement of a condition is the “if-then” statement: *If A happens, then B takes under the trust*. Inherent in a conditional statement is a specific requirement that the requisite condition be met before the condition applies. The language employed by Dr. Conklin in his trust amendment does not use an if-then construction. Neither does it use the other accepted terms to describe a condition (upon condition that, upon express condition that, provided that ...) See, generally, *DeHart v. Ritenour School District*, 663 S.W.2d 332 (Mo. App. E.D. 1983)(describing conditions subsequent). Read in context, the language explains one thing: why any of the four persons to whom the document is addressed is likely to have occasion to read the document. The language does not condition the application of the

contents to the narrow situation where the author and his spouse die on the trip. This is apparent from the language used:

"Cari, Carli, David & Alisha,

Am writing this in the car on the way to KC, MO so excuse the penmanship.

If you are reading this it means that Jo and I have met our demise either going to or coming back from Phoenix.

The trust has not been updated for several years so I will express my desire on how I wish everything to be handled."

(LF0117)

The key language overlooked by the trial court is that the second sentence only explains why someone might be reading the document. It does not express a condition. It does not purport to make the trust amendment effective only if both Dr. and Mrs. Conklin die in a common accident, but rather, says that this would be the likely reason someone would be reading the document. And, as the Court of Appeals noted, "the conditional nature of the 'if you are reading this' language is not used in the context of distributing the Trust's assets.'" *Rouner v. Wise*, WD75305 (July 30, 2013) slip op. at 12.

Thus, there is no causal connection between the trip and the disposition of property.

The lack of an express condition is also obvious from the choice of words used as well as that the next sentence acknowledges that the trust has not been updated for several years, and the settlor is now expressing his wish as to how things should be handled. What is noteworthy is what is **not** said in these sentences: the author omits that these amendments should only be applied in the event of a joint death on the referenced trip, or that these updates are in fact conditional.

Put succinctly, while there is an “if” statement in the second sentence, there is no “then” statement. Nothing is conditioned on the joint demise of the settlor and his wife. Rather, this statement explains, much like the first sentence does, the fact that it was being written in the car on the way to Kansas City, and was motivated by the fact that people sometimes meet their death on trips to far away places.

This case can be summarily retransferred to the Court of Appeals because the language of the trust instrument simply fails to create a condition. The Court of Appeals analysis was correct. Without some change in how the document is to be interpreted or distributions affected by a joint death, there simply is no conditional language and the trial court did not have any

substantial basis for its holding. This is an error of law that this Court reviews *de novo*.

Missouri case law supports such an unconditional construction. In *Helmer v. Voss*, 646 S.W.2d 738 (Mo. banc 1983) this Court decided the question of conditional or motivational language in a will. The *Helmer* case involved a mutual Last Will and Testament of a husband and wife. After declaring in Item I that all debts be paid, Item II of the *Helmer* will said this:

All of our property of any kind and character is at the present time so arranged that it will pass unto the other party in the event of the death of one of the parties herein. *Therefore, the purpose of this will is to devise and bequeath the property of the parties in the event of a common disaster to both John Robert Greener and Cecile M. Greener.*

Id. at 739. (italics in original). Items III, IV and V also contained language that appeared to limit the operation to a condition that the testators meet their demise in a common disaster. The remaining Items did not contain such language and the bequests in those Items were unconditional.

The *Helmer* contestants sought to declare the entire will invalid so as to take under the law of intestate succession. This Court construed the language in Item II as describing the purpose for making the will. *Id.* at 744.

The trial court had determined that the entire will was conditioned upon the testators perishing in a common disaster and was therefore totally ineffective. The Court of Appeals reversed the trial court's decision and found that the will was not conditioned upon the testators perishing in a common disaster. This Court upheld the Court of Appeals' ruling:

It is perfectly possible to execute a will which has no effect at all unless a specified condition is performed or occurs. If such condition is expressed, it will be enforced. *Unless the language is compelling, however, courts hesitate to construe language of purpose or occasion for making a will as establishing a condition precedent to the very effectiveness of the will.* Courts, furthermore, are disposed to adopt any reasonable construction which will avoid intestacy.

Id. at 742 (*emphasis added*).

In analyzing the disputed Item II, the Supreme Court of Missouri noted that “[l]egion cases hold that a will must be construed in its entirety and recognize the possibility that a will may contain provisions which are at war with each other, so that all cannot be given full effect.” *Id.* at 744.

Even though the language of the will appeared to make it dependent on a common disaster, this Court in *Helmer* held, “we conclude that Item II did not have the effect of making the entire will conditional of the death of the testators in a common disaster.” *Id.* The bequests conditioned on joint demise failed, and those that were unconditional were given effect. *Id.*

Contrast the rather clear language in Item II of *Helmer* with the language used in the present instrument. Here decedent wrote, “*If you are reading this it means that Jo and I have met our demise either going to or coming back from Phoenix.*” (LF00117). There are no words of condition; the language is substantially less direct than that held inadequate in *Helmer*.

Blue Ridge Bank & Trust Co. v McFall, 207 S.W.3d 149 (Mo. Ct. App. W.D. 2006) is also instructive. In *McFall*, the testator set up testamentary trusts that were nearly identical in how they distributed the income and principal. The contestant’s mother had a life estate in the income but had no power to invade principal. The principal was to be held for distribution to the son Richard if he survived to age 35. If Richard did not survive to age 35, the principal was to benefit any issue of Richard. If Richard left no issue, it was to go to the respective heirs at law of the couple. Richard lived to age 35, but predeceased his mother Joan in 2002. In 2003, Joan died and the respective heirs at law sought to have the will construed as impliedly requiring Richard

to survive Joan in order to take under the wills. The Court of Appeals, following the canons of construction set out above, and denied the will contest and construed the language of the will in accord with its plain meaning:

In any event, in interpreting the trust, the court must look to the language of the instrument and *not* to the results to be achieved. *Commerce Bank*, 141 S.W.3d at 445; *Estate of Straube*, 990 S.W.2d at 44. Courts should not guess what the settlor might have done under certain conditions if not expressed in his will or trust. *Gardner*, 69 S.W.2d at 949; *Commerce Bank*, 141 S.W.3d at 443. Testators and settlors generally do not anticipate every potential future scenario that could affect the degree of their pleasure in the disposition. It is virtually impossible, for instance, to predict that a beneficiary might acquire a gambling addiction or marry a spendthrift, or go to prison, or leave an estate to an organization that the testator would have abominated. The courts have no right to make a new will for the testator. Courts are to ascertain what the testator meant from the words actually used. *Commerce Bank*, 141 S.W.3d at 444. Courts cannot interpret a will to make what appears to them to be a more equitable distribution. *Waldron*, 406 S.W.2d at 59; *First Nat'l Bank of Kansas City v.*

Stevenson, 293 S.W.2d 362, 366 (Mo.1956). While the results here may *seem* unanticipated because Joan survived her son Richard by sixteen years, we cannot agree that the documents show that Ruby and Leo did not contemplate that Richard's estate could receive the funds at Joan's death if he reached thirty-five and then predeceased her.

Id. at 161 (italics in original). Even though it might have been reasonable to construe the wills to effect the supposed intent of the settlor, the Court refused because the condition of survivorship was not expressly stated. In this case, there is no condition expressly stating that the amendment is to take effect only if death occurs on the way to or from Phoenix. The trial court erred to the extent it held otherwise.

This Court must find the intent from within the four corners of the document. *Id.* The Respondents here have agreed there is no ambiguity in the provisions at issue¹. Where the language is clear and has well-defined

¹ See Respondent's brief before the Court of Appeals at 28: "Respondents have never felt that the document was ambiguous." *Id.* at 11: "Respondents asserted that this language, at least as to the conditions set forth therein, was unambiguous."

meaning, it must stand as written, *First Nat'l Bank of Kansas City v. Hyde*, 363 S.W.2d 647, 653 (Mo.1962); *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 443 (Mo.App.2004). A testator or settlor is presumed to know and intend the legal effect of the language he uses. *Hyde*, 363 S.W.2d at 653; *Theodore Short Trust v. Fuller*, 7 S.W.3d 482, 488 (Mo. App. 1999). Unless the context of a trust indicates a different meaning of a word, the word will be interpreted according to its plain, ordinary meaning. *Gardner v. Vanlandingham*, 334 Mo. 1054, 69 S.W.2d 947, 950 (1934); *Estate of Straube v. Barber*, 990 S.W.2d 40, 44-45 (Mo. App. 1999). If the language is clear, there is no need to look to rules of construction; the courts cannot rewrite an instrument using rules of construction. *Boone County Nat'l Bank v. Edson*, 760 S.W.2d 108, 111 (Mo. banc 1988); *Estate of Carter v. Carter*, 404 S.W.2d 693, 695 (Mo. 1966). This Court should either retransfer this case or reverse and remand.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE RESPONDENTS FAILED TO SUSTAIN THEIR BURDEN OF PRODUCING SUBSTANTIAL EVIDENCE THAT DECEDENT INTENDED THE NOVEMBER 1, 2002, AMENDMENT TO BE EXPRESSLY CONDITIONED UPON DECEDENT MEETING HIS DEMISE, IN THAT THE LANGUAGE RELIED ON BY THE TRIAL COURT TO FIND A CONDITION FAILED TO CONSIDER THE ENTIRETY OF THE NOVEMBER 1, 2002, AMENDMENT BUT INSTEAD RELIED ONLY ON TWO SENTENCES FROM THE THREE PAGE AMENDMENT.

A. STANDARD OF REVIEW AND CONSTRUCTION

Appellants incorporate the standards set out in Point I.

B. CONSTRUCTION OF THE NOVEMBER 1, 2002, AMENDMENT

The law in Missouri concerning the construction of wills and trusts is clear. The court must determine whether or not a will is conditional in nature from the will itself, when it is read as a whole. In construing a will, and thus a

trust, “a court may not make a new will, rewrite a will, attempt to make what may seem to be a more equitable distribution nor impart to the testator that which is not expressed in the will.... It is presumed that the testator knows the legal effect of the language he uses in a will.... The guide for the court in the construction of a will is the intent of the testator as gathered from the language from the will read as a whole....” *In re Welter's Estate*, 598 S.W.2d 618, 619 (Mo. App. S.D. 1980)(emphasis added). This is where the trial court erred. It considered only the first three sentences of the amendment, and not the amendment as a whole. In *Helmer* and all the cases decided before and since, intent was determined from the document as a whole. And when viewed in this context, the trial court’s error is manifest.

“Courts are not inclined to find a will conditional where it can be reasonably determined that the testator was merely expressing his inducement or reason for making the will.” *Eaton v. Brown*, 193 U.S. 411, 414 (1904). As this Court noted in *Helmer v. Voss*:

“It is perfectly possible to execute a will which has no effect at all unless a specified condition is performed or occurs. If such condition is expressed, it will be enforced. Unless the language is compelling, however, courts hesitate to construe language of purpose or occasion for making a will as establishing a condition

precedent to the very effectiveness of the will. Courts, furthermore, are disposed to adopt any reasonable construction which will avoid intestacy.”

Helmer, 646 S.W.2d at 742.

Based upon the foregoing, in determining whether or not the November 1, 2002, Amendment was conditioned upon the demise of Decedent on his trip to or from Phoenix, Arizona, the trial court needed to only look at the document itself.

The November 1, 2002, writing was created by Decedent while traveling from Kirksville, Missouri to Kansas City, Missouri, where he was to board an airplane and fly to Phoenix, Arizona. Between the time the original trust was settled in 1996 and the November 2002 date, numerous significant events had taken place in his life. Decedent and Mrs. Conklin began living together in May, 1990. When Decedent created his inter vivos Revocable Trust in October, 1996, he was unmarried and had only two children. Decedent and Mrs. Conklin married in April 2000. As a result of this marriage, Appellants became Decedent's step-children and objects of Decedent's estate. From October 24, 1996, to November 1, 2002, Decedent had not updated any of his estate planning documents, including the Trust. Thus, the first three sentences read in the context of the entire document show only the occasion

for making the amendment, not conditions upon which the amendment was based.

A reading of the November 1, 2002, Amendment, confirms the intent of Decedent. The Amendment is addressed to the four children: Cari, Carli, David, and Alisha². (LF0071, Appendix, Exh. 2). The third sentence of the Amendment states:

"The trust has not been updated for several years so I will express my desire on how I wish everything to be handled."

(Appendix, Exh. 2).

Throughout the remainder of the Amendment, Decedent addresses events that will take place in the years following November 1, 2002. For

² That the amendment was drafted and addressed to all four children is important. Had Dr. Conklin intended the amendment to take effect only upon the condition of his death during that trip, logic suggests he would have destroyed it upon his return rather than placing it with his important papers. Instead he left it addressed to all four children and placed it where it would be found in the event of his death. Had he intended to disinherit David and Alisha, there would have been no need to mention them in the amendment as the original trust made no provision for them at all.

example, Decedent outlines the payment of farms that is based upon yearly payments in the months of March and December. (Appendix, Exh. 2). These described payments begin on December 31, 2002, and end on December 31, 2005. (Exh. 2). If Decedent intended the Amendment to be operative only if he were to die on his trip to Phoenix, Arizona, Decedent would have had no need to discuss years of prospective annual payments on these farms.

The Amendment makes future distribution provisions for all four children. For example, near the end of the first page of the Amendment, Decedent wrote:

"After the farms are paid for I want David & Alisha to have the Apt at 710 S. First Street & Cari & Carli to have the Apt at 708 S. First St."

(LF0071).

In relation to the farm, known as the Glidewell Farm, Decedent further directed in the Amendment:

"I wish all four of you (Cari, Carli, David, Alisha) to have an undivided $\frac{1}{4}$ interest. Later in your lives you can all decide whether to pass it to your families or to sell."

(LF0072).

Moreover, in the November 1, 2002, Amendment, Decedent directed that;

“All of my personal tools I would like to have kept by any of you children or your spouse’s³ that will use them.”

(LF0073).

The word “*spouse’s*” is plural in the Amendment. Only Cari was married. Carli, David and Alisha were all single at the time of the execution. Decedent was obviously speaking into the future, beyond the few days of travel to and from Phoenix, Arizona, when speaking of multiple marriages of his children and step-children.

When read in its entirety, the Amendment makes distribution of Decedent's entire estate, including life insurance benefits. Decedent clearly understood the nature and extent of his estate and intended that all of his assets be distributed in accordance with the Amendment. The Amendment distributes both real and personal property.

Further, reading the Amendment as a whole clearly demonstrates that Decedent anticipated the Trust distribution might not occur for several years.

³ Although the use of the apostrophe suggests the possessive form of spouse, the context indicates the plural was the intended meaning.

He mentions future changes in marital status of the beneficiaries and future payment of student loans. These changes in circumstances are prospective and would certainly not be something Decedent expected to happen before he returned from his trip. There would be no reason to include them in an Amendment that would only take effect during the short period of time. To conclude otherwise is illogical and unreasonable.

Of further significance is that Decedent preserved the Amendment after he returned to Kirksville from Phoenix. It is clear from the evidence, as well as the holding of the trial court, that at some point in time after November 1, 2002, Decedent opened the envelope which contained the Amendment and that he was able to review the Amendment. (LF0101) If Decedent truly intended for the Amendment to only be operative if he perished on his trip going to or coming from Phoenix, then it is logical to assume that he would have destroyed the Amendment upon his safe return or when he later reviewed it. Yet, Decedent secured the Amendment with other papers that would need to be reviewed upon his death, e.g. life insurance papers. (LF0102)

The Amendment is absolute in its terms. The substantial and admissible evidence in this case supports a finding that the Amendment was unconditional and operative upon Decedent's death.

The impending journey of Decedent and Mrs. Conklin was clearly an occasion that was on his mind and an understandable inducement for modifying his trust. The fact that it had not been updated for several years - in fact, not since his marriage to Mrs. Conklin - supports the conclusion that the Amendment was unconditional. Decedent's original Trust provided for his "children" in 1996. His stepchildren were not beneficiaries under this original Trust. It is logical that in November 2002 David and Alisha were then the objects of his bounty, along with his own children. His desire to include them as beneficiaries is reasonable and logical, as their inclusion is a continuation of Decedent's original estate plan of providing for his "children."

Holding that the Amendment is conditional and inoperative, the trial court in essence created a form of intestacy surrounding the distributions to Appellants. This is contrary to the law of Missouri and many other states. Courts must construe testamentary writings so that the intent of a Decedent is followed, because those written words are all that a Decedent has left after death. See *Eaton v. Brown*, 193 U.S. 411 (1904); *Helmer v. Voss*, 646 S.W.2d 738 (Mo. Banc 1983); *Breckner v. Prestwood*, 600 S.W.2d 52 (Mo. App. E.D. 1980); *Albright v. Albright*, 901 S.W.2d 144 (Mo. App. W.D. 1995).

C. APPLICATION OF CASE LAW

There are numerous cases throughout the United States with facts similar to this case. The overall trend in construing language like that used in this case “has been in the direction of absoluteness rather than conditionality, increasing weight apparently being given to the presumption against intestacy.” *Determination Whether Will Is Absolute Or Conditional* 1 A.L.R.3d 1048 (1965, with Cuml. Suppl.).

In *Eaton v. Brown*, 193 U.S. 411, 412 (1904), the only question posed to the United States Supreme Court was whether a holographic will was void because of the return of the Decedent from her contemplated journey. The testatrix there wrote: “I am going on a journey and may never return. And if not, this is my last request...” *Id.* The Supreme Court held that such language was not conditional, but was rather an expression of inducement for the writing. The Supreme Court noted that “Courts do not incline to regard a will as conditional where it reasonably can be held that the testator was merely expressing his inducement to make it, although his language, if strictly construed,” would express a condition. *Id.* at 488 (quoting *Damon v. Damon*, 90 Mass. 192, 197 (Mass. 1864)).

In *Ferguson v. Ferguson*, 121 Tex. 119, 45 S.W.2d 1096 (1931), the Texas Supreme Court relied on *Eaton v. Brown* in holding that “a will is construed to

be a general, and not a contingent, will, unless the intention to the contrary clearly appears either expressly or by necessary implication from a reading of the language of the will as a whole.” In *Ferguson*, the testatrix stated, “I am going on a journey and I may never come back alive so I make this will, but I expect to make changes if I live.” The Court held, “There are no express words expressing a condition...”; thus the single statement referencing the journey and making changes, “when construed with the rest of the will,” does not make the will conditional. The Court further noted that the testatrix did not state in her will, “This Will is to be effective if I die on this trip.” *Ferguson*, 121 Tex. 119, 45 S.W.2d at 1097. Because the will contained no express provision that it was contingent upon the testatrix's death during a journey, the Court held that the Will was not conditioned on the testatrix dying on her trip. *Id.* at 1098.

In re Tinsley's Will, 187 Iowa 23, 174 N.W. 4, 7 (Iowa 1919), supports Appellants. There the Iowa Supreme Court held:

“When the event which constitutes the contingency expressed in an instrument can be reasonably construed to have been the occasion for making the will at a particular time, rather than as the reason for making it in a particular way, it should be so construed; and further, that, unless it clearly appears from the

instrument itself that it was not to operate in a certain event, it will be entitled to probate.”

Id.

The court took note of the squeamishness that afflicts persons confronting their own death in a will and stated:

Many persons shrink from the bald mention of their own possible demise, and, when the disagreeable subject must be spoken of, make use of some figure of speech or euphemistic phrase which suggests the idea in less repulsive form. In ordinary parlance, it is by no means unusual for a person, in stating his wishes or giving directions concerning what shall be done in the event of his death, to preface his statement with the expression, “If anything happens to me;” and in such case, no one misunderstands or doubts the meaning of the phrase. Words of this general character have often been considered by the courts, and held sufficient to indicate a testamentary intent. For example: “According to my present intention, should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposal,” etc. *Ex parte Lindsay*, 2 Bradf. Surr. 204. “In case of any fatal accident happening to me, being about to travel by railway, I hereby leave,”

etc. *In the Goods of Dobson*, L. R. 1 Prob. Div. 88. "I intend starting tomorrow morning to Montana. Knowing the uncertainty and risk of a journey, I hereby," etc. *Forquer's Estate*, supra. "I request that, in the event of my death while serving in this horrible climate, or any accident happening to me," etc. 4 Swab. & Trist. 36. "Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate," etc. *Tarver v. Tarver*, 34 U.S. 174. "As I am about to leave home for Bangor, should any accident, etc., take me out of the world," etc. *In the Goods of Stuart*, 21 L. R. (Ireland) 105. "I am going on a journey, and may never return. And if I do not, this is my last request," etc. *Eaton v. Brown*, 193 U.S. 411 (48 L. Ed. 730, 24 S. Ct. 487). "If any accident should happen to me that I die from home," etc. *Likefield v. Likefield*, 82 Ky. 589. "If it please Almighty God to call me suddenly from this mortal life, and during my absence from home," etc. *In the Goods of Tylden*, 18 Jurist 136. See, also, *Bradford v. Bradford*, 4 Ky. L. Rep. 947."

In each of these illustrative cases, it was held, not only that the instrument expressed a testamentary intent, but, in each and all, it was also held that the reference made by the testator to the cause

which prompted or induced the making of the will did not make the bequest or devise either conditional or contingent upon any event except the testator's death.”

In re Tinsley's Will, 174 N.W. at 7-8.

Even California, which permits the introduction of extrinsic evidence, favors an unconditional construction. *In re Taylor's Estate*, 119 Cal. App. 2d 574, 581 (Cal. App. 2d 1953). *Taylor* said:

In order to require a denial of admission to probate on the ground that death did not occur in circumstances contemplated by decedent, the writing must contain language which clearly indicates a purpose to limit its operation. Courts will not regard a will as conditional when it reasonably can be held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be if strictly construed. The language should be held to be mere inducement if that construction is fairly permissible. A condition will not be implied from indefinite language.

Id.

Ferguson, *In re Tinsley's Will*, and *In re Taylor's Estate* are mere snapshots of the legions of cases in multiple jurisdictions, holding that a

testator's reference to the motivation for making the writing does not make the devise or bequest conditional, but simply provides an explanation for its creation. Moreover, the cases from across the country, including Missouri, construe wills and trusts from the premise that the documents are intended by the testator or settlor to be unconditional. The opinions in *In re Desmond's Estate*, 223 Cal. App. 2d 211 (Cal. 1st DCA 1963) and *In re Taylor's Estate*, cases relied upon by the trial court, accept and adopt this premise.

This Court could not have expressed this premise better when it stated: "Unless the language is compelling, however, courts hesitate to construe language of purpose or occasion for making a will as establishing a condition precedent to the very effectiveness of the will. Courts, furthermore, are disposed to adopt any reasonable construction which will avoid intestacy." *Helmer* at 742. The trial court lost sight of what this Court has consistently held: look at the document with an eye towards finding the document unconditional and enforce the last directives of the deceased.

D. THE TRIAL COURT'S CONSTRUCTION OF THE AMENDMENT

It is clear from the *Judgment* that the trial court went well beyond the four corners of the Amendment in its analysis to determine that the Amendment was conditional in nature. (See, e.g., LF0097-0100, ¶¶ 20-39) By so doing, the trial court erroneously declared the law and erroneously applied

the law. While the error regarding the admission of extrinsic evidence is dealt with in Point IV, here this Court should focus on the trial court's analysis of the document itself. The trial court prefaces its analysis by stating:

“If that language is held to be absolute, then David and Alisha share in the corpus of the Trust in accordance with the terms of the 2002 writing. If that language is held to be conditional upon Decedent and Jo having "met their demise" on the way to or from Phoenix in November 2002, then the remainder of the 2002 writing never became operative, and Cari and Carli remain the sole beneficiaries of the K.R. Conklin Living Trust.”

(LF00117) (emphasis added).

The rule in Missouri, as it is in most states, is that the will or trust must be construed in its entirety, not in isolation. The holdings in *Helmer, Wilson v. Rhodes*, 258 S.W.3d 873 (Mo. Ct. App. S.D. 2008); *Blue Ridge Bank and Trust Co. v. McFall*, 207 S.W.3d 149 (Mo. Ct. App. W.D. 2006); *Mercantile Trust Co. v. Hardie*, 39 S.W.3d 907 (Mo. Ct. App. S.D. 2001); *In re Gene Wild Ins. Trust*, 340 S.W.3d 139 (Mo. Ct. App. S.D. 2011). *Commerce Bank v. Blasdel*, 141 S.W.3d 434 (Mo. Ct. App. W.D. en banc 2004)(The paramount rule of construction is that the settlor's intent is controlling and such intention must be ascertained

primarily from the trust instrument as a whole.); *In re Carl McDonald Revocable Trust*, 942 S.W.2d 926 (Mo. Ct. App. S.D. 1997)(same); *In re Gene Wild Revocable Trust*, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009)(same); *Boatmens First Nat. Kansas City v. Globus-Rodriquez*, 887 S.W.2d 641 (Mo. Ct. App. 1994)(same); *Ross v. Everhart*, 185 S.W.3d 720 (Mo. Ct. App. S.D. 2006) (same); *Goulding v. Bank of America*, 340 S.W.3d 114 (Mo. Ct. App. W.D. 2010)(same); *Boone County Nat. Bank v. Edson*, 760 S.W.2d 108 (Mo. banc 1988); *Kempton v. Dugan*, 224 S.W.3d 83 (Mo. Ct. App. W.D. 2007)(same); *Ittner v. United Missouri Bank of St. Louis*, 924 S.W.2d. 40 (Mo. Ct. App. E.D. 1996)(same); are all predicated on this longstanding and sound legal principle. Respondents can show no sound public policy reason to depart from this principle, and when applied to the facts of this case, they support the holding of the Court of Appeals. This Court should retransfer the case to the Court of Appeals or reverse and remand with instructions.

III. THE TRIAL COURT ERRED IN HOLDING THAT THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST WAS CONDITIONAL UPON THE RETURN OF DECEDENT FROM A TRIP, BECAUSE IT FAILED TO CONSIDER THE FACTORS SET OUT IN THE CASE IT RELIED UPON TO ADMIT EXTRINSIC EVIDENCE, IN THAT HAD IT PROPERLY APPLIED THESE FACTORS THE TRUST AMENDMENT WOULD HAVE BEEN FOUND UNCONDITIONAL.

A. STANDARD OF REVIEW

Appellants incorporate the standards set out in Point I.

B. THE IRONY INHERENT IN THE TRIAL COURT'S CHOICE OF THE *DESMOND* CASE

In determining that the Amendment was conditional in nature, the trial court relied upon a 1963 California case that, with the exception of allowing extrinsic evidence of intent, otherwise fully supports the holding of the Court of Appeals in this case. *In re Desmond's Estate*, 223 Cal. App. 2d 211 (Cal. 1st DCA 1963), held that extrinsic evidence of decedent's intent on whether or not the Amendment was conditional in nature was admissible, in California, at trial. No prior Missouri case has permitted the introduction of such evidence,

nor should it. But it is indeed ironic that, having used this case to justify the admission of extrinsic evidence (not of the circumstances of making the amendment, but of the hearsay statements of the decedent about his supposed intent), the trial court failed to apply the factors set out in that case in analyzing the evidence thereafter erroneously admitted.

In *Desmond*:

The disputed language in the document dated August 31, 1951, reads as follows: “The enclosed should convey my wishes of disposition to be made of any and all of my personal and tangible possessions in case I should have a mishap and not return due to some unforeseen accident” and “My last will and testament before leaving on a short trip.”

Id. at 213 (quotations in original). The testatrix returned safely and the document was found shortly after her death in May, 1959. *Id.*

The *Desmond* court found the will to be unconditional and absolute stating that, “The cardinal rule is that a will must be construed according to the intention of the testator and that effect must be given to the expressed intention so far as possible to avoid intestacy.” *Id.* The *Desmond* Court, relying upon *In re Taylor’s Estate*, further held that “[t]o establish a condition, the will must contain language which clearly indicates a purpose to limit its

operation and is not to be deemed conditional when it can reasonably be held that the testator in using the language in question was merely expressing his motive or inducement to make the will.” *Id.* at 214.

C. THE *DESMOND* FACTORS

The court in *Desmond* enunciated several factors to guide its determination on the conditionality of the will: “Extrinsic evidence is admissible on the issue whether decedent intended to make an absolute or a conditional will.” *Id.* at 214.

The circumstances which the court may take into consideration in determining whether the deceased regarded the contingency as relating to the motive inducing the making of the will, rather than as a condition, differ in each case, but include in addition to the language in context, the circumstances surrounding the execution of the document and its delivery; the testator’s state of health; his plans for the future; the preservation of the document, particularly after the contingency has failed; instructions upon delivery; subsequent declarations of the testator; lack of another subsequent will; lack of alternative disposition of the property and the amount of the estate disposed of by the instrument (*Estate of Taylor, supra*).

Id. at 214.

Despite the fact that the trial court relied upon the *Desmond* case, the trial court's analysis of the conditionality of this Amendment is completely void of any analysis comparing the facts in this case to the factors listed by the *Desmond* case.

If the rule of law as stated in *Desmond* is in fact the law of Missouri – a point about which Appellants disagree, and which is contrary to every Missouri Supreme Court case, including *Helmer v. Voss* – then at the very least the trial court should have evaluated the factors enumerated in *Desmond* and included this analysis in its *Finding of Facts and Conclusions of Law*. Had the trial court used the factors announced in *Desmond* and applied them to this case, the trial court would have had no choice but to find that the November 1, 2002, Amendment was absolute and unconditional.

1. The Circumstances Surrounding Execution & Delivery Favor a Finding of Unconditional Disposition.

The first *Desmond* factor is “the circumstances surrounding the execution and delivery of the document...” *Id.* at 214. In this case, the circumstances surrounding the execution of the Amendment are clear. Decedent created the Amendment while driving to the airport to take a trip to

Phoenix, Arizona at a time when he had not updated his inter-vivos revocable trust since its creation in 1996.

Decedent's own language was: "*The trust has not been updated for several years so I will express my desire on how I wish everything to be handled.*" Clearly, the trip motivated Decedent to amend his Trust to secure the disposition of all of his assets to those named in the Amendment, Cari, Carli, David and Alisha. Had this not been the case, he would not have mentioned the fact that the Trust had not been updated for several years. Moreover, Decedent put language in the Amendment indicating his wish to express *his own desire* as to how his assets should be distributed. There is no other explanation than Decedent amending his Trust for the benefit of all four of his children.

It is illogical to read into the Decedent's own language in the Amendment that he was executing the Amendment to appease anyone but his own peace of mind. He placed language in the Amendment in order to prove to anyone reading the document his motivation for including his stepchildren and his lamenting the fact that he had not revised his 1996 trust in six (6) years.

2. The Execution and Delivery Favor A Finding of Unconditional Disposition.

The second *Desmond* factor is “the execution and delivery of the document.” *Id.* at 214. As the sole Trustor and Trustee under the Trust and pursuant to Article Six of the Trust, it was solely Decedent’s responsibility to execute any amendments in written form. That is exactly what Decedent did on November 1, 2002; it is undisputed that Decedent executed and delivered the Amendment to himself as sole Trustee of the Trust.

3. Dr. Conklin’s Health

The third *Desmond* factor is “the testator's state of health.” *Id.* at 214. The overwhelming evidence in this case was that on November 1, 2002, Decedent was a healthy, sound minded, competent, savvy businessman, strong willed and it was “his way or no way.” The overwhelming evidence proves that Decedent's state of health was excellent. (TR0064-5)

4. Dr. Conklin’s Future Plans Favor a Finding of Unconditional Disposition.

The fourth *Desmond* factor is “the testator's plans for the future.” *Id.* at 214. Decedent provides his plans for the future when he states: “*The trust has not been updated for several years so I will express my desire on how I wish everything to be handled.*” Decedent explained his plans for not only his

future, but also the future of the four individuals he considered his children. Moreover, the Amendment clearly identifies all of his assets, including personal property, real property and life insurance benefits.

5. Preservation of the Document Favors Unconditional Disposition

The fifth *Desmond* factor is “the preservation of the document, particularly after the contingency has failed.” *Id.* at 214. Decedent clearly made it back to Kirksville, Missouri at some point after November 1, 2002. Equally clear is the fact that the Amendment remained in existence from that day forward. Evidence at trial proved that at some point Decedent opened the envelope that contained the Amendment; the Court found that Decedent in “all likelihood at some point looked at it.” (LF0120). Clearly, Decedent had an opportunity to destroy the Amendment and chose not to. Even Cari realized the validity of the writing when she found the Amendment and preserved it with Decedent’s other important papers, including life insurance paperwork. The trial court dismissed this fact by indicating that the preservation of the document amongst this type of paperwork, instead of being placed with the Trust document, supported a finding that the Amendment was conditional. Yet, the emphasis and analysis of the preservation issue hinges on the

preservation of the document and not where the document is preserved. In *Desmond*, the testatrix left her Will in an envelope in her safe. *Id.* at 213.

In the instant case, the Amendment existed for nearly seven years after its creation by a person who was very interested in the planning of his estate and who was well aware of his assets. It seems illogical that in the seven years after the execution of the Amendment that Decedent would not at some point destroy the document if it was conditioned upon his demise on his trip to and from Phoenix. The fact that the Decedent preserved the Amendment implies he intended to include Appellants as beneficiaries under the Trust. See *In re Taylor's Estate*, 119 Cal. App .2d 574, 581 (Cal 2d DCA 1953); See also, *Desmond*, 223 Cal. App. 2d at 214.

6. Instructions Upon Delivery Favor a Finding of Unconditional Disposition.

The sixth *Desmond* factor is “the instructions upon delivery.” *Id.* at 214. Since Decedent was the Settlor and only Trustee of the Trust on November 1, 2002, there is no direct evidence of any instructions Decedent contemplated upon the completion of the Amendment. The evidence in this case, especially the evidence of preservation, supports a finding that Decedent's instructions were that the Amendment is to be complied with upon his death and that it was not conditioned upon his safe return from Phoenix, Arizona. There was

no evidence presented to the trial court that supported a finding that Decedent instructed anyone to disregard the Amendment, destroy the Amendment or in any way not follow the directives of the Amendment⁴.

7. Subsequent Declarations of Testator Do Not Favor a Finding of Unconditional Disposition.

The seventh *Desmond* factor is “subsequent declarations of the testator.” *Id.* at 214. Besides the Trust itself and the November 1, 2002, Amendment, there was no evidence of any other document executed by the Decedent related to estate planning. Under Missouri law, this factor is controlling and no extrinsic evidence should have been admitted. See authorities and argument in Point IV, *infra*.

⁴ The trial court made much of the supposed ongoing estate-planning activity engaged in by Dr. Conklin, and also of the fact that he made non-probate transfers to take care of his wife, Jo. The former activities were found as fact based on hearsay statements of the Decedent. The latter are merely the culmination of Dr. Conklin’s desire to protect his wife after his death. The first type of evidence was inadmissible and should not have been received; the second irrelevant.

The trial court in this case received into evidence the testimony of Respondents and Decedent's siblings as to Decedent's intentions surrounding the creation of the Amendment. Those witnesses testified that Decedent intended the Amendment to be conditioned upon Decedent's demise on his trip. Using extrinsic evidence in this fashion is contrary to well settled law in Missouri, as set forth below. See *Helmer v. Voss*, 646 S.W.2d 738 (Mo. banc 1983); *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434 (Mo. App. W.D. 2004); *Breckner v. Prestwood*, 600 S.W.2d 52 (Mo. App. E.D. 1980). That this evidence was fraught with contradictions and came in from persons either interested in the trust or related directly by blood to the Respondents is also significant. However, the character of the evidence admitted over objection at trial does support a finding that the document was conditional.

8. Lack of Another Subsequent Will Favors of Finding of Unconditional Disposition

The eighth *Desmond* factor is "lack of another subsequent will." *Desmond*, 223 Cal. App. 2d at 214. There was no evidence presented to the trial court that a subsequent trust and/or any trust amendments were created by the Decedent after November 1, 2002.

9. Lack of Alternative Disposition Favors Unconditional Status

The ninth and final *Desmond* factor is “lack of alternative disposition of the property and the amount of the estate disposed of by the instrument.” *Id.* at 214. Over the objection of counsel for the Appellants, the trial court relied upon irrelevant and inflammatory evidence surrounding the property received by Mrs. Conklin, upon Decedent’s death. The evidence, as provided by Kenneth Conklin, was that Mrs. Conklin received nearly \$1,000,000.00 in assets that had been re-titled in her name. The trial court found that Appellants had a future expectancy of inheritance from Mrs. Conklin without any testimony that Mrs. Conklin intended to leave anything to Appellants. As a matter of fact, the trial court made a finding that Mrs. Conklin was a “financial disaster.” (LF0098). The trial court used inadmissible evidence to show that Decedent had taken care of Appellants through alternative means. No evidence was presented to the trial court that the Decedent had provided for the Appellants in any other way except for the Amendment. The Decedent's entire estate was disposed of by the 1996 Trust and the 2002 Amendment.

Respondents' entire case hinges upon alleged conversations with Decedent after the Amendment was created in order to determine Decedent's intent when he executed the Amendment. The record is full of inconsistencies

in the testimony relied upon by the Court. Even if those conversations took place, the statements allegedly made by Decedent do not support a finding of conditionality in the Amendment. The alleged statements of Decedent never mention a writing that centers around Decedent's estate planning directives. When reviewing the admissible evidence presented at trial, it is clear that the Amendment was absolute and unconditional. Respondents did not produce substantial evidence that would support a finding of conditionality based upon the law announced in the *Desmond* case. Moreover, although the holding in *Desmond* may be instructive in California and in jurisdictions that look to California law for persuasive authority, Appellants have not found a single case where it has been followed by a Missouri court.

IV. THE TRIAL COURT ERRED IN ADMITTING EXTRINSIC EVIDENCE OF ORAL STATEMENTS MADE BY DECEDENT BEFORE, ON AND AFTER NOVEMBER 1, 2002,, TO DETERMINE WHETHER DECEDENT INTENDED TO MAKE THE NOVEMBER 1, 2002, AMENDMENT TO THE K.R. CONKLIN LIVING TRUST, CONDITIONAL OR ABSOLUTE, BECAUSE SAID EXTRINSIC EVIDENCE WAS INADMISSIBLE AS A MATTER OF LAW, IN THAT MISSOURI LAW DOES NOT PERMIT THE ADMISSION OF ORAL STATEMENTS MADE BY A DECEDENT TO DETERMINE DECEDENT'S INTENT AS TO THE ISSUE OF CONDITIONALITY.

A. STANDARD OF REVIEW

The standard of review in this case is set forth in *Commerce Bank, N.A* as follows:

“The standard of review in declaratory judgment cases is the same as in any other court-tried case. This Court will affirm the decision of the trial court 'unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies

the law.” *Kerperian v. Lumberman's Mut. Cas. Co.*, 100 S.W.3d 778, 780 (Mo. banc 2003) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). ‘Questions of law are matters reserved for de novo review by the appellate court, and we therefore give no deference to the trial court's judgment in such matter.’ *H & B Masonry Co., Inc. v. Davis*, 32 S.W.3d 120, 124 (Mo. App. E.D. 2000).”

Commerce Bank, N.A. at 442.

B. THE HISTORICAL UNDERPINNING OF MISSOURI’S RULES ON EXTRINSIC EVIDENCE

The “plain meaning rule” is founded on a judicial desire to provide some predictability to the form and interpretation of will and trust documents. *In re Estate of Campbell*, 655 N.Y.S.2d 913, 920 (N.Y. Surr. Ct. 1997). A settlor expects that the language he has employed will mean the same thing fifty years from now as it does today. *Atwater v. Meeks*, 508 P.2d 866, 873 (Kan. 1973)(“If courts should indulge an unlimited latitude of forming conjectures on wills by continually placing themselves in the positions of the testator to ascertain his intentions, instead of attending to their grammatical and legal construction, the consequences must be endless

litigation.”); *Campbell*, 655 N.Y.S.2d at 920 (“A Will is a document of signal importance, expressive of an individual’s last wishes regarding the disposition of the property he has worked a lifetime to accumulate. A testator has a right to expect . . . that only true expressions of the wishes of an individual possessing testamentary capacity and executed in accordance with the proper statutory formalities will be given effect by the courts of this state.”).

Free use of extrinsic evidence – posthumous statements of the settlor’s specific intent – offered by persons interested in the distributions in the will or trust, threatens the certainty established by a clear rule of law that has been followed for than 150 years. For this reason Missouri has always strictly stood with the jurisdictions that denied the admission of extrinsic evidence of settlor/testator intent. See, e.g., *Wilson v. Rhodes*, 258 S.W.3d 873 (Mo. Ct. App. S.D. 2008)(When trust “contains plain and unambiguous language, courts give effect thereto.”); *Blue Ridge Bank and Trust Co. v. McFall*, 207 S.W.3d 149 (Mo. Ct. App. W.D. 2006)(If the language of a trust is clear, there is no need to look to rules of construction because the courts cannot rewrite a will or trust using rules of construction); *Mercantile Trust Co. v. Hardie*, 39 S.W.3d 907 (Mo. Ct. App. S.D. 2001)(same); *In re Gene Wild Ins. Trust*, 340 S.W.3d 139 (Mo. Ct. App. S.D. 2011)(same). *Commerce Bank v. Blasdel*, 141 S.W.3d 434 (Mo. Ct. App. W.D. en banc 2004)(The paramount rule of construction is that the

settlor's intent is controlling and such intention must be ascertained primarily from the trust instrument as a whole.); *In re Carl McDonald Revocable Trust*, 942 S.W.2d 926 (Mo. Ct. App. S.D. 1997)(same); *In re Gene Wild Revocable Trust*, 299 S.W.3d 767 (Mo. Ct. App. S.D. 2009)(same); *Boatmens First Nat. Kansas City v. Globus-Rodriquez*, 887 S.W.2d 641 (Mo. Ct. App. 1994)(same); *Ross v. Everhart*, 185 S.W.3d 720 (Mo. Ct. App. S.D. 2006) (same); *Goulding v. Bank of America*, 340 S.W.3d 114 (Mo. Ct. App. W.D. 2010) (same); *Boone County Nat. Bank v. Edson*, 760 S.W.2d 108 (Mo. banc 1988)(Unambiguous instrument precludes admission of extrinsic evidence); *Kempton v. Dugan*, 224 S.W.3d 83 (Mo. Ct. App. W.D. 2007)(same); *Ittner v. United Missouri Bank of St. Louis*, 924 S.W.2d. 40 (Mo. Ct. App. E.D. 1996)(same);

The majority of American courts continue to follow the plain meaning rule. See *In re Estate of Pouser*, 975 P.2d 704 (Ariz. 1999); *In re Estate of Jenkins*, 904 P.2d 1316 (Colo. 1995); *Fine Arts Museums Fndn. v. First Nat'l*, 633 So. 2d 1179 (Fla. Dist. Ct. App. 1994); *In re Estate of Kirk*, 907 P.2d 794 (Idaho 1995); *In re Estate of Beck*, 649 N.E.2d 1011 (Ill. App. Ct. 1995); *Succession of Neff*, 716 So. 2d 410 (La. Ct. App. 1998); *In re Estate of McPeak*, 534 N.W.2d 140 (Mich. Ct. App. 1995); *In re Estate of Strick*, 934 S.W.2d 312 (Mo. Ct. App. 1996); *In re Estate of Frietze*, 966 P.2d 183 (N.M. Ct. App. 1998); *In re Estate of Ellis*, 683 N.Y.S.2d 113 (N.Y. App. Div. 1998); *In re Estate of Brown*, 559 N.

W.2d 818 (N.D. 1997); *Rumberg v. Rumberg*, No. 96 CA 156, 1998 Ohio App. LEXIS 6195 (Dec. 16, 1998); *In re Estate of Eversole*, 885 P.2d 657 (Okla. 1994); *Scarlett v. Hopper*, 823 P.2d 435 (Or. Ct. App. 1992); *Estate of Caplan*, 31 Phila. 304 (1996); *Bowles v. Bradley*, 461 S.E.2d 811 (S.C. 1995); *Gordon v. Georgetown Univ.*, No. 02A01-9709-CH-00218, 1998 Tenn. App. LEXIS 325 (May 15, 1998); *Sammons v. Elder*, 940 S.W.2d 276 (Tex. Ct. App. 1997); *In re Estate of Elmer*, 959 P.2d 701 (Wash. Ct. App. 1998); *In re Estate of Smith*, 591 N.W.2d 898 (Wis. Ct. App. 1999). *In re Bowlers Trust*, 56 Wis. 2d 171, 201 N.W.2d 573 (1972); *In re Estate of Shepherd*, 2012 Wis. App. 116, 344 Wis. 2d 440, 452, 823 N.W.2d 523, 529, review dismissed (Oct. 17, 2012), *review dismissed*, 344 Wis. 2d 306, 822 N.W.2d 883 (2012)(best evidence is language of will, which is considered first, then circumstances surrounding execution, and only afterwards, to extrinsic evidence).

American courts look to the words of a will to interpret testator intent because they tend to doubt the reliability of extrinsic evidence. *Estate of Utterback*, 521 A.2d 1184, 1188 (Me.1987) (assuming that testimony concerning oral declarations of intent is inherently unreliable); *Matter of Estate of Wendl*, 37 Wash. App. 894 (1984)(finding extrinsic evidence of what a testator/settlor stated before, after, or at the time of the will drafting to be “inherently unreliable”). Because a will does not take effect until the testator’s

death, a court cannot ask the testator if a piece of extrinsic evidence truly reflects her wishes, and, as a result⁵, some courts consider extrinsic evidence too unreliable to truly reflect a testator's intent. *Wendl*, 37 Wash.App. 894. Current American approaches to determining a testator's intent from the language of a will tend to eschew the consideration of extrinsic evidence of testamentary intent in a manner consistent with traditional approaches. Generally, courts refuse to use extrinsic evidence of a testator's intent so long as the will document, by itself, yields some clues—through its language, structure, or general theme—about the author's wishes regarding his property⁶.

⁵ “The testator's main protection against fabricated or mistaken evidence is the will itself.” John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* 130 U. PA. L. REV. 521, 525 (1982).

⁶ These courts limit their analyses to the actual terms of the will. See, e.g., *Robertson v. United States*, 310 F.2d 199, 202 (5th Cir. 1962) (the will must speak for itself); *Roberts v. United States*, 182 F. Supp. 957, 959 (S.D. Cal. 1960) (intent is derived from the language of the will); *Born v. Clark*, 662 So. 2d 669, 671 (Ala. 1995) (same); *In re Lanart's Estate*, 9 Alaska 535, 542 (D. Alaska

C. INADMISSIBILITY OF EXTRINSIC EVIDENCE

In the present case, the trial court relied almost exclusively on extrinsic evidence to reach its conclusion that Decedent intended the November 1, 2002, Amendment to the Trust to be conditioned upon his safe return from Phoenix. Quoting from the *Judgment* of the trial court:

“Taken together, all of these facts lead the Court to firmly conclude that although the language of the 2002 writing itself is ambiguous, Decedent's intent is not. Decedent intended the 2002 writing to be contingent in nature, conditioned upon the occurrence that both "Jo and I have met our demise either going

1939)(the intention need not be expressly declared if it can be inferred from the scope/import of the will); *Lowell v. Lowell*, 240 P. 280, 282 (Ariz. 1925); *Aycock Pontiac, Inc. v. Aycock*, 983 S.W.2d 915, 919 (Ark. 1998)(court must allow language within the four corners to govern as to intent); *Crittenden v. Lytle*, 253 S.W.2d 361, 363 (Ark. 1953)(intent must be derived from the language of the will); *Westmoreland County Volunteer Rescue Squad v. Melnick*, 414 S.E.2d 817, 818 (Va. 1992) (intent must be determined from the language of the will).

to or coming back from Phoenix." That condition never having been satisfied, the 2002 writing never became, and is not now, operative as an amendment to the K.R. Conklin Living Trust."

(LF00121).

Contrary to the trial court's ruling that "extrinsic evidence has been freely admitted to show whether the testator intended to make an absolute or conditional will," (LF00118), this Court has stated the law on the admissibility of extrinsic evidence as follows:

"We agree generally with the contestants that the questions presented must be solved within the four corners of the will, and that extrinsic evidence as to what the testators may have intended is not admissible. The law draws a distinction between latent and patent ambiguities. The problems presented by this will are patent--that is, apparent to a person who reads the entire document with care. It is not inappropriate to resort to outside evidence of surrounding circumstance to identify the beneficiaries, to explain their relationship to the testators, or to show the nature and extent of the testators' holdings. When such

explanatory material has been obtained, however, we must look primarily to the language of the will.”

Helmer, 646 S.W.2d at 741.

Although both parties agreed at trial that the language was unambiguous (although in varying contexts), whatever ambiguity may exist is patent, and not latent. *Id.* (“ The problems presented by this will are patent—that is, apparent to a person who reads the entire document with care.”) The trust does not incompletely describe beneficiaries, nor does the Court need to look at another document or consider other evidence to determine if an ambiguity exists. *Seltzer v. Shroeder*, 409 S.W.2d 777 (Mo. 1966)(latent ambiguity arose from description of realty) Rather, whatever ambiguity exists was created at trial by the admission of extrinsic evidence that should not have been admitted. *Helmer*, 646 S.W.2d at 741. Although Appellant believes, like the trial court, that the document is a valid amendment and clearly expresses the author’s intent, if an ambiguity exists it is patent and this Court applies the plain meaning rule in that situation, construing the document as a whole. *Id.*

Thus, extrinsic evidence surrounding the intent of testator as to whether or not a will is conditional or absolute is not admissible.

[E]xtrinsic evidence does not include evidence of the testatrix's declarations about her intent, and generally evidence of a testatrix's statements concerning her intentions, whether made before, at the time of, or subsequent to the execution of her will is not admissible to construe the will.

Winkel v. Streicher, 365 Mo. 1170, 295 S.W.2d 56, 56 (Mo. banc 1956). This is the rule because:

The intentions of the testatrix must be gleaned from the will because those intentions were reduced to writing and she, being dead, could not dispute proffered evidence of intent.

Id. "Moreover, such evidence violates the Statute of Wills, and is susceptible to perjury." *Id.* at 59.

In *Wooley v. Hays*, 285 Mo. 566, 576-77 (Mo. 1920), "it is said that to admit parol testimony of what the testator said as to his intention would be to permit wills to be made by parol and would, in effect, repeal the statute requiring them to be in writing."

The text of the judgment itself makes clear that the trial court relied heavily on extrinsic evidence of Dr. Conklin's intent to support its conclusion that Dr. Conklin intended the Amendment to be conditional. In its *Judgment*, the trial court relied upon the following:

- (1) The lack of publication of the Amendment to the beneficiaries;
- (2) Observations made by Adam Davis shortly before Decedent and Jo left on the Arizona trip;
- (3) “The tenor of Decedent's own comments by telephone to Cari and Carli on or about the day the 2002 writing was created;”
- (4) Decedent's comments to his brother Kenneth Conklin, “who had earlier handled some of Decedent's estate planning matters and with whom he continued to discuss estate planning matters throughout his lifetime;”
- (5) Comments decedent made to his brother Ronald following the 2002 trip to Arizona;
- (6) Kenneth's testimony that Decedent's primary intent was “to forestall 2000 miles of bitching;” and
- (7) Kenneth's testimony that Decedent had told Kenneth that Decedent had managed his property in such a way that he generously provided for Jo in the event that he should predecease her. Therefore, Decedent had conferred a benefit to David and Alisha through their expectation of inheritance from their mother.

(LF00119-121).

Over the objection of Appellants, each of the foregoing factors used by the trial court was admitted into evidence to determine whether or not Decedent intended for the Amendment to be conditional. Extrinsic evidence such as Decedent's alleged statements concerning his intentions has been held to be inadmissible, in violation of the Statute of Wills and susceptible to perjury. *Winkel*, 295 S.W.2d at 59; *Wooley*, 285 Mo. 566 at 576-77; *Breckner v. Prestwood*, 600 S.W.2d 52 (Mo. App. E.D. 1980).

The trial court admitted this evidence construing the second and third paragraphs of the Amendment to “illuminate the intentions of Decedent at time the 2002 writing was created.”⁷ (LF00118). These two paragraphs do not stand alone in the document and in the final analysis must not be construed in isolation without the entire text of the Amendment considered.

The *Judgment* of the trial court fails to address the remainder of the three pages Amendment. “In determining the meaning of a trust provision, the paramount rule of construction is that the settlor's intent is controlling and such intention must be ascertained primarily from the trust instrument as

⁷ Given the clear precedent of *Helmer, Commerce Bank, First National Bank*, and other Missouri cases, this statement amounts to the trial court's confession of judicial error.

a whole.” *Commerce Bank, N.A.* 141 S.W.3d at 443 (*emphasis added*) (citing *First Nat. Bank of Kansas City v. Hyde*, 363 S.W.2d 647, 652 (Mo. 1962)). The nature of extrinsic evidence that was received by the trial court is against the well-established law in Missouri. The trial court failed to analyze the facts of this case in the context of *Helmer* and *Commerce Bank, N.A.*, both of which are very instructive as to determining the intent of a settlor of a trust.

In writing the opinion of the Court in *Commerce Bank N.A.*, Judge Joseph M. Ellis states:

“It must be remembered that courts must decide the meaning of a testator by what he said in this will, and not by attempting 'to guess what he meant or what he might have done under certain conditions if not expressed in his will.' Thus a testator's intent "must be determined by what the will actually says and not by what we might imagine the testator intended to say or would have said if he had decided to further explain his intention. While it is not inappropriate to resort to outside evidence of surrounding circumstances to identify the beneficiaries, to explain their relationship to the testators, or to show the nature and extent of the testator's holdings, even when such explanatory material has

been obtained, we must still look primarily to the language of the will.”

Commerce Bank, N.A., 141 S.W.3d at 443.

The language of the Amendment is not ambiguous when taken with the Amendment as a whole, which the trial court failed to do. The trial court clearly focused solely on the second and third sentences of the Amendment in isolation, not in context. In the words of the trial court:

“If that language is held to be absolute, then David and Alisha share in the corpus of the Trust in accordance with the terms of the 2002 writing. If that language is held to be conditional upon Decedent and Jo having "met their demise" on the way to or from Phoenix in November 2002, then the remainder of the 2002 writing never became operative, and Cari and Carli remain the sole beneficiaries of the K.R. Conklin Living Trust.”

(LF00117) (*emphasis added*).

The trial court failed to take the document as a whole in construing the second and third sentences of the November 1, 2002, Amendment.

In determining whether an ambiguity exists, 'courts must look to the language used within the entire instrument, not to the result

of the distribution plan.' That is, we 'must ascertain the testatrix' intention from the four corners of the will, not from the results to be achieved under the will.'

Commerce Bank N.A. 141 S.W.3d at 445, (citing *Boone County Nat'l Bank v. Edson*, 760 S.W.2d 108, 111 (Mo. banc 1988)). The trial court erroneously singled out the second and third sentences and focused upon the resulting distribution of the trust corpus in determining if the Amendment was conditional or contingent.

The rules of law surrounding the introduction and receipt of extrinsic evidence were also discussed at length in *Breckner v. Prestwood*, 600 S.W.2d 52 (Mo. App. E.D. 1980). In *Breckner*, the trial court interpreted a Will that contained conflicting provisions. The trial court did not allow extrinsic evidence to address the intentions of the testatrix. The Appellate Court affirmed the trial court's rejection of extrinsic evidence and provided an analysis of the law surrounding the admission of extrinsic evidence in cases surrounding the construction of a will. The *Breckner* court stated:

“However, this type of extrinsic evidence does not include evidence of the testatrix's declarations about her intent, and generally evidence of a testatrix's statements concerning her intentions, whether made before, at the time of, or subsequent to

the execution of her will is not admissible to construe the will. The intentions of the testatrix must be gleaned from the will because those intentions were reduced to writing and she, being dead, could not dispute proffered evidence of intent. Moreover, such evidence violates the Statute of Wills, and is susceptible to perjury.”

Breckner, 600 S.W.2d at 55-56.

It is clear from the foregoing that Missouri law does not allow the admission of extrinsic evidence to prove the intent of the deceased as to whether or not a will or trust is conditional in nature. The admission of testimony on the issue of what the Decedent intended is exactly the type of evidence that cannot be admitted, as the Decedent is not present to proffer contradictory evidence. History and common sense tell us that this type of testimony is inherently susceptible to perjury. It is apparent that Respondents' witnesses knew that Decedent could not dispute any of the proffered evidence of the alleged statements made by Decedent before, on and after November 1, 2002. The intent of the Decedent must be gleaned from the four corners of the Amendment; to look elsewhere invites the admission of evidence the *Breckner* court impliedly found inherently unreliable.

D. THE PLAIN MEANING RULE IS NOT ARCHAIC

Newly-minted on the Application for Transfer was the Respondent's contention that the plain meaning rule is archaic. This suggestion was predicated almost entirely upon the RESTATEMENT OF THE LAW THIRD, PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) (2011) and one lone law review article suggesting the same. A. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J., 811 (2001).

This Court has not adopted the Restatement of Property view with regard to extrinsic evidence, nor should it. The Restatement of Property has been roundly criticized by commentators – and largely ignored by courts – to the point that it has become nearly irrelevant:

For over eighty years, some of the best and brightest legal minds have given enormous energy to creating three restatements of property laws, several dozen uniform laws relating to property, and a handful of model acts on property topics. Except for those engaged in the drafting and reviewing processes, and with isolated exceptions among the uniform laws, the results of these efforts have been ignored largely by the American legal community. The Restatements of Property have been cited in fewer than fifteen hundred cases since they were first published;

of the forty-two uniform laws issued, twelve have been withdrawn or superseded, and twenty-five of the remaining thirty have been adopted in an average of only six jurisdictions; model acts are adopted in an average of only three jurisdictions.

David A. Thomas, *Restatements Relating To Property: Why Lawyers Don't Really Care*, 38 REAL PROP. PROB. & TR. J. 655 (2004). Thomas notes that one of the reasons that the Restatement has been so thoroughly criticized and jurisdictions have failed to adopt it, is that the purpose of the Restatements shifted away from restating property law as it was, to stating what it should be. The Restatement then became less useful because its purpose had changed to reforming, rather than restating, the law. "The Restatement (Second) of Property both subtly and openly was acknowledged as a vehicle for law reform, rather than for restatement of existing law." *Id.* This penchant toward reform has rendered the work open to criticism because many commentators "question the wisdom and authority of those who propose the reforms." *Id.*

Certainly Missouri has not been quick to jump on the Restatement bandwagon. None of Missouri's cases (See Section B, *supra*) have embraced the approach taken by the Restatement. And, as noted, the Restatements of Property have been cited in the courts much less than the other major

restatements (only twenty-three percent of the frequency of Contracts restatement citations; only fifteen percent of the frequency of Torts restatement citations). *Id.* This is because the Restatement abandoned the plan of comprehensively citing supporting authority, and instead embarked on a quest for reformation of the law. *Id.* Thomas concludes with this observation:

With the benefit of hindsight, the Restatements generally and the Restatements of Property particularly, may be best viewed as academic exercises. As such, they have benefitted from, and given benefit as, profoundly good thought about important issues of law. But in the end the Restatements have had little influence on the actual daily application and administration of the law.

Id. at 695.

Similarly, Professor Cornelison's law review article, 35 REAL PROP. PROB. & TR. J., 811 (2001), other than being mentioned in the Restatement (Third) of Trusts, has not been cited as authority by any case in any jurisdiction serviced by Westlaw. No case has adopted the view taken in that article. The reason is self-evident. The Plain Meaning Rule is settled law. Scriverners of trusts rely on that to guide their draftsmanship. Trusts and wills are drafted with that

rule in mind, and disturbing the Plain Meaning Rule will not only invite more litigation, *Atwater v. Meeks*, 508 P.2d 866, 873 (Kan. 1973), but will result in less certainty and less predictability in the law of trusts and estates.

E. PERJURY REMAINS A CONCERN AND THE REASON FOR THE
STATUTE OF WILLS

The Application for Transfer also took the Court of Appeals to task for its language regarding the Plain Meaning Rule and perjury, suggesting there that perjury no longer remains a legitimate concern in the area of trusts and estates. Respondents claim § 491.010 RSMo. (2012), amended after *Helmer*, represented “an abrupt reversal in course,” with respect to concerns about perjury. This is wrong. The only thing the amended “Dead Man Statute” did was obviate the hearsay objection.

It did not magically convert evidence barred by the substantive law of trusts and estates into either relevant or admissible evidence. The parol evidence rule, in the context of contracts, is a rule of substantive law, and not an evidentiary rule. *Don King Equipment Co. v. Double D Tractor Parts, Inc.*, 115 S.W.3d 363 (Mo. Ct. App. 2003). No different rule should apply in the context

of estates and trusts⁸.

Summarizing, while § 491.010 might save testimony about a decedent's supposed intent from a hearsay exclusion in an appropriate instance, it does not save it from the parol evidence or plain meaning rule as it applies to wills and trusts.

⁸ The Parol Evidence Rule in contracts is predicated in part on the Statute of Frauds. *Poelker v. Jamison*, 4 S.W.3d 611, 613 (Mo. Ct. App. 1999)(The rule is justified on the basis of two premises: (1) a written document is more reliable and accurate than fallible human memory, and (2) varying written terms by extrinsic oral evidence opens the door to perjury.) The Plain Meaning Rule is predicated on the Statute of Wills. *Murphy v. Enright*, 264 S.W. 811, 813 (Mo.1924)("To admit parol testimony, when there is no ambiguity, as to the intention of the testator or what he meant by the words used, would in effect repeal the statute requiring wills to be in writing.") *cited with approval* by *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 444 (Mo. Ct. App. 2004). Both are rules of substantive law, not discretionary evidentiary guidelines that a trial court may disregard as it sees fit.

F. § 456.1-103(27) RSMO. (2012) DOES NOT CHANGE MISSOURI
LAW

Respondents' application for transfer claimed that the enactment of § 456.1-103(27), RSMo. (2012) defining "terms of a trust" to include "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in the judicial proceeding," indicated a legislative detour away from the Plain Meaning Rule, opening the door freely to the admission of extrinsic evidence. No such detour can be found from the statutory language.

It is a cardinal rule of statutory interpretation that "[t]he legislature is presumed to know the existing law when enacting a new piece of legislation." *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557 (Mo. Banc 2012) quoting *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001). See also, *County of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 490 (Mo. banc 1995). See also *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988).

In *Nothum*, the issue was whether the immunity conferred by § 513.380 RSMo. (2012) was co-extensive with the constitutional privilege against self incrimination. In finding that it wasn't, this Court applied the statutory canon

of interpretation and noted that if the Legislature had intended it to be co-extensive, it could have used language that effected that coextensivity. *Nothum*, 380 S.W.3d at 567. The same analysis applies here. Had the legislature intended to disregard the Statute of Wills and the canons of interpretation established in case law, which it is presumed to know, (including the Plain Meaning Rule), it could have said so. Instead, it specifically made the terms of a trust subject to “evidence that would be admissible in the judicial proceeding.” § 456.1-103(27). At the time that this provision was enacted and since the law of Missouri has not allowed extrinsic evidence to determine a settlor’s intent.

Careful research through the case law of other jurisdictions has shown no state court has used § 1-103 of the Uniform Probate Code to obviate the Plain Meaning Rule. This Court should not be the first.

V. THE TRIAL COURT ERRED IN AUTHORIZING RESPONDENTS TO PAY THEIR ATTORNEYS' FEES AND COSTS FROM THE CORPUS OF THE K.R. CONKLIN LIVING TRUST BECAUSE THE RESPONDENTS WERE NOT DEFENDING THE TRUST BUT INSTEAD WERE DEFENDING THEIR RIGHTS AS BENEFICIARIES OF THE TRUST AND ATTORNEY FEES ARE ONLY RECOVERABLE WHEN LITIGANTS ARE DEFENDING THE TRUST.

A. STANDARD OF REVIEW

Appellants adopt the standard of review in Point I.

B. THE MOTION FOR FEES

Respondents filed in this case a *Motion for Attorney Fees and Costs* wherein they sought an award of “all of their attorney fees and costs incurred in relation to this action.” (LF00122). While the trial court denied Respondents this relief, the court did authorize payment of Respondents’ attorney’s fees from the Trust. The trial court stated:

Because Defendants incurred their attorneys’ fees in successfully defending the Trust against the litigation brought by Plaintiffs, the Court concludes pursuant to Section 456.10-1004, RSMo that

Defendants, who are the sole beneficiaries of the K.R. Conklin Living Trust, at their option, should they find it advantageous for tax purposes or administrative reasons, may reimburse themselves for their attorney's fees in this action from the corpus of the Trust, prior to distribution of Trust assets.

(LF00124).

Judgment was thereafter entered accordingly. (LF00125).

C. STATUTORY LANGUAGE

Appellants allege error in the trial court's ruling regarding payment of attorneys' fees. § 456.10-1004, RSMo. (2012) states:

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is subject of the controversy.

§ 456.10-1004, RSMo. (*emphasis added*).

The trial court, in its award, failed to follow the logic of Missouri appellate opinions related to this issue. In the case at bar, Respondents were not defending the Trust, but instead were defending their own individual rights as beneficiaries of the Trust.

D. THE CHALLENGE BENEFITTED ONLY THE BENEFICIARIES

“Fees are not allowed if a challenge is made solely for the beneficiaries’ own benefit, with no resulting benefit to the trust.” 4C MO. PRAC., TRUST CODE & LAW MANUAL, SECTION 456.10-1004 (2012 Ed.). Here Respondents can show no benefit to the trust, only to themselves.

In *Hamerstrom v. Commerce Bank of Kansas City, N.A.*, 808 S.W.2d 434, 438-39 (Mo. App. W.D. 1991), the Court stated:

The trial court relied on *St. Louis Union Trust Co. v. Kaltenbach*, 353 Mo. 1114, 186 S.W.2d 578, 583 (1945), stating that a trust beneficiary may recover reasonable attorney fees from the trust estate where the efforts of the beneficiary result in real benefit to the estate. A trust instrument which is so ambiguous that two or more persons may fairly make adverse claims to the fund is an example of a situation justifying awarding costs and attorney fees. *Coates v. Coates*, 316 S.W.2d 875, 878 (Mo.App.1958). Costs and attorney fees have also been allowed where a trustee’s duties are ambiguous and he sues for judicial construction of the testamentary trust. *First Nat’l Bank v. Danforth*, 523 S.W.2d 808, 823 (Mo. 1975), cert. denied, 421 U.S. 992, 1016, 95 S.Ct. 1999, 2424, 22 L.Ed.2d 483, 685 (1975). However, where a challenge is

made by a party solely for his own benefit and no benefit to the trust estate is demonstrated, an award for attorney fees payable from the trust estate cannot normally be made. *Kaltenbach*, 186 S.W.2d at 583; *Trautz v. Lemp*, 334 Mo. 1085, 72 S.W.2d 104, 108 (banc 1934). Mrs. Hamerstrom's proposed deviation would diminish the estate by \$22,200.00 per year for the remainder of her lifetime, estimated by her own exhibit to be another fourteen years. The court held that, over that period of time, the estate, at its present earning rate, would be diminished in excess of \$300,000.00. Based upon this evidence, the trial court concluded that no benefit to the trust estate had been demonstrated.

Id. (*emphasis added*).

In *St. Louis Union Trust Co. v. Conant*, 499 S.W.2d 761 (Mo. banc 1973), the Plaintiff was Trustee of the Trust; it sought an award for attorney fees and expenses in connection with and prosecution of a declaratory judgment action. The trial court ruled "that no such fees and costs were allowable because they were 'incurred in the furtherance of the will contest suit and the action was instituted and prosecuted pursuant to the settlement agreement.'"

Id. at 769. On appeal, this Court held:

In this case, the attorney fees and expenses in bringing this suit were not incurred by the trustee in obtaining instructions from the Court as to its powers or duties ‘relating to the administration of the trust,’ but were incurred in litigation brought about as part of a proposed settlement of a will contest suit, and such litigation was in fact a part of the will contest proceeding. Therefore the trial court correctly ruled that the fees and expenses were not properly chargeable to the trust.”

Id.

This Court considered this issue in *Trautz v. Lemp*, 72 S.W.2d 104 (Mo. 1934). The defendants were trustees of a testamentary trust; the plaintiffs and defendants were all beneficiaries of the testamentary trust. The defendants were sued individually and in their capacity as trustees of the trust. *Id.* at 106. The object of the suit was “to recover on behalf of the estate” shares of stock or to alternatively “enforce a charge” of a specified value of the stock. *Id.* The Court, in *Trautz*, stated:

Where an instrument that creates a trust estate is so ambiguous that two or more persons may fairly make an adverse claim to the fund, either may resort to a Court of equity for correct

interpretation, and the Court is justified in not only assessing the costs of the litigation against the estate, but also in allowing reasonable attorneys' fees payable out of the trust estate both to the defeated and successful parties. (citations omitted). But this rule does not apply where the bill is not filed merely for the purpose of obtaining a construction of the instrument creating the trust and the direction of the court, but to enable the litigant to obtain something as an heir.

Id. at 107-08. (*emphasis added*).

The Court in *Trautz* concluded that "Under these circumstances the costs including the attorneys' fees should not be allowed, even if the litigation incidentally settled the status of the trust estate, that not being the purpose of the litigation." *Id.* at 108.

In the case at bar, the purpose of the *Petition* filed by Appellants was not to challenge the propriety or legal effect of the Trust, but was instead to enforce the November 1, 2002, Amendment as an unconditional Amendment to the Trust. Because at trial Respondents successfully challenged the conditionality of the Amendment and not the Amendment itself, the effect of the trial court's ruling is that Respondents would not have to share with the Appellants as beneficiaries of the Trust estate. This challenge – and ultimate

ruling of the trial court – did not benefit the Trust, but instead merely benefitted Respondents individually. The trial court’s order allowing Respondents to be paid or reimbursed attorneys’ fees and costs from the corpus of the Trust should therefore be reversed.

VI. THE TRIAL COURT ERRED IN FINDING THAT RESPONDENTS DID NOT VIOLATE THE “NO-CONTEST CLAUSE” OF THE K.R. CONKLIN LIVING TRUST IN DEFENDING THIS CAUSE, BECAUSE RESPONDENTS ACTED IN CONJUNCTION WITH EACH OTHER AND CONTESTED IN THEIR PLEADINGS AND EVIDENCE THE VALIDITY OF THE NOVEMBER 1, 2002, WRITING AS A VALID AMENDMENT TO THE TRUST.

A. STANDARD OF REVIEW

Appellants adopt the Standard of Review from Point I.

B. THE PLEADINGS SHOW A DIRECT CHALLENGE TO THE TRUST INSTRUMENT

In Paragraph No. 13 of *Plaintiff's Second Amended Petition*, Appellants state:

13. The writing made by Keith R. Conklin on November 1, 2002, satisfies Article Four, Section 1.d. of the Trust as it was made in writing and was delivered to the Trustee, who at the time was Keith R. Conklin, on November 1, 2002.

(LF0086).

In Paragraph No. 19 of *Plaintiff's Second Amended Petition*, Appellants state:

19. Plaintiffs, through their attorneys, have demanded that the Trustees distribute the Trust property according to the terms of the Trust and the November 1, 2002, writing and the Trustees have failed and refused to make such a distribution.

(LF0087).

Respondents' Answer to the Second Amended *Petition*, as to Paragraph No. 13 states:

13. Paragraph 13 contains legal conclusions to which no response is required. To the extent that an answer is required, Defendants deny the allegations contained in Paragraph 13.

(LF0075).

Respondents' Answer to the Second Amended *Petition*, as to Paragraph No. 19 states:

19. Defendants admit that they have not distributed property according to the Paper Writing. Defendants further state that the Paper Writing is a nullity. Defendants deny the remaining allegations of Paragraph 19.

(LF0076) (*emphasis added*).

Article Twelve, Section 6, the “No-Contest Clause” of the K.R. Conklin Living Trust, states:

If any person or entity, other than me, singularly, or in conjunction with any other person or entity, directly or indirectly, contests in any court the validity of this trust agreement, including any amendments thereto, then the right of that person or entity to take any interest in the trust property shall cease, and that person (and his or her descendants) or entity shall be deemed to have predeceased me.

(LF0054).

“Generally, a trust instrument providing for forfeiture in event of contest is enforceable as against contention that it is contrary to public policy.” *Rossi v. Davis*, 133 S.W.2d 363, 373 (Mo. 1939). This Court further stated in *Rossi*:

It is a general principle of law that one cannot claim under a will and against it too, and one who accepts a beneficial interest under

a will thereby adopts the whole will and renounces every right or claim that is inconsistent with the will.

133 S.W.2d at 380.

C. STRICTLY CONSTRUED, BUT VALID

“No contest” provisions in trusts are valid, but they are to be strictly construed. *Hillyard v. Leonard*, 391 S.W.2d 211, 224 (Mo. 1965). However, they will be enforced “where it is clear that the trustor intended that the conduct in question should forfeit a beneficiary’s interest under the indenture.” *Id.*

In the case at bar, Respondents have maintained through their pleadings that the November 1, 2002, writing was invalid, a legal nullity, and not a Trust amendment. (LF0074-83). Contrary to Respondents’ position, the trial court found that the November 1, 2002, writing was in fact a valid Amendment, and not a legal nullity (LF00153), as alleged by Respondents in their Answer. (LF0076).

If Respondents were truly “defending the Trust” as the trial court found, they would have simply joined Appellants’ request for declaratory judgment concerning the meaning and operation of the November 1, 2002, writing. Instead, Respondents firmly denied the legal significance and operation of the writing by claiming the same to be a “legal nullity.” (LF0076). Respondents

further asserted twelve separate defenses which can only be interpreted as attacking the validity of the Amendment. (LF0079-81). Respondents' efforts throughout this process have been in an effort to preclude Appellants from sharing in the corpus of the Trust, which is directly contrary to the Decedent's Trust and the Amendment thereto.

The trial court clearly erred in finding that Respondents were defending the trust, because there was no finding by the court that either the Trust or the Amendment was invalid. In applying the facts of this case to the "No-Contest Clause" of the Trust, there can be no other finding but that Respondents acted in conjunction with each other and contested in court the validity of an Amendment to the Trust. The result of their actions can lead to no other conclusion except that they no longer have a right to take any interest in the Trust property and have been deemed, per the terms of the Trust, to have predeceased the Decedent. The final directives of the Decedent in the Trust and the Amendment thereto cannot be disputed. In the final words of the Decedent, *"Above all I wish to have no fighting or bickering between the four of you."*

CONCLUSION

Upon the trial court's finding that the November 1, 2002, Amendment was a valid amendment to the K.R. Conklin Living Trust, the burden of proving that the Amendment was "conditional and contingent in nature" shifted to Respondents. Respondents failed to carry their burden of proof in that they failed to present the court with "substantial evidence" of Decedent's intent that the Amendment to the Trust was conditional.

The sentence relied upon by the trial court "*If you are reading this it means that Jo and I have met our demise either going to or coming back from Phoenix*" was not considered by the trial court in context with the entirety of the three page Amendment. When read in its entirety, Missouri case law supports the conclusion that the above sentence relied on by the trial court was motivational – an inducement to amend the Trust – rather than conditional. The true motivation of Decedent's intent to amend the Trust was clearly stated in his own written declaration: "*The trust has not been updated for several years so I will express my desire on how I wish everything to be handled.*"

Moreover, the above sentence relied on by the trial court did not "expressly" condition the legal effect of the Amendment on the Decedent and

Mrs. Conklin having “*met our demise either going to or coming back from Phoenix.*” An “express” condition, e.g. “if I do return disregard this document” or “this Amendment shall only be effective if I die on my trip,” was not stated by Decedent in the Amendment. Missouri law requires that a condition be expressly stated within the instrument.

Absent compelling language, Missouri courts are hesitant to construe language of purpose or occasion for making or amending a trust to establish a condition precedent to the legal effectiveness thereof.

The trial court erred in finding the November 1, 2002, Amendment was conditional in nature. The *Judgment* should therefore be reversed and the K.R. Conklin Living Trust and the November 1, 2002, Amendment thereto should be enforced pursuant to all terms described therein.

The trial court considered extrinsic evidence as to the issue of Decedent’s intent to make the Amendment conditional on Decedent and Mrs. Conklin meeting their “*demise either going to or coming back from Phoenix.*” In so doing, the court failed to follow well established precedent in Missouri evidence law that extrinsic evidence is not allowed to determine the intent of a testator. While extrinsic evidence may be allowed to identify beneficiaries, to explain their relationship to the testator or to show the nature and extent of the testator’s holdings, extrinsic evidence is not allowed to determine intent.

The Decedent's intent must be determined by reviewing the language in the Amendment itself, "as a whole" and within the four corners of the instrument. The trial court's consideration of extrinsic evidence in determining Decedent's intent was erroneous. The trial court's *Judgment* should therefore be reversed and the November 1, 2002, Amendment should be enforced.

Finally, Respondents were allowed by the trial court to invade the corpus of the Trust for payment of attorneys' fees and costs in defending this action. The trial court's *Judgment* relating to attorneys' fees and costs was erroneous in that Respondents were not defending the Trust, but instead were defending their rights as beneficiaries of the Trust. The court's *Judgment* in this regard should therefore be reversed.

For each and all of the reasons stated herein, Appellants respectfully pray for an Order of this Court reversing the rulings of the trial court, and Ordering that the November 1, 2002, Amendment is not conditional or contingent in nature but instead is an operative Amendment to the Trust. Appellants further pray that the Court's Order direct that the Co-Trustees of the K.R. Conklin Living Trust reimburse the corpus of the Trust for the attorney fees and costs paid and subsequently carry out the directives of the Trust and the Amendment by distributing the Trust assets consistent therewith. Finally, Appellants pray that the Court enforce the "No-Contest

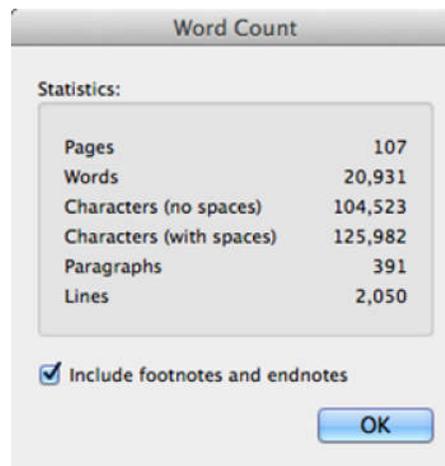
Clause” contained in Article 12, Section 6 of the Trust pursuant to the terms thereof.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

The undersigned certifies that this brief complies with the word limitations found in Rule 84.06(b) in that the brief contains 20,931 words. The word count was obtained from Microsoft Word as shown below:



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CERTIFICATE OF SERVICE

I certify that in filing this document with the MO Supreme Court through the electronic filing system an electronic copy of this document was served on counsel named below on this 6th day of January, 2014.

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