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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 REPLY BRIEF OF APPELLANTS C. DAVID ROUNER & ALISHA HUDSON

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ARGUMENT

I. RESPONDENTS DO NOT ADDRESS THE DEFINING CHARACTERISTICS OF A CONDITION AND RELY ON EXTRINSIC EVIDENCE TO CREATE AMBIGUITY

a. STANDARD OF REVIEW

By not providing a statement of the standard of review in Point I, (or any other point) Respondents concede this Court's review is *de novo. Helmer v. Voss*, 646 S.W.2d 738 (Mo. banc 1983).

b. BRIEF FACTUAL NOTE

Appellants regret the factual error regarding the words "explained" and "exercised." Respondents' Substitute Brief[1] at 10. The Court of Appeals did not base its decision on this language. Other than being a regrettable typographical error, it has no import.

Factual issues were hotly contested at trial. The admission of extrinsic evidence was error. Respondents admitted the document was not ambiguous (RB0011, 28) and the evidence did not cast light on an

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[1] Hereafter, RSB00__. Respondents Brief before the Court of Appeals is referenced as RB00__.

ambiguity, but rather attempted to create ambiguity. Respondent's additional factual material is extrinsic evidence, and was inadmissible.

c. NO LANGUAGE OF CONDITIONALITY

Appellants' Substitute Brief explained that conditionality is created by words of condition, e.g., the "if-then" statement. The amendment does not use "if-then" language. It is language describing motivation. Respondents do not address this argument. They simply draw a different conclusion from the words used, that both Dr. and Mrs. Conklin needed to die for the document to be effective.

Had Dr. Conklin wanted to make the writing conditional, as a well-read, well-spoken veterinary physician, he could have used that language: "If we die on this trip then, and only then will this document serve as my amendment to the trust." Dr. Conklin did not do that. Instead, he explained his motivation for drafting the document. Moreover, if he intended for it to be operational only upon his death on that trip, then there was no reason for him to preserve the document upon return. Yet, he did. He preserved the document with his life insurance policy. People do not place documents with their life insurance and documents they know will be important on their death if they do not want them found and acted upon. Dr. Conklin's

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preservation of the document for seven years is yet another reason why Respondents' arguments fail.

Respondents suggest that dispositions of property outside the trust, included in the document, reflect the intent of both Dr. and Mrs. Conklin that the document be effective only on their joint death. Yet when Mrs. Conklin testified at trial, she was never cross-examined on this issue. (TR0008-0012). There was no testimony that Mrs. Conklin drafted anything.

Yet, if her signature were truly relevant to the issue of a joint death and to Dr. Conklin's intentions, then Respondents made no attempt to establish that[2]. If she was, as Respondents claim, a joint scrivener, her testimony as to the joint intentions of the scriveners

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[2] Dr. Conklin's intent should be determined from the four corners of the writing. Mrs. Conklin's intent is irrelevant to Dr. Conklin's intent. Respondents introduced pages of extrinsic evidence from people who did not sign the document. An adverse inference is arguably permitted from Respondents' failure to question Mrs. Conklin on what Respondents deem the key question. *Leehy v. Supreme Exp. & Transfer Co.,* 646 S.W.2d 786, 790 (Mo. banc 1983).

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would be relevant to the construction of the document on the question of intent. Yet, Respondents never attempted to obtain this testimony. They failed to ask on cross examination in Appellants' case, (TR008-0012), did not call her in their case (TR002-3), and failed to cross-examine her in the rebuttal case on the issue of intent (TR0136-141). They did not inquire if she intended the document to be effective only upon her death. This is likely because they knew what her answer would have been.

The inclusion of non-trust assets in the document does not indicate any intention by Dr. Conklin's to make the trust amendment effective only on death. There is no language in the document purporting to make it effective only on the joint death. As a veterinarian, Dr. Conklin understood trauma and death. If joint death were actually contemplated in this situation, then surely Dr. Conklin would have foreseen the scenario where he or his wife might have survived an accident claiming the other spouse. There was no provision in the document for only one of their deaths. This indicates that the slight possibility of accidental death during travel was simply the motivation for drafting the amendment.

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Respondents also claim the amendment "completely disinherits" Mrs. Conklin. But by the time the document was drafted in 2002 most of the non-probate transfer of assets to Mrs. Conklin referenced in the Respondents' brief had already occurred. (TR0081) See Resp. Subs. Br. at 4. More importantly, under § 474.235 RSMo. (2012) a spouse not provided for by a will may elect against it, unless the spouse is provided for by other means. A spouse may not be disinherited without the spouse's acquiescence. 1A MO. PRAC., METHODS OF PRAC.: TRANSACT. GUIDE § 34.24 (4th ed.)

Here, the spouse had been both provided for by other means and had signed off on the dispositions in the document. Thus, acquiescence is plain from the face of the document. Non-probate transfers that had already taken place and those that took place after the writing reinforce this. While Respondents concern for Mrs. Conklin's statutory share is laudable, it is misplaced. Non-probate transfers do not express an intention to make the document effective only on the joint death. And, as noted, the one surviving signer was never called to testify about this purported "complete disinheritance" or Dr. Conklin's intent.

Neither *Naylor v. Koeppe*, 686 S.W.2d 47 (Mo. App. E.D. 1985), nor *Gehring v. Henry*, 332 S.W.2d 873 (Mo. 1960) require a different result.

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Naylor uses specific words of conditionality ("provided however") and it's "if" statements are followed by "then" statements. Both are absent from this case. *Naylor* used words of condition and used them properly to convey the specific conditions that had to occur before the dispositions became effective. Here, the dispositions were not conditional because as noted, there is no "then" statement effecting a disposition tied to a preceding condition.

Gehring provides no comfort to Respondents either. *Gehring* dealt with a testator-drafted joint will so deficient in spelling and punctuation as to create a one-of-a-kind decisional situation for this Court. The lack of punctuation caused this Court to supply a period to the third article of the will. This Court thought it best expressed the testator's intention. Here, the Court need not supply any punctuation. Also, the language found in *Gehring* to be conditional ("*of this will in case we the undersiners died on or near the same date all of the real and persnal property owened and by each and/or by both of us is to be divided equelly between, Bert Henry, Greensburg, Mo, Elmer Henry, Greensburg, Mo Arthor Henry, Greensburg, Mo Claud Henry, Greensburg, Mo, Herald Henry Greensburg, Mo…*" *Id*. at 875) is so far removed from the language at

issue here as to be in a different galaxy. The comparison between *Gehring* and *Helmer* shows *Helmer* to be much closer to point.

It is, of course, *Helmer* that the Respondents take issue with, and whose "wooden" dictates they ask this Court to bend in order to satisfy their constructional preferences. *Helmer* included the following language from whence the contestants there sought conditionality:

> *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). Just as in this case, there are no express words of condition (e.g., provided that, provided however, on condition that, if x, then y) only words of purpose. However, within the *Helmer* dispositions there were words of condition. Express common disaster conditions were set out in Items III, IV and V, but did not appear in Items I, VI, VII and VIII. *Id*. at 745. This Court gave effect to the unconditional dispositions but not to the conditional ones. The *Helmer* testator described the "purpose of this will" but never expressly conditioned its operation on the joint demise of the parties. This Court stated sound policy in differentiating between <u>compelling language</u> and <u>compelling circumstances</u>. *Id*. at 742.

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Under *Helmer*, it is the language that must be compelling to establish a condition, not the circumstances surrounding the generation of that language. Mountains of inadmissible extrinsic evidence of the settlor's intent volunteered by the very parties interested in taking under the trust, cannot establish a condition not written in the trust.

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II. RESPONDENTS DO NOT ADDRESS THE TRIAL COURT'S RELIANCE ON ONLY TWO SENTENCES OF THE TRUST AMENDMENT AND ARGUE REVERSAL OF THE TRIAL COURT'S DETERMINATION OF A VALID TRUST WITHOUT CROSS APPEALING.

a. RESPONDENTS DID NOT RESPOND TO APPELLANT'S POINT II

Respondents have not responded to Appellants' Point II that expressly addressed the reliance, by the trial court, on only two sentences of the trust amendment. Perhaps Respondents recognize that the trial court erred in relying solely on the first two sentences and not in construing the trust as a whole. Concession of this point is plain, however, from a reading of Respondents brief[3]. The respondent's duty

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[3] Although Respondent need not adopt the organizational scheme of the Appellant's brief, it must identify the points raised by Appellant that any portion of its brief responds to. Rule 84.04(f). Nothing in Point I or Point II of Respondents' brief responds to Appellants' Point II directly, and numerous references to construction of the trust as a whole appear in Respondents' brief. See, e.g., RSB0011, 20, 33.

is to support the judgment. *Noll v. Shelter Insurance Companies,* 774 S.W.2d 147, 150 (Mo. banc 1989). In doing so, a respondent must respond to the points preserved and argued by the appellant. *Boyer v. Grandview Manor Care Ctr., Inc.*, 793 S.W.2d 346, 347 (Mo. banc 1990). Respondent did not respond and concession is the logical conclusion.

b. RESPONDENT'S POINT II ATTACKS THE VALIDITY OF THE TRUST AND WAS WAIVED BY FAILURE TO CROSS-APPEAL

Respondents' second point asks this Court to hold the language of the amendment is precatory in nature and that the trust amendment is invalid[4]. This presents a problem.

While a Respondent may set forth additional grounds on appeal for affirming the trial court's order, Rule 84.04, Respondent may not attack the trial court's order in the absence of a cross appeal. *Pollock v.*

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[4] Respondents argue: "The informal handwritten letter replete with precatory language, combined with these extrinsic facts, cast substantial doubt on whether the 2002 Writing was ever intended to have binding legal effect." (RSB0029)

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Berlin-Wheeler, 112 S.W.3d 73 (Mo. App. W.D. 2003); *International Harvester Co. v. Mahacek,* 705 S.W.2d 603, 605 (Mo.App.1986).

Respondents did not cross appeal the trial court's determination that the trust amendment was valid. Respondents admit that "Neither the trial court nor the court of appeals embraced this argument." Resp. Br. At 26. Appellants timely appealed from the trial court's order that found the amendment was conditional, but inherent in that judgment is a finding of a valid amendment to the trust. If Respondents were aggrieved by the trial court's finding that the document was a valid trust amendment, Respondents were obliged to cross appeal this point. The entirety of the Respondents argument under Point II is waived.

c. THE LANGUAGE IS NOT PRECATORY

Should this Court engage in *ex gratia* review, Appellants refer the Court to the specific language in each directive in the November 1, 2002 Amendment, the context in which the language is used and the relationship between the Decedent and the beneficiaries.

Respondents simply excise Dr. Conklin's use of the terms "wish," "desire," and "want", from the context of such use without analysis. While Decedent's directives to the beneficiaries as to the disposition of the property upon receipt were at times instructive, each and every one

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of the Decedent's dispositions to the beneficiaries was absolute in its terms. The mere use of the words "wish," "desire," and "want" do not make the dispositions precatory, as these words are common in estate planning documents. Respondents' entire argument relies on taking the individual words out of context without contextual evaluation of the document as a whole. Upon analyzing the November 1, 2002 Amendment as a whole, it is immediately apparent that Decedent's dispositions are absolute.

Finally, Respondents state the writing was created for Decedent's "desires and musings" (Respondent's Brief Pg. 27) and seemingly ignore the nature of the writing and its tenor of care, love and affection towards his children. Though the Decedent uses the words "wish" and "desire", he does so in an absolute manner as positive tones of command to his "children."

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III. RESPONDENTS POINT III CONCEDES THE FACT THAT THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE FACTORS SET OUT IN THE CASE IT RELIED ON BY NOT ADDRESSING THAT ARGUMENT. RESPONDENTS' ARGUMENT THAT *HELMER V. VOSS* IS OUTDATED IS MISPLACED AND ITS STATUTORY ARGUMENTS DO NOT APPLY PROPER PRINCIPLES OF STATUTORY CONSTRUCTION.

a. RESPONDENTS FAILED TO ADDRESS APPELLANT'S POINT III

Labeled as Point III, Respondents do not address the arguments found in Appellants' Point III, but rather, attack this Court's *Helmer* decision as outdated. Respondents have effectively conceded Appellants' Point III by not addressing it, or directing the Court to argument responsive to it. *Boyer,* 793 S.W.2d at 347.

b. UNLIKE BREAD, THIS COURT'S PRECEDENT DOES NOT BECOME STALE

In their attack on this Court's precedent, Respondents note that the Court of Appeals "felt compelled to follow this Court's 31 year-old decision in *Helmer v. Voss*, 646 S.W.2d 738 (Mo. Banc 1983)…" Implicit in this statement is an assumption that, like bread, Supreme Court

precedents become stale on a certain expiration date[5]. While evolving standards of decency and changes in society sometimes require that *stare decisis* be abandoned in favor of new rules, see, e.g., *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. banc 1994)(abolishing criminal conversation), none of the arguments presented by the Respondent here rise to that level.

Respondents' initial complaint is that the Court of Appeals adhered to the Plain Meaning Rule. Citing to the 1999 version,

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[5] Unlike *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Helmer* is not affected by societal change or evolving standards of decency mandating reconsideration. More importantly, Respondents fail to note that the rule they seek would not even apply in the context of this case, as they conceded before the Court of Appeals that the document was unambiguous. "Respondents have never felt that the document was ambiguous."(RB0028) See also "Respondents asserted that this language, at least as to the conditions set forth therein, was unambiguous." (RB0011)

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Respondents note that BLACK'S LAW DICTIONARY[6] criticizes the rule without noting that the 2009 version of the same reference also says "the plain meaning rule states a tautology: Words should be read as saying what they say. The rule tells us to respect meaning but it does so without disclosing what the specific meaning is." BLACK'S LAW DICTIONARY (9th ed. 2009) citing R. Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES, 229 (1975).

The "plain meaning rule" is more than just a constructional preference for trusts. It is applied to statutes[7], trusts, wills, contracts and other writings presented for judicial interpretation. *Fruin-*

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[6] Justice Jackson said that dictionaries were the last resort of baffled judges. *Jordon v. DeGeorge*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting).

[7] The plain meaning rule is codified at § 1.090 RSMo (2012). Although the chapter is titled "Laws in Force and Construction of Statutes," the constructional dictate is not restricted to statutes: "Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

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Bambrick Const. Co. v. St. Louis Shovel Co., 211 Mo. 524, 111 S.W. 86, (1908)(applying plain meaning construing city charter): *Sloan v. Director of Revenue,* 900 S.W.2d 256 (Mo. App. E.D. 1995)(construing court rules); *Hadlock v. Director of Revenue,* 860 S.W.2d 335, 337 (Mo. banc 1993)(same); *Farmers & Labors Co-op. v Director of Revenue*, 742 S.W.2d 141 (Mo. banc 1988)(construing statutory provisions); *Spotts v. City of Kansas City*, 728 S.W.2d 242 (Mo.App. W.D. 1987)(applying plain meaning rule to contracts); *State Farm Mut. Auto. Ins. Co. v. Thomas,* 549 S.W.2d 616, 617–18 (Mo.App.1977)(same); *In re Gene Wild Trust*, 340 S.W.3d 139 (Mo. App. S.D. 2011)(applying plain meaning to trust); *Boone Cnty. Nat'l Bank v. Edson,* 760 S.W.2d 108, 111 (Mo. banc 1988)(same re wills); *Blue Ridge Bank & Trust Co. v. McFall* 207 S.W.3d 149 (Mo. App. W.D. 2006)(trusts); *Gardner v. Vanlandingham,* 334 Mo. 1054, 69 S.W.2d 947, 950 (1934).

c. NO PUBLIC POLICY ARGUMENT SUPPORTS ABANDONING PLAIN MEANING

Thus, the real question for this Court is whether to wholly abandon the plain meaning rule with regard to trusts, carving out an exception that would be at odds with the construction required by one hundred ninety-six years of Missouri jurisprudence, in favor of … what,

exactly? What Respondents seek is the admission of extrinsic evidence, in a situation where by their own admission the document is unambiguous. They invite this Court to throw the doors wide open to the receipt of testimony about a settlor's intent not from parties who were present when drafted, (Mrs. Conklin) but from the very parties with a pecuniary interest in the outcome.

At trial, guided by Missouri's long-standing rules regarding construction of trust instruments, Appellants put on only one witness (Mrs. Conklin) to verify the authenticity of the writing and to establish the circumstances requiring administration. Although Appellants could surely have produced dozens of witnesses who would have testified about the relationships and the settlor's intent, Appellants were guided by the rules of construction and the rules of evidence then in force in their case in chief.

What Respondents seek is permission to use extrinsic evidence to create, rather than resolve, ambiguities. If a writing can be described as containing an ambiguity (and what writing cannot?), then testimony about the scrivener's intent would <u>always</u> need to be received. The result would be a swearing match where even Solomon likely could not

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reach a wise result[8]. Respondents advance no sound public policy reason to place such a burden on Missouri courts. The "four corners" and "plain meaning" rules are sound public policy.

d. THERE IS NO "MODERN TREND" FAVORING WHOLESALE ADMISSION OF EXTRINSIC EVIDENCE

Next, relying heavily on the Restatement of Trusts that has not been adopted by Missouri, Respondents argue that not permitting extrinsic evidence of settlor's intent goes against "the modern trend." Their theory is based entirely on one law review article and some aspirational phrases in the Restatement this Court has never adopted. But what does a review of the law of the several states show? Very few

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[8] Family conditions are not static and parents are not perfect. Might not a parent tell his two children, on different dates and at different times, that each would get the lion's share of his estate, only to fail to implement those provisions? Both children would tell vastly different stories about the "settlor's intent;" neither would be lying. This is why trust documents conveying land and title must be in writing, and why intent must be discerned from the words used.

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states are abandoning the plain meaning or "four corners" rule in construing trusts:

State	**"Four Corners" Case Law**
Kansas	*In re Hjersted Revocable Trust,* 35 Kan.App.2d 799 (2006); *In re Estate of Sanders,* 261 Kan. 176, 182, 929 P.2d 153 (1996).
Oregon	*Jarrett v. United States National Bank of Oregon*, 81 Or. App. 242 725 P.2d 384 (1986); *Roehr v. Pittman,* 256 Or. 193, 472 P.2d 278 (1970).
Indiana	*Hauck v. Second National Bank of Richmond,* 153 Ind. App. 245 (1972)("The so-called 'four corners' rule has long been the law in Indiana."); *Bilger v. Trinity Evangelical and Reformed Church of Indianapolis,* 136 Ind. App. 320, 199 N.E.2d 855 (1964).
District of Columbia	*O'Connell v. Riggs Nat'l Bank of Wash., D.C.,* 475 A.2d 405, 408 (D.C.1984) (citing *Jewell v. Graham,* 57 App. D.C. 391, 24 F.2d 257, *cert. denied,* 277 U.S. 596, 48 S.Ct. 559, 72 L.Ed. 1006 (1928)).

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Minnesota	*Trust Created Under Agreement with McLaughlin,* 361 N.W.2d 43, 44-5 (Minn.1985); *In Re Trusts Created by Will of Hartman,* 347 N.W.2d 480, 482-03 (Minn.1984);
South Carolina	*Chiles v. Chiles,* 270 S.C. 379, 242 S.E.2d 426 (1978). *Germann v. New York Life Ins. Co.,* 286 S.C. 34, 331 S.E.2d 385 (Ct.App.1985).
Connecticut	*Palozie v. Palozie*, 283 Conn. 538, 927 A.2d 903 (2007); 1 A. Scott, W. Fratcher & M. Ascher, TRUSTS (5th Ed.2006) § 4.5, pp. 209–15; cf. *Erickson v. Erickson,* 246 Conn. 359, 370, 370–71 n. 10, 716 A.2d 92 (1998).
Florida	*Knauer v. Barnett*, 360 So.2d 399 (Fla. Ct. App. 1978); *Pentland v. Pentland*, 113 So.2d 872 (Fla. 2d DCA 1959)
Illinois	*First Nat. Bank of Chicago v. Canton Council of Campfire Girls, Inc.,* 85 Ill.2d 507 , 426 N.E.2d 1198, 55 Ill.Dec. 824 (1981).
Ohio	*McDonald & Co. Sec. Inc v. Alzheimer's Disease and Related Disorders Assoc., Inc.,* 140 Ohio App. 3d 358 , 747 N.E. 843 (2000); *Domo v. McCarthy,* 66 Ohio St.3d 312, 314, 612 N.E.2d 706, 708 (1993);

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New York	*Matter of Kellogg,* 35 A.D.2d 145, 316 N.Y.S.2d 293; *Matter of Hooker,* 233 N.Y.S.2d 947).
North Dakota	*Sabo v. Keidel*, 745 N.W.2d 661 (N.D. 2008); *Matter of Estate of Schmidt,* 1997 ND 244, ¶ 13, 572 N.W.2d 430.
Colorado	*Denver Foundation v. Wells Fargo Bank, N.A.*, 163 P.3d 1116 (Colo. 2007)("In other words, intent must be determined from contract language itself, and an unambiguous document cannot be explained by extrinsic evidence so as to dispute its plain meaning."); *In re Dewson's Estate,* 181 Colo. 189, 192, 509 P.2d 311, 312 (1973). *Fox v. I–10, Ltd.,* 936 P.2d 580, 582 (Colo.App.1996).

Without ever admitting what it acknowledged to the Court of Appeals – that the instrument is not ambiguous – the best Respondents can do is suggest that while the language used in the instrument does not compel a conclusion of conditionality in the gift, it similarly doesn't refute it. (RSB0035) This Court's longstanding rule – one recognizing that laymen sometimes draft trusts and are not as careful with language as lawyers – has been that language of conditionality must be clear and

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compelling, *Helmer*, 646 S.W.2d at 742, and here it simply is not. Moreover, Respondents' argument goes to conditionality, not to whether extrinsic evidence should be admitted.

e. THERE IS NO HIDDEN MEANING IN §§ 491.010 OR 456.1-103(27)

To justify extrinsic evidence, Respondents cite § 491.010 RSMo. (2011) without quoting it. When the Court reads the plain language of the statute, the words necessary to make the statute applicable to a trust, as would be required here, are missing. The statute limits its reach to certain matters:

> In any such suit, proceeding or probate matter, where one of the parties to the contract, transaction, occurrence or cause of action, or his agent in such matter, is dead or is shown to be incompetent …

Id. The legislature pointedly omitted the words "will" or "trust" and used "contract, transaction, occurrence or cause of action" instead. More importantly, the statute only removes the hearsay objection and predicates admission on whether the witness would have been able to testify, and whether the testimony is relevant. Missouri's law of trusts and estates has always precluded admission of extrinsic evidence except as noted in *Helmer*. Given the state of Missouri law at the time §

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491.010 was enacted, in order to make the statute binding on settlors and testators, different language would have been required. As this Court reaffirmed only last year in *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557 (Mo. banc 2012) "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.'"

Respondents attempt to use this rule to their advantage when they argue the timing of the adoption of the Dead-man statute and § 456.1-103(27) RSMo. (2012) as indicative of a legislative intent to open the door to extrinsic evidence. The statute says only this:

> "Terms of a trust" means 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 a judicial proceeding;

The statute makes the admission of this evidence a matter of judicial discretion consistent with existing law and, if it applies to extrinsic evidence at all, is only meant to permit resolution of latent ambiguities. *Helmer* at 741. It does not create a statutory mandate that extrinsic evidence is automatically admissible. Perhaps more importantly, if the gestalt of this provision was to make extrinsic

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evidence freely admissible, the legislature did not have to speak in code to do it. It could have said so directly. It did not.

The statute requires that the evidence sought to be admitted "would be admissible in a judicial proceeding." *Id*. (emphasis supplied). Given that Respondents conceded to the Court of Appeals that the document was not ambiguous, extrinsic evidence simply would not have been relevant or admissible. Even the section of the Restatement cited by Respondents favors Appellants' view when it says consideration should be given only where it "is not denied consideration because of a statute of frauds, the parol-evidence rule, or some other rule of law." Here the relevant rule of law is that set out in *Helmer* regarding the admission of extrinsic evidence. Even Respondents recognize that Missouri's rule is effectively a parol evidence rule.

f. MISSOURI'S PUBLIC POLICY AS EXPRESSED IN THE STATUTES FAVORS THE SAME CONSTRUCTION OF WILLS AND TRUSTS

Respondents suggest that the legislature's failure to enact a portion of the Uniform Trust Code is relevant. The legislature omitted the section that held that wills and trusts should be construed the same way (UTC section 1-112). The legislature did not need to. The law in Missouri had always been that wills and trusts were construed together.

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Blue Ridge Bank, 207 S.W.3d 156, fn. 3. There was no need for the legislature to codify that which had always been the law. *Nothum*, 380 S.W.3d 557.

Respondents cite to the "Missouri Comment" to suggest the omission was somehow intended to alter the law of trusts. Yet, what is omitted from the section quoted is more important that what was quoted:

> Missouri law regarding construction of testamentary dispositions contains two sets of rules of construction, those contained in Chapter 461 that are applicable to non-probate transfers and those contained in Chapter 474 that are applicable to wills. These rules are inconsistent with each other and the Committee perceived that a study needs to be made <u>with a view toward creating one set of rules of construction applicable to trusts, wills, and non-probate transfers</u>.

4C MO. PRAC., TRUST CODE & LAW MANUAL, Section 456.1-112 at 90-91. (emphasis added) In other words, the statute did not adopt uniform rules because the current statutes regarding wills and non-probate

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transfers are at odds, not because trusts and wills should not share the same constructional preferences. In fact, reading this, it is clear that the legislators believe they should share the same construction.

Respondents aver that if the admission of extrinsic evidence is allowed in contract cases, and should be expanded to the construction of trusts. But the Parol Evidence Rule prevents the introduction of extrinsic evidence to vary or contradict the terms of a contract. *Johnson ex rel. Johnson v. JF Enterprises, LLC,* 400 S.W.3d 763, 769 (Mo. banc 2013) ("This rule is substantive, and … any extrinsic evidence must be ignored.") It does so for the same reasons that apply to trusts. Extrinsic evidence invites parties who put their agreement in writing to offer up creative explanations for what they "really meant."

Respondents argue Wills and Trusts arise from different legal origins and should be interpreted differently. Respondents claim these rules are "anachronistic and inconsistent with modern views." (RSB0040). Respondents offer no citation for this. Respondents overlook legislatively established public policy in Chapter 456 RSMo. *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169 (Mo. banc 2008) citing *Brawner v. Brawner,* 327 S.W.2d 808, 812 (Mo. banc 1959)("statutes are

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the very highest evidence of public policy and [are] binding on the courts") *overruled on other grounds by Townsend v. Townsend*, 708 S.W.2d 646 (Mo. banc 1986).

The Legislature could easily have changed the rules of construction for trusts such that they would be different from wills. They did not. Instead, the Legislature, fully aware of the rules of construction used by Missouri Courts, simply omitted the UTC code section. Public policy is thereby expressed.

Respondents argue that Wills and Trusts should not be construed the same way, in spite of the legislature's expressed view that they should be. They claim wills cannot be oral, but that trusts can[9]. Yet at no point do they establish a compelling rationale for why trusts and wills should not be accorded the same construction, or why a construction that permits the unrestrained admission of extrinsic evidence is preferable.

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[9] Interestingly Respondents do not cite § 456.4-407, RSMo. (2012) which provides that while an oral trust may arise, land, tenements and hereditaments cannot be placed in trust without a writing.

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The remainder of Respondents Point III simply quotes at length from the trial court's erroneous order. Respondents thereby admit by default what they will not plainly admit. Specifically, Respondents had to create an ambiguity in the trust instrument through the introduction of extrinsic evidence. While some of the extrinsic evidence (coming exclusively from Respondents' witnesses) does indeed cast doubt on Dr. Conklin's intent, it does so only if the plain language of the document is not given effect. Respondents claim extrinsic evidence removes all doubt about the settlor's intent, but in truth, it is what creates the doubt: the trust amendment shows that both Dr. Conklin and his wife loved all the children and wished them all well equally.

Respondents cite *Schupbach v. Schupbach*, 760 S.W.2d 918, 923 (Mo. Ct. App. 1988) in concluding Point III. They suggest that at least some of the extrinsic evidence was admissible, without suggesting what that evidence might be. In so doing, Respondents omit from their discussion of *Schupbach* this statement: "This type of [admissible extrinsic] evidence does not include evidence of declarations by the testator of his intent; such evidence is generally inadmissible." *Id*.

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IV. RESPONDENTS ARGUMENT ABOUT DEFENDING THE TRUST FAILS TO CONSIDER THAT ALTHOUGH AWARE OF THE AMENDMENT, RESPONDENTS TOOK NO ACTION ON IT UNTIL APPELLANTS DISCOVERED IT, INDICATING AN INTENTION TO EXCLUDE APPELLANTS FROM LAWFUL PARTICIPATION IN THE TRUST.

a. RESPONDENTS HAD A DUTY TO DISCLOSE THE AMENDMENT

Respondents argument regarding attorney's fees, and to a lesser extent, the no-contest clause of the trust (see Point V, *infra*), is predicated on the idea – unsubstantiated by the clear terms of the trust amendment – that Respondents and only Respondents had a right to the trust assets:

"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 and Carli's testimony (see, e.g., TR0081, 111, 161-163) indicates that they had knowledge of a document that was addressed to all four children, that made dispositions of property under the trust to all four children, and that they purposefully, intentionally, or at least recklessly did not disclose to Appellants.

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Carli Conklin is an attorney and at one point asserted an attorney-client privilege (later withdrawn)[10]. Appellants are unsure of her current licensure status. She does not appear in the Missouri Bar's directory. Still, Rule 4-3.4 provides in relevant part: "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;"

The Missouri comments state "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." *Id.* Comment 1. They note that "[d]ocuments and other items of evidence are often essential to establish a claim or defense." *Id.* Comment 2.

Even if she was not acting as a lawyer in her case, Carli Conklin had a duty to inform Appellants about the writing. *In re Hess*, 406 S.W.3d 37 (2013)(interpreting "a lawyer" to apply both to the lawyer as

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[10] See Respondents Brief at 8, referencing the withdrawal of the objections made in discovery.

advocate and the lawyer as litigant). While the same cannot be said about Cari's admission that she concealed the writing, this evidence casts doubt upon the claim that Respondents were merely defending the trust against some third-party interloper. Had they openly acknowledged the existence of the documents in the days and hours after Doctor Conklin's untimely passing, a proper construction of the document as well as a proper division of estate assets could have been effected without acrimony or recrimination.

Or, said differently, at this point, having held back the document, never disclosed its existence, and received money and property that should have gone to Appellants had the Settlor's intentions expressed in the document been revealed, Respondents had little choice to but mount a fierce opposition to Appellants. They were acting not to defend the trust, but to secure an advantage personal to them.

b. NON-DISCLOSURE SPEAKS TO BAD FAITH

In determining that the Respondents could have their fees paid by the trust, the Court of Appeals opined that the legal questions of trust construction were significant. Appellants concede this. Yet in so holding, the Court may not have fully considered the implications of § 456.10–1004, RSMo (Cum.Supp.2012). It provides:

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> 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 the subject of the controversy.

Id. (emphasis added) The Court of Appeals did not give full effect to the requirements of "justice and equity." For these reasons and those expressed in the Appellants' Substitute Brief, Appellants seek reversal of the fee award.

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V. ENFORCEMENT OF THE NO-CONTEST CLAUSE SHOULD BE REQUIRED WHERE THE RESPONDENTS KNEW OF THE AMENDMENT, FAILED TO DISCLOSE THAT AMENDMENT, DENIED THE APPELLANTS THEIR RIGHTFUL SHARE OF TRUST ASSETS, AND ATTACK (AND CONTINUE TO ATTACK) THE VALIDITY OF THE TRUST AMENDMENT.

Respondents contend Appellants have raised the "No-Contest Clause" to create "settlement pressure" on the Respondents and that "the very last thing the late Keith Conklin would ever have wanted would be for his daughters, whom he had a 'wonderful' relationship, to be disinherited from his estate under these circumstances." (RSB0054).

These two assertions are curious in two respects. First, there is no evidence in the record of Appellants attempting to create "settlement pressure." Respondents do not cite the record in making this assertion. There have never been any settlement discussions between the parties. Accordingly, this assertion has no basis. Appellants leave it to the Court to deduce the reason Respondents make such an assertion.

Respondents' second assertion regarding disinheritance is directly contrary to the original trust document and amendment. As

both Appellants and Respondents seem to agree, the intent of the Settlor is to be derived from the terms used in the trust. *Blue Ridge Bank*, 207 S.W.3d 149. The K.R. Conklin Living Trust was created in 1996 and at that time it only provided for the Decedent's two daughters. Article Twelve, Section 6 of the Trust, referred to as the "No-Contest Clause", was included in that original document. It could not have been directed at anyone other than Respondents and reflected Dr. Conklin's desire that no one attack the validity of the trust he created to hold the assets he worked an entire lifetime to accumulate. If the Decedent's last desire was not to disinherit the Respondents, such a clause would not have been included. It was included and directed squarely (and solely at that time) at the two Respondents. Thus Respondents' argument is untethered to reason.

In asserting before the trial court, court of appeals, and this Court that the trust amendment is invalid, the Respondents attacked the validity of the trust, and continue this attack to this day. Not honoring this clause effectively repudiates the intent of the Settlor.

Additionally, Respondents seem to ignore the final directive of the Decedent in the November 1, 2002 Amendment, where he states "*Above*

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all I wish to have no fighting or bickering between *<u>the four of you</u>*." (L.F. 73)(emphasis added).

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CONCLUSION

Counsel for Appellants takes exception to Respondents' characterizations in their Conclusion. The phrasing suggests that Appellants here piggy-backed on their mother's claim. The docket shows this is not true. It also implies a resort to threats and coercion with its reference to "bare knuckle fight." Again, this characterization goes beyond the record evidence.

To be clear, Appellants are not morose family members who feel that they were not provided for because of their status as "step-children." Appellants never felt that way. As Dr. Conklin pointed out in directing the trust amendment to "the four of you," Alisha and David were always treated like natural children. They always treated Dr. Conklin as their father because he was the only one they ever really knew. No document, and no court order, can take away the love those children have for that man. It is regrettable that a directive to share the trust assets has provoked such a lugubrious response from Respondents.

Appellants suggest it is equally sad that even though Respondents were aware the amendment was addressed to and provided for all four

children, only Respondents knew of its existence, and they chose to remain silent, perhaps in hopes that it would be lost forever. That Dr. Conklin retained the document until the time of his death, that he made non-probate transfers for the benefit of his wife to carry out his estate plan, and that he fully expected his gifts to Appellants to be operative is consistent with a plain meaning of the terms of the document and its preservation.

While the contrary testimony by those interested in preserving the status quo tells a different story, it is all extrinsic evidence that for the purposes of construction must be ignored. The Court of Appeals reached the right conclusion. This Court should retransfer this action to the Court of Appeals for entry of the mandate or reverse and remand as it sees fit.

Respectfully submitted,

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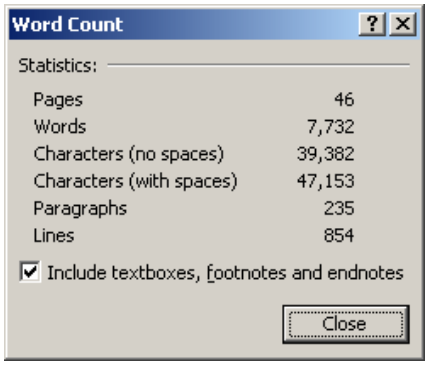

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I certify that in filing this document with the MO Supreme Court through the electronic filing system an electronic copy of this document was served on counsel named below on this 27th day of February, 2014.

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