

**IN THE SUPREME COURT OF MISSOURI**

Case No. SC93679

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**C. DAVID ROUNER and ALISHA HUDSON,**

**Appellant,**

**vs.**

**CARI RENEE WISE and CARLI NICOLE CONKLIN,**

**Respondents.**

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**Appeal from the Circuit Court of Adair County, Missouri**

**Case No. 1031CV00117**

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**RESPONDENTS' SUBSTITUTE BRIEF**

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## STATEMENT OF FACTS

Appellants' Statement of Facts omits several key facts and, as will be shown, likewise materially misstates other facts. Respondents will not restate the entire factual record in this Brief, but a number of clarifications and corrections are nevertheless warranted.

To begin, rather than to quote piecemeal from the written document that is at the heart of this case, the entirety of its language is set forth as follows:

*NOV 1, 2002*

*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 & 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.*

*My life insurance (250,000) is to be used to pay off the loan against the apartments (120,000) The balance of it (after taxes) to be used to pay off the morgage [sic](at NEMO bank) against the house.*

*Cash flow from the apartments will meet the payments on the Zimmerman farm (16,000/yr on Mar 1, 2003, 2004 & 2005) to Bob Zimmerman and will make the portion of the Glidewell farm payment to Donald Glidewell on Dec 31, 2002, 2003, 2004 & 2005 that the farm*

*doesn't generate. Farm generates around 10,000 clear/yr - payment is 33,000/yr*

*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.*

*The farm north of Novinger by Lee Kittles will go to Cari & Carli.*

*The Zimmerman farm will go to Cari, Carli David & Alisha, 1/4 undivided interest to each. If one of the four or two of the four wants to purchase the farm, I would want them to have it at a fair market appraised value to be fair to those selling their interest. If all decide to sell, I would think keeping it for several years & then maybe splitting it in to smaller parcels would be the best alternative for maximum selling price. The rental income will more than pay the taxes & annual expenses so there would be no need to sell it.*

*I don't want the Glidewell farm sold. I wish all four of you (Cari, Carli, David & Alisha) to have an undivided 1/4 interest. Later in your lives you can all decide whether to pass it to your families or to sell.*

*We wish to have the proceeds of Jo's life insurance (100,000) given to David & Alisha.*

*We wish to have Parkview Animal Hospital sold and the proceeds to Cari & Carli.*

*We wish to have the residence at 406 Suburban Drive sold and the proceeds first used to pay all student loans for Carli, David & those that*

*Alisha will incur through college, hoping she doesn't desire to study in France or England ☺ the remainder to be split equally between you four children.*

*All tractors & equipment to stay with the farms. All of my personal tools I would like to have kept by any of you children or your spouses that will use them.*

*All vehicles are to be sold at fair market value & the proceeds equally divided.*

*I wish to have all of my collectors guns (pistol shotguns & rifles) to be entrusted to my brother Ron to sell through someone who knows and can get the best price for them. I wish for the proceeds to be divided 1/5 for each child & 1/5 for Ron for his assistance.*

*I wish for my modern guns (4 pistols, 4 High Powered rifles, 2 short barreled shotguns) to be equally distributed on a fair market value monetary basis between all four children. Each may elect to keep or sell the guns.*

*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.*

*It has been our pleasure to be your parents*

*KR Conklin*

*Jo Conklin*

(LF 71-73) (Respondents' Appendix at 110-112).

Dr. Keith "K.R." Conklin<sup>1</sup> died unexpectedly on May 21, 2009. (Tr. 126-127). By the time of his death the trial court noted that "[m]any of the dispositions of property indicated in the 2002 writing were no longer relevant or possible at the time of the death of the Decedent, various debts mentioned therein having been retired, and certain items of property having been subsequently sold or re-titled." (Tr. 114-115). Dr. Conklin's wife, Jo Conklin, who survived him, received some of the assets referred to in the 2002 writing, later retitled through tenancy by the entireties or other non-probate transfers. (Tr. 81). The trial court found these provisions for Jo outside of the Trust to be "substantial" and calculated their value to be "nearly one million dollars." (App. 103, Tr. 54). Various witnesses supported these findings. (L.F. 54, 81).

The lower court found that approximately two days after Dr. Conklin's passing, Appellant David Rouner, who was then a law student, asserted to Carli Conklin that the Trust was not valid for a variety of reasons. (Tr. 83, L.F. 102). At his urging, David, Alisha, Jo, Carli and Cari met with an attorney who was a friend of David's who prepared a proposed "family settlement agreement," (Respondents' Exhibit D), that was to result in liquidation of the Trust and transfer of the majority of the real and personal property from it to Jo. (Respondents' Exhibit D, Tr. 83, 152-153). The preamble to the agreement recited that "*K.R. Conklin during his lifetime, did not revoke or modify the terms of the K.R. Conklin Living Trust....*" (Respondents' Exhibit D).

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<sup>1</sup> Dr. Conklin was a veterinarian. (Tr. 59).

Respondents retained their own legal counsel to review the Trust and ultimately did not sign the family settlement agreement. (Tr. 90-91). Instead, the trial court found they eventually probated their late father's will and undertook to administer his Trust according to its terms. (L.F. 103). The trial court found that Jo then took the position that certain other assets besides those that she had received belonged neither to her husband's probate estate nor to the Trust, but rather that they had passed to her by way of tenancy by the entireties with the Decedent or through other survivorship or other non-probate transfer devices. (L.F. 104). The trial court took judicial notice of the file in the probate estate over which the court had also presided. (L.F. 104).

After Dr. Conklin's death, certain equipment at a farm held in the Trust was transferred to another location at Appellant David Rouner's insistence and all of Dr. Conklin's belongings, files and personal effects were removed from the family home. (Tr. 91). The Respondents eventually filed a discovery of assets action to retrieve the assets that had been removed and Jo then filed a counterclaim asserting breach of contract on the part of Respondents for failure to sign the family settlement agreement and for a constructive trust. (Tr. 90). Jo later filed an additional claim for an equitable lien on the Trust properties. (TR. 90). After giving her deposition, Jo dismissed her counterclaim and Respondents dismissed a claim for tortious interference. (Tr. 104-105, 116). The discovery of assets action was heard in a trial in April of 2011. (L.F. 103-104). Certain equipment was later returned to the Respondents (Tr. 115, 118), and the court ruled that Jo was allowed to keep the proceeds of a dog breeding operation that the couple had operated. (Tr. 87).

During the discovery phase of that case the 2002 Writing was produced by Mrs. Conklin's attorneys approximately two weeks before the trial. (L.F.104). While Appellants assert in their statement of facts that the writing "*was not brought to the attention of Appellants until April, 2011,*" the record is clear that the document was in the possession of their mother and their mother's law firm, a firm that Appellant David Rouner was working for at the time of Dr. Conklin's death. (Tr. 89, 94). Further, Appellants also assert in their statement of facts that Respondent Dr. Cari Conklin Wise<sup>2</sup> "*had discovered the November 1, 2002 writing on the day after Decedent's death but that she did not tell anyone about it.*" (Appellant's Brief at p. 32). The trial court found, however, and the record supports, that Cari saw the writing among the contents of a hanging file folder containing a lot of "*random stuff.*" (Respondents' Appendix at A-10) (*See also* Tr. at 164). The hanging file was given to Cari by Jo Conklin and the trial court found that "*Cari looked at the document, decided it was 'insignificant,' and handed it back to Jo.*" (Respondents' Appendix at A-10. *See also* Tr. at 164).

The trial court found that Appellant David Rouner was involved in various respects with his mother's litigation but that he was not in control of it. (L.F. 104). Less than a month after the trial of their mother's lawsuit, the Appellants herein, through their attorney, filed the instant action asserting for the first time that the 2002 writing served to amend the K.R. Conklin Living Trust and that, by virtue of that amendment, they were now beneficiaries of the Trust. (L.F. 1, Tr. 183). In their brief, Appellants recite in their

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<sup>2</sup> A Doctor of Veterinary Medicine (Tr. 155).

statement of facts that the 2002 Writing named them as “beneficiaries” of the Trust. (Appellants’ Substitute Brief at p. 19) That statement is a legal conclusion, however, since the document does not use that term.

Appellants twice amended their petition and eventually included a count seeking to disinherit Respondents entirely based on an *in terrorem* or no contest clause contained in the trust indenture, reasoning that by refusing to adhere to the 2002 Writing, Respondents were in essence contesting the Trust. (L.F. 90). Respondents thereafter filed a motion for judgment on the pleadings (L.F. 3), which was later overruled. (L.F. 4). Thereafter Respondents filed their Answer to the Second Amended Petition denying the purported legal effect of the 2002 Writing and asserting a number of affirmative defenses including that the language of the document was conditional in nature and, separately, that the language was precatory and not mandatory, imposing no legal obligations or rights. (L.F. 79). Respondents also invoked the doctrine of unclean hands, asserting that Appellants had previously denied the validity of the Trust and had actively participated in their mother’s lawsuit and had only brought the instant action after their mother’s attempt to garner more assets had largely failed. (L.F. 80).

During the pendency of the litigation the parties engaged in discovery, most of which is not noteworthy here. But at page 26 of their statement of facts in Appellants’ brief they assert the following:

*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 (Tr. 113). Carli testified at trial that her law license in the state of Arkansas was placed on “inactive status.” (Tr. 113). 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 statuses.” (Tr. 96-97).*

(Appellants’ Brief at p. 26). Absent from Appellants’ brief however is any reference to an email later sent to Appellants’ counsel by the undersigned, admitted at trial as Respondents’ Exhibit B, which recited as follows:

*Mark, As you’ll recall at the recent deposition of Carli Conklin, I raised an objection regarding her conversations with her sister as being privileged. This was based on Carli’s status as a lawyer and law professor who has participated in the defense of her case. I felt it was a wholly proper objection at the time. I have since learned, however, that Carli’s law license has been put on inactive status throughout the time that this case has been ongoing. Accordingly, I cannot, in good conscience, maintain that objection, since Carli would not have been authorized to advise a client during this time. Carli represents that had she answered your question regarding her conversations with her sister, her answer would have simply highlighted various of the subjects about which she and her sister already testified. But if you would like to take a brief phone deposition of Carli to confirm this, we would be amenable to making her available for that purpose. Thanks, Bob*

(Tr. 112-113, Respondents' Exhibit B, Respondents' Appendix at A-94). Appellants' counsel responded "*thanks for the information*" and they did not thereafter avail themselves of the offer to ask follow-up deposition questions of the witness. (Tr. 113). As referenced elsewhere in this brief and in Appellants' brief, Respondent Carli Conklin is a law professor now in Columbia, Missouri and does not practice in Arkansas.

Several other entries from Appellants' statement of facts bear mention. Appellants recite at page 23 of their brief that Dr. Conklin's brother Kenneth testified that the decedent was "*fairly close*' to David and Alisha." But the actual testimony at trial was that Dr. Conklin was "*fairly close to David early on, Alisha later on, to my knowledge.*" (Tr. 41). The witness was then asked: "*Okay. You say he was fairly close to David early on. Did that change later?*" And the witness answered, "*It seemed to change that they drifted apart.*" (Tr. 41).

Dr. Conklin's wife, Jo (Appellants' mother), testified that during their nine-year marriage Dr. Conklin did not assist with paying for Appellants' education. (Tr. 8-9, 130, 174). She described Dr. Conklin's relationship with Appellants as "*pleasant*" but then described his relationship with his own daughters as... "*wonderful.*" (Tr. 136-137). With regard to his own children, Dr. Conklin's brother testified that he and Dr. Conklin had "*a discussion on how much education you should give a child.*" (Tr. 44). Dr. Conklin replied, "*They do everything right. As much as they want, I'm paying for it.*" (Tr. 44). Dr. Conklin ultimately paid for his daughters' college, veterinarian school, law school and a PhD program. (Tr. 155-156).

Finally, Appellants have advanced a critical misquotation of the language of the Trust at issue. Appellants recite at page 18 of the brief that the Trust provides “*the power to amend, revoke or terminate’ the Trust ‘is personal’ to the Decedent ‘and may not be explained by any person or entity.*” Appellant’s Substitute Brief at p. 18 (Emphasis added). The use of the word “explained” might be highly relevant in a case where extrinsic evidence might be utilized to forcefully explain the meaning of a document that the trial court found to be ambiguous. But the Trust does not include the word “*explained.*” Instead, the correct quote is “*the power to amend, revoke or terminate this Trust is personal to me and may not be exercised by any other person or entity.*” (Emphasis added) (L.F. 27).

I. THE LANGUAGE OF THE 2002 WRITING UNMISTAKABLY CONTEMPLATES THAT ITS DISPOSITIVE PROVISIONS WOULD ONLY BE OPERATIVE IF BOTH THE DECEDENT AND HIS WIFE FAILED TO SURVIVE THEIR IMPENDING TRIP AND THUS ANY ENTITLEMENT CREATED FOR THE APPELLANTS WAS CONDITIONAL IN NATURE.

A. Reconciliation of the Terms of the Entire Document Within its Four Corners Plainly Supports that Appellants' Purported Bequests are Subject to Conditions Precedent Including the Prior Death of Their Mother.

In Missouri, the paramount rule in construing the meaning of a trust provision is that the settlor's intent is controlling. Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 443 (Mo. App. W.D. 2004). “[A]bsent any ambiguity in the terms of a legal instrument, the intent of its maker, including the intent of a testator or the settlor of a testamentary or *inter vivos* trust, is to be ascertained from the four corners of the instrument without resort to parol evidence as to that intent.” Id. at 444. Courts must glean a settlor's intent from the trust instrument as a whole by examining the trust agreement in its entirety, giving no undue preference to any single word, clause or provision. In re Gene Wild Ins. Trust, 340 S.W.3d 139, 143 (Mo. App. S.D. 2011). Thus, when determining whether an ambiguity exists, “courts must look to the language used within the entire instrument.” Blasdel, 141 S.W.3d at 445 (internal quotation omitted). *See also* Court of Appeals opinion herein at p. 10 (Appellant's Appendix at A-10). Following these principles,

Respondents have maintained throughout this case--beginning with a motion for judgment on the pleadings (Tr. 16)--that the various statements and words at issue in the 2002 Writing yield the logical conclusion that the document was intended to be conditional in nature and not operative if the decedent and his wife returned from the trip on which they had embarked.

First, the document contains the unmistakable expression that it would pertain only if decedent and his wife were both dead. Focusing on this issue, it is important to begin with the language of the second sentence of the document:

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

This language makes clear that the people to whom the letter was addressed were not even intended to ever read the letter unless the decedent failed to return from the trip that he describes in the document. Moreover, the document clearly states that the decedent -- looking forward into the future-- conditioned the applicability of the document on both he and his new wife having both died. Embracing the holding Blasdel, 141 S.W.3d at 444 that, absent any ambiguity, the intent of a testator is to be ascertained “from the four corners of the instrument,” the four corners of the 2002 Writing provide significantly more insight into the decedent’s intentions than the three sentences focused upon by the Court of Appeals below. (Appellants’ Appendix at A-11-13).

First, as noted by the Court of Appeals, both the decedent and his wife are signatory to the document. Both sign off in the past tense with “[i]t has been a pleasure to be your parents.” While the document uses the singular “I” in a number of places, so

too does it also use the term “we” in expressing a preference for the disposition of various assets. A number of the assets referenced in the document are not even part of the trust estate nor the property of the decedent in any other capacity, but instead include assets owned by decedent’s wife including vehicles, her life insurance, and half of the “Zimmerman Farm”, which she held as a tenant in common with the decedent (Tr. 114-115). By her signature, she is clearly mandating what she wants done with her assets in the event of her demise. In addition, it should be noted that at three places in the document, the decedent crosses out the word “I” and replaces it with the word “we,” referring to his wife’s life insurance, which was not his asset, as well as the animal hospital and the marital home. (Respondents’ Appendix at A-111.)

Thus, even if this Honorable Court believes that the decedent was motivated to make estate planning changes after his marriage and in the face of a lengthy trip to Phoenix, the document unmistakably reflects the decedent’s and his wife’s assumption and intention that its terms would *only* be operative if the decedent died on the trip and separately that his wife not survive him.

This reasoning does not require a finding that the couple die in a common accident or that they otherwise die simultaneously. It merely follows that the decedent expressed his intentions --and those of the other signatory to the document sitting next to him on the trip to Phoenix, based on the assumption that his entire estate-- *and hers*, would be left to the children and step-children and not to a surviving widow. To find otherwise would be to construe this document to provide for Mrs. Conklin’s complete disinheritance in the event that she survived her husband. Indeed, such a construction would presuppose that

Mrs. Conklin, given her signature to the document, approved of an outcome that would leave her none of her husband's assets in the event of his death. Moreover, such a construction also renders the explicit disposition of decedent's wife's assets and life insurance to be meaningless surplusage.

While the one condition present in every estate planning document is the condition that someone die before another will take, undoubtedly a condition expressed nearly as often is one providing that a married person's surviving spouse benefit from that estate if indeed the spouse survives the settlor. Many or all of the people reading this document will have such provisions in their own estate planning. A corollary to that condition then is a contingency that if the spouse does not survive, then the assets fall to the children, to other relatives, to charity, etc. The expression of such a condition is familiar and straightforward even here notwithstanding that the lay scrivener seems to take this concept as a given in his writing.

Taking into account the multiple instances within the four corners where reference is made to both spouses, to their joint and separate assets, to their both having died, their joint signature to the document, and to their various joint expressions of intent embodied by the use of the word "we" in place of the marked-out "I," this condition is unmistakably established within the four corners of the document. In addition, it should be remembered that it is the public policy of Missouri to avoid the disinheritance of a spouse. *See* Section 474.160 RSMo. (Allowing a surviving spouse to take a forced share of a deceased spouse's estate regardless of the explicit provisions in a will). As referenced above, to label the mention of the decedent's wife's demise as something

other than a condition is to necessarily sanction her complete disinheritance if one considers that she could then—and did, survive him. And surely it is a common sense reality that most people provide for their wife or husband in their estate planning.

The Court of Appeals below—at the urging of Appellants, found the decedent’s reference to his impending trip and to the fact that his Trust had “not been updated for several years” to reflect only his “motivation for drafting the 2002 Writing, not a condition precedent to its effectiveness.” (Appellants’ Appendix at A-14). These referenced passages very arguably *do express the decedent’s motivation*. But nowhere in the cited authority is it written that a document cannot contain *both* words of motivation and conditional terms. The words referenced above must be read in tandem with the following: “*If you are reading this it means that Jo & I have met our demise either going to or coming back from Phoenix.*” The fact that this statement is adjacent to other statements that may be read as statements of motivation does not make this statement one of motivation also. Reading them in the context of the rest of the document, which unmistakably assumes the death of Mrs. Conklin, underscores that the document was, indeed, conditional.

Respondents agree that trusts and wills have often been construed in largely the same fashion by Missouri courts. In re Gene Wild Ins. Trust, 340 S.W.3d at 143 (“*In general, Missouri courts use the same rules when construing both wills and trusts.*”). The admonition that “in general” the two instruments have been treated the same implies, however, that in some circumstances they have not been treated interchangeably. Assuming for the sake of argument here that the analysis is the same, Missouri has long

recognized that conditional instruments of whatever variety require satisfaction of the condition or conditions upon which their benefits are based.

In Naylor v. Koeppe, 686 S.W.2d 47 (Mo. App. E.D. 1985), the court was faced with a will that provided for a conditional bequest based on the following language:

*To my dear wife, Betty P. Naylor, provided however, if my said wife and I should perish in a common disaster, or if she should die within thirty (30) days after me from injuries or effects of a common disaster from which I met my death, then I make instead the following provisions for distribution of said residue of my estate that my said wife would have taken had we not died from such a common disaster:....*

In reviewing this language, the court made the following analysis:

*It has long been recognized in this State that the operation of a will may be conditioned upon the happening of a certain event and that, if the event does not occur, the will is inoperative. In Robnett v. Ashlock, 49 Mo. 171, 172 (1872), the dispositive provisions of a will were based on the testator's fear that he would die during an impending trip. 'I this day start to Kentucky; I may never get back. If it should be my misfortune, I give my property to...' The testator did return to Missouri where he lived for thirteen years before his death, and the court held the will inoperative. Recently our Supreme Court, citing Robnett, reaffirmed the principle that: "It is perfectly possible to execute a will which has no effect at all unless a specified condition is performed or occurs. If such a condition is*

*expressed, it will be enforced.” Helmer v. Voss, 646 S.W.2d 738, 742 (Mo. banc 1983).*

Id. at 49.

The Naylor court went on to hold that the provision in the will was ineffective because the condition precedent to its operation was not performed. “*If may be a small word, but all know its meaning, and instead of a more formal phrase it is used in common language to express condition or limitation; ...*” Id. at 50 (quoting Robnett v. Ashlock, 49 Mo. 171, 175 (Mo. 1872)). “*So it is here. Cognizant though we are that courts ‘are disposed to adopt any reasonable construction which will avoid intestacy,’ Helmer, supra, 742, we may not under the guise of ‘construction,’ ignore the pellucid import of the testator’s words.*” Id. at 50.

In Gehring v. Henry, 332 S.W.2d 873 (Mo. 1960), this Honorable Court held that where a testatrix disposed of her entire estate in the event she and her husband died on or near the same date and she made no further disposition of her estate and such contingency did not occur, she died intestate. Here, the language of the 2002 Writing makes clear that the parties to whom it was addressed were not even meant to read the document unless Dr. and Mrs. Conklin had met their “*demise either going to or coming back from Phoenix.*” The pleadings and record make clear that Dr. Conklin survived that trip by many years and that his wife survives to this day.

**B. This Court’s Decision in Helmer v. Voss does not Prevent a Finding that the 2002 Writing is Conditional.**

The Court of Appeals below did not end its inquiry into the settlor’s intent with a neutral reconciliation of the various terms and statements within the four corners of the 2002 Writing. Instead it looked to this Court’s 1983 decision in Helmer v. Voss, 646 S.W.2d 738, 742 (Mo. banc 1983) to guide its analysis of the conditional aspects of the document. Helmer involved a joint will created by a married couple who later adopted two children. The joint will made repeated reference to dispositions that were to be made in the event both spouses died in a common disaster. When the wife eventually predeceased the husband—in other words when no common disaster struck, the will was eventually probated for the surviving husband who had become the sole owner of the couple’s joint assets. But the adopted children—who were not mentioned in the will that predated their adoption-- contested the will, not by challenging the mode of execution or the testators’ competency, but rather by asserting that the document by its terms was entirely conditional and thus completely inoperative since the condition precedent to its application was not satisfied. If the will was not operative, then as adopted children they would then inherit their father’s estate through intestacy. Id. at 740-741.

The Court of Appeals below in this case cited to the holding in Helmer, which included the admonition that, unless the language allegedly stating the conditional nature of the document was “compelling,” then courts should “hesitate to construe language of purpose or occasion for making a will as establishing a condition precedent to the very effectiveness of the will...” Helmer at 742. App. At A-11. Accordingly, since the issue

presented here squarely involves the question of whether the 2002 Writing is conditional, the Court of Appeals applied the “compelling” standard--a constructional preference,<sup>3</sup> against such a finding, undertook its analysis subject to that presumption and then held that the language in question “unambiguously reflects only Decedent’s *motivation* for drafting the 2002 Writing, not a condition precedent to its effectiveness.” App. at A-14.

Respondents respectfully disagree with the Court of Appeals’ analysis. If indeed the 2002 Writing is to be construed within its four corners by considering all of its language and terms, Respondents continue to maintain with alacrity that, despite the handicap imposed by the Helmer presumption against conditional wills, the language of the document supporting its conditional nature is indeed “compelling” and overcomes the presumption. Without restating Respondents’ analysis in total here, the bottom line is that the late Dr. Conklin made clear that no one was to even read the document unless he and his wife had “*met [their] demise either going to or coming back from Phoenix.*” The

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<sup>3</sup> According to the Comment to section 1-112 of the Uniform Trust Code dealing with trust construction, (a section that, as will be discussed, was *not* adopted as part of the *Missouri* Uniform Trust Code), “[a] constructional preference is general in nature, proving general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoids illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms.” 4C Mo. Prac., Trust Code & Law Manual, Section 456.1-112 at p. 90 (2013-14).

document leaves nothing to his surviving widow if she were to survive him and disposes of various of his wife's separate assets as well in a writing that was co-signed by her. These realities underscore the conditional nature of the document as a whole. That the document also includes the decedent's motivation for making it does not diminish its conditional nature. The Court of Appeals, again at the urging of Appellants, treated the language as if the conditional/motivational analysis was an either/or proposition. It simply was not, at least with respect to the document at issue in this case.

As will be discussed later in this brief, the presumption against conditional documents recited by the Helmer case, and its separate holding that extrinsic evidence may not be considered in divining a testator's intent where a patent ambiguity is presented, are at odds with modern authority and public policy applicable to other diverse areas of Missouri law. But the point to be made here is that, even with the analysis handicapped against the Respondents on this issue, conditional wills and trusts are still enforceable and the reasonable analysis of the language presented in this case meets the higher "compelling" standard in the first instance. Of course, this position is the direct opposite of the Appellants' position that the document is unambiguously *unconditional*. Suffice it to say that Respondents stand by their analysis and believe that this Honorable Court should embrace their construction.

Adding to the complexity of this case is the Court of Appeals' reading of Helmer as expressing a concern that a finding of a condition may prevent the instrument from even becoming operative. (Court of Appeals Opinion, Appellants' Appendix at A-14. Citing Helmer at 742.). But the Helmer court was faced with a situation where the joint

will – the *only* formal estate planning created by the decedents therein, would rise or fall in its entirety based on whether the document was found to be conditional. The Helmer court acknowledged this reality and held: “Courts, furthermore, are disposed to adopt any reasonable construction which will avoid intestacy.” Id. But in the case at bar, no intestacy results from the 2002 Writing being found to be conditional. If it is conditional, then it operates to allow the original terms of the (formally drafted) original trust instrument to govern the disposition of the trust assets. Intestacy is avoided. To the extent that the recitation of a presumption/constructional preference against conditional language in a will or trust is part of the holding in Helmer, then it follows that such a presumption should be limited to situations where the application of the disputed condition results in the decedent dying intestate.<sup>4</sup> Indeed, the Helmer court itself pointed out that “[f]ew wills of any length do not contain some conditional bequests.” Id. at 743. And it further held that “[t]he court may give effect to unconditional bequests, while holding that conditional bequests fail if the condition on which they depend is not established. Such a holding would be strictly in accordance with the language of the will and would give effect to all terms as they are written.” Id. Thus, only when the finding of a condition will result in intestacy should a presumption/constructional preference be applied in determining whether a condition precedent exists. In the absence of that

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<sup>4</sup> Appellants’ assertion that their lack of a bequest under the Trust results in partial intestacy is not correct nor logical so long as the decedent’s assets are otherwise distributed.

potential outcome, the language in question should be harmonized with other terms in the document to give effect, as this Court held, to all terms as they are written. No extra weight should be given to any of the language depending on whether a condition is expressed or not in the document.

That analysis is what the Helmer court applied in the majority's final opinion. Noting that there were a number of independent bequests in the document, some preceded by the conditional language and some with *no such reference*—including the catch-all “general residuary clause” leaving the “rest and residue of [decedents’] property” to specified residual beneficiaries, this Court held that the will could still be fully operative. “We observe that the conditional items in III, IV and V are bequests of sums of money or specific property and that if they were to fail there would still be a complete testamentary scheme. Item VI operated to disinherit [wife’s natural son], who would take her entire estate if she were to survive and were to die intestate.... Item VII is a general residuary clause of a type which is common among childless couples. \* \* \* *There would be no partial intestacy if Items III, IV and V were not given effect.*” Id. (Emphasis Added).

The Court of Appeals below noted that although the decedent had qualified his second sentence in the 2002 Writing by use of the word “if,” (“*If you are reading this it means that Jo & I have met our demise....*”) (emphasis added), the court reasoned that the word “does not condition Decedent’s distribution of the Trust’s assets.” (Court of Appeals Opinion, Appellants’ App., A-13). The Court of Appeals then recited that this Court in Helmer “noted the significance of the expressed condition’s placement with

respect to the will's dispositive clauses.” Citing Helmer at 742. But the significance of the conditional language immediately before dispositive provisions arose because the condition was set forth before some—*but not all*, of the dispositive clauses. The contestants in Helmer made the same argument and this Court found it unavailing:

*The contestants argue that the repetition of the language of condition in Items III, IV and V reinforces their argument that the entire will was intended to be conditional on the death of both testators in a common disaster. This circumstance, however, strongly supports the opposite position. Inasmuch as Items I, VI, VII and VIII contain no conditional language, the only reasonable conclusion is that the testators intended that these clauses be treated in a manner different from the conditional clauses. The different treatment, coupled with the lack of a positive command in Item II, persuade us that the testators intended that the unconditional clauses remain effective, so that the will may be probated as the will of the survivor. It is not for us to speculate as to why the testators made some clauses of the will conditional and others unconditional, once our task of construction is performed.*

Id. at 742.

This case is simply different from Helmer in this respect. The various dispositions in the 2002 Writing are not individually preceded by conditional language. But at the very beginning of the document itself, prior to any discussion of dispositions, is the announcement that, if the document were even being read, then it meant that the decedent

and his wife had both perished on the trip they were taking. Unlike Helmer, that condition is not then contradicted by other language introducing some, but not all of the individual dispositions. Then, as previously referenced, allusions to the wife's death, the disposition of her separate property and the fact that she would receive nothing from her husband's property combine to make clear that couple's death on the trip would be the trigger for the dispositions outlined in the writing.

C. **The Decedent/Settlor's Intent Must Still Control the Analysis And Should Not Be Arbitrarily Defeated By A Constructional Preference.**

The difficulties of this case are compounded by the competing public policy goals presented by the case law applicable to these facts. While the Court of Appeals Opinion recites that the paramount rule in construing the meaning of a trust provision is that the settlor's intent is controlling (Appellants' Appendix at A-10), it also recites that courts should "hesitate to construe language of purpose or occasion for making a will as establishing a condition precedent to the very effectiveness of the will." (Appellants' Appendix at A-11). Thus, this latter countervailing directive (if broadly applied) essentially "handicaps" the outcome with a constructional preference even in the face of a "paramount" rule of construction upholding the settlor's intent. (Court of Appeals Opinion, Appellants' Appendix at A-11). This Honorable Court has examined a similar clash of competing rules of construction in the context of statutory construction. As with the instruments at issue here, the paramount rule of statutory construction is to give effect to the intent of the legislature. In that regard, this Court held in State ex rel. Schwab v. Riley, 417 S.W.2d 1 (Mo. banc 1967) as follows:

*Further, the doctrine of strict construction does not exclude a reasonable and sound construction of the statute under consideration.' State ex rel. Missouri Water Co. v. Bostian, 365 Mo. 228, 280 S.W.2d 663, 666 (Mo banc 1955). It has also been said that 'the rule of 'strict construction' has no definite or precise meaning. It has only relative application. It is not the opposite of liberal construction, and it does not require such a strained or narrow interpretation of the language as to defeat the object. The primary purpose of all statutory construction is to determine the intent of the legislature; and all such rules are but vassals to the liege sovereign intent.' Southwestern Bell Telephone Co. v. Newingham, Mo. App., 386 S.W.2d 663, 665, 666 (Mo. App. SD 1965).*

Id. at 3-4.

It is established that decedent's wife has not died and that she has, instead, received a large portion of his estate as a result of his subsequent actions to jointly title assets for her benefit. (Trial Court Opinion, Respondents' Appendix at A-11). Under Appellants' requested outcome, they then also take *yet another substantial portion* of the estate leaving decedent's daughters with a minority stake in their father's estate. Recognition of the conditional nature of the 2002 writing, at the very least as to the requirement that decedent's wife not survive him, is appropriate under a proper construction of that document. But it is also not in any sense an overstatement to assert that an injustice will result here if a mechanical and wooden interpretation is allowed to divest Respondents of a substantial portion of their inheritance.

**II. APART FROM ITS CONDITIONAL NATURE, THE 2002 WRITING IS ALSO PRECATORY BECAUSE IT DOES NOT MANDATE THE REFERENCED DISTRIBUTIONS AND INSTEAD CONTEMPLATES THAT A FORMAL UPDATING OF DECEDENT’S ESTATE PLANNING NEEDED TO BE PUT IN PLACE.**

One of Respondents’ affirmative defenses also asserts that the language of the 2002 Writing is precatory in nature, rather than mandatory, and thus is not binding in the first instance. Neither the trial court nor the court of appeals embraced this argument but Respondents’ will briefly restate it here since it may be reviewed de novo and, regardless, an ambiguity regarding this issue provides an independent basis for extrinsic evidence to be considered as will be discussed *infra*.

A “precatory” document is one with words “*requesting, recommending, or expressing a desire for action, but usu. in a nonbinding way. An example of precatory language is ‘it is my wish and desire to...’*” *Black’s Law Dictionary* (9th ed. 2009). The 2002 Writing begins with the following introduction: “*The trust has not been updated for several years so I will express my desire on how I wish everything to be handled.*” The 2002 Writing is then further replete with the writer(s)’ expression that what is outlined therein is based on his or their “*wish*” (six references), as well as use of the term “*want*,” “*would want*,” “*don’t want*,” and the following: “*If all decide to sell I would think keeping it for several years and then maybe splitting it into smaller parcels would be the best alternative for maximum selling price.*” (Emphasis added).

Given that this is all expressed in the context of a writer who makes clear that this is only to be read if the couple does not survive the anticipated trip upon which they were embarking, then it seems clear that everything in the document is simply an expression of the writer(s)' desires and musings. Implied by all of this is that the writer would take further or formal action upon his/their return (e.g., a trust amendment, property conveyances, beneficiary designations, etc.). The only method of effecting the terms of the Trust that the Decedent had previously utilized was in having an attorney draw up formal paperwork for execution. Given the language referenced above and that fact that the 2002 Writing was handwritten by a layperson riding in a car to the airport, it seems logical that the Decedent more likely than not did not expect or intend his letter to be an enforceable instrument.

In the context of interpreting the meaning of wills, Missouri courts have held that where words such as these are utilized, “*considering that it did not appear that the testator intended to make them imperative, ... no [testamentary] trust was created by the use of such precatory words as ‘wish,’ ‘will,’ ‘will and desire,’ ‘request,’ etc.*” Estill v. Ballew, 26 S.W.2d 778, 780 (Mo. 1930); *see also* Thompson v. Smith, 300 S.W.2d 404, 407 (Mo. 1957) (use of the words “*wish and desire*” in will were not mandatory in nature). At best, the language of the 2002 Writing would have imposed nothing more than a moral duty on the trustees of the Trust had the authors of the document perished during their trip. The “acts and entries of a trustor done or made subsequent to the supposed creation of a trust may be considered as indications of his intent.” Gardner v. Bernard, 401 S.W.2d 415, 421 (Mo. 1966). As the Court of Appeals (Western District)

recently stated, “Missouri trust law *is designed* to effect the settlor’s intent.” Colonial Presbyterian Church v. Heartland Presbytery, 375 S.W.3d 190, 196 (Mo. App. W.D. 2012) (emphasis in original). “*In the discernment of intention to settle a trust, ... the words used as well as the relations between the parties and the motives which influenced the settlor to disposition are circumstances for consideration.*” Penney v. White, 594 S.W.2d 632, 639 (Mo. App. W.D. 1980). A trust may be created “*if the context of the instrument and the full circumstances show an intention to settle a trust.*” Id. In summary, “*Intent is to be gathered from the words and acts of the parties before, at the time of, and subsequent to the transaction under scrutiny, in the light of the entire situation and all of the surrounding facts and circumstances, in short ‘from all the evidence.’*” Masterson v. Plummer, 343 S.W.2d 352, 355 (Mo. App. S.D. 1961) (internal citations omitted).

As referenced above, if this Honorable Court is not convinced that the language of the 2002 Writing is unambiguously precatory, then even under existing case law an ambiguity with regard to that issue allows for the introduction of extrinsic evidence to determine the Decedent’s intention on that issue. If the context of an instrument and the surrounding circumstances show an intention to create a trust, a valid trust may be found, even though precatory words are used. Penney, 594 S.W.2d 632; *see also* 4C Mo. Prac., Trust Code & Law Manual, Section 456.4-401 at p. 120 (2013-14). A court of equity may determine the intent from oral or written declarations, the relationship between parties, and the motives that influence the disposition of the subject property. Id. The trial court found that Dr. Conklin did indeed later consult an attorney and that he did not

want his wife to know about it. (LF at 136, Respondents' Appendix at A-7). The trial court further found that Dr. Conklin undertook to jointly title certain property so that his wife would inherit approximately a million dollars upon his death. (LF., at 140, Respondents' Appendix at A-11).<sup>5</sup> These facts at least support the conclusion that Dr. Conklin felt he had to take formal legal steps to effectuate his intentions, as he had done when he created the Trust at issue. 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.

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<sup>5</sup> Of course, if current Missouri law allows consideration of extrinsic evidence to determine whether a writing creates a trust or amends it *ab initio*, then as will be shown later it makes little sense that the very same extrinsic evidence cannot be considered to determine the meaning and scope of the language at issue.

**III. CURRENT MISSOURI LAW, TO THE EXTENT IT PROHIBITS CONSIDERATION OF EXTRINSIC EVIDENCE TO DETERMINE A GRANTOR'S INTENT IN THE CASE OF PATENT AMBIGUITIES IN A TRUST DOCUMENT, IS AT ODDS WITH MODERN PUBLIC POLICY, WITH EXISTING MISSOURI LAW IN A NUMBER OF RELATED AREAS AND WITH THE PRINCIPLE THAT THE GRANTOR'S INTENTIONS WITH RESPECT TO HIS OR HER TRUST PROVISIONS ARE OF PARAMOUNT IMPORTANCE.**

The Court of Appeals in this case felt compelled to follow this Court's 31 year-old decision in Helmer v. Voss, 646 S.W.2d 738 (Mo. Banc 1983) (three judges dissenting) in examining the trial court's finding that the 2002 Writing was conditional in nature. The Court of Appeals held that "unless the language was *compelling*, courts should 'hesitate to construe language of purpose or occasion for making a will as establishing a condition precedent to the very effectiveness of the will.'" (Ct. of Appeals Opinion at 11, quoting Helmer at 742). (Emphasis added.) "Equally important, the [Helmer] Court opined that questions pertaining to whether a will is absolute or conditional are generally to 'be [re]solved within the four corners of the will' and 'extrinsic evidence as to what the testator may have intended is not admissible.'" (Ct. of Appeals Opinion, Appellants' Appendix at A-11, quoting Helmer at 741.) In light of this strict constructional preference, the Court of Appeals excluded all of the extrinsic evidence upon which the trial court had relied and then strained to force a construction that found no ambiguity whatsoever in the 2002 Writing. As part and parcel of this finding, the Court of Appeals

then found the document was not in any way conditional either with respect to the Decedent's wife predeceasing him or their failure to return from the trip upon which they were embarking. It further held that Missouri law requires wills and trusts to be construed according to the same rules. (Ct. of Appeals Opinion, Appellants' Appendix at A-10, f.n. 4, citing In re Living Trust of Johnson, 190 S.W.3d 469, 474 (Mo. App. S.D. 2006).)

In forcing a construction of the 2002 Writing without considering the available extrinsic evidence, the Court of Appeals was following a line of cases that adhere to the "plain meaning rule." That rule provides that if a writing appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence. *Black's Law Dictionary* 1170 (7th ed. 1999). But Missouri and some other jurisdictions have taken the rule a step further, combining it with a constructional preference that assumes no extrinsic evidence can ever be utilized to address a patent ambiguity in a document, which thereby forces a construction against a finding that the document or provision is conditional. Even *Black's Law Dictionary* editorializes on the rule: "*Though often applied, this rule is often condemned as simplistic because the meaning of words varies with the verbal context and the surrounding circumstances, not to mention the linguistic ability of the users and readers (including judges).*"

Other commentators have made similar judgments as to the logic and efficacy of the rule:

*The plain-meaning rule has been the subject of considerable derision, with no less an authority than Professor Wigmore branding it a fallacy: 'In truth*

*there can be only some person's meaning; and that person, whose meaning the law is seeking, is the writer of the document....[T]he 'plain meaning' is simply the meaning of the people who did not write the document.' Estates and trusts scholars, too, have challenged the notion that wills ever contain plain language. Any language, they claim, 'is so colored by the circumstances surrounding its formulation that evidence regarding the donor's intention is always relevant.'"* (Internal citations omitted)

Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction between Will Interpretation and Construction*, 56 Case W. Res. L. Rev. 65, 71 (2005).

The plain meaning rule and the Court of Appeals' analysis are at odds with the modern trend of the law of trusts, *See* Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 Real Prop. Prob. & Tr. J. 811 (2001) (Respondents' App., at A-64),<sup>6</sup> the predominant recent authorities from other jurisdictions (as amply highlighted in the applicable restatements, *infra*), and the "paramount rule" in construing trusts that "the settlor's intent is controlling." *See Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 443 (Mo. App. W.D. 2004). The Restatement (Third) of Trusts provides in section 4 that, "The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust provisions expressed in a manner that admits of its proof in judicial proceedings." (See

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<sup>6</sup> "[T]he number of jurisdictions that continue to bar the admission of extrinsic evidence to resolve patent ambiguities appears to be shrinking...." *Id.* at 820.

Respondents' Appendix at A-37) Comment (a) thereto recites that "the terms of the trust" is used in a broad sense to include any manifestations of the settlor's intention at the time of the creation of the trust, including the relationships of the settlor and beneficiaries, the formality or informality as well as the skill or lack of skill with which the instrument in question is drawn: "The settlor's intention at the time of the trust's creation may be shown...also by facts occurring thereafter to the extent evidence of those facts may be considered under the applicable rules of evidence to show the intention in question." The general notes on Comments (b) are particularly instructive here: "Comment b instructs not only that a document is to be read as a whole but that this does not 'justify the so-called plain-meaning rule, which relies solely on the document's text and excludes extrinsic evidence.' The Comment disapproves the plain-meaning rule as archaic, 'because it unduly stresses a supposed ordinary meaning' and 'because the text of a document is so colored by the circumstances surrounding its formulation that evidence regarding the donor's intention is always relevant.'" (Emphasis added.)

The comments to section 4 of this Restatement draw heavily from the Restatement (Third), Property (Wills and Other Donative Transfers). The notes to section 4 thus reference section 11.3 of that Property Restatement, "*Rules of Construction and Constructional Preferences.*" (Respondents' Appendix at A-46). That section provides in subsection (a) that, "An ambiguity to which a rule of construction applies is resolved by the rule of construction, unless evidence establishes that the donor had a different intention." (Emphasis added.) Here, of course, the trial court considered extrinsic

evidence and “firmly” concluded that the Decedent intended for the 2002 Writing to be conditional. (Respondents’ Appendix at A-29).

Subsection (c) of section 11.3 of the Property Restatement also recites that, “the foundational constructional preference is for the construction that is more in accord with common intention than other plausible constructions.” Thus, in (c)(1) the Property Restatement favors a construction that is “more in accord with the donor’s general dispositive plan....” Here, the trial court found that the Decedent had provided for his wife Jo—the Appellants’ mother—by later setting aside approximately one million dollars’ worth of assets, including some referenced in the 2002 Writing, in joint names so that she would inherit by way of non-probate transfers. (L.F. 102, 120-121, Respondents’ App., at A-28). Subsection (c)(3) promotes a construction that favors close family members over more remote family members. Subsection (c)(6) favors a construction that is more in accord with public policy than other constructions. As referenced previously, the 2002 Writing leaves nothing to Decedent’s wife Jo. Missouri public policy as embodied by Section 474.160 RSMo., (allowing a surviving spouse to take a forced share of a deceased spouse’s estate regardless of the latter’s will), disfavors the disinheritance of a spouse.

Comment “a” to section 11.3(a) of the Property Restatement recites: “In case of a conflict between the intention of an individual donor and a rule of construction or a constructional preference, the donor’s intention, when sufficiently established, is controlling. Because rules of construction and constructional preferences are merely presumptive, they are rebuttable upon a finding of different intention.” (Emphasis

added.) Comment “c” to section 11.3(a) states that, “[a]ctual intention, when sufficiently established, always overcomes attributed intention.” Missouri’s current rule, however, appears to look no further than the constructional preference.

The Court of Appeals here held that the disputed language in the 2002 Writing “does not *compel* a finding that Decedent intended to condition the effectiveness of the 2002 writing....” (Ct. of Appeals Opinion at 14). (Emphasis added). Although Respondents have consistently disagreed with that conclusion, at the very least it can be said that neither does such language *refute* such a finding. If one assumes for the sake of argument that the document is ambiguous—not a leap for a handwritten document written by a layman riding in the car on the way to the airport—then consideration of extrinsic evidence clearly reveals the scrivener’s intention. If his intention can be plainly discerned from such evidence, as the trial court had no hesitation in finding, then what possible public policy reasons are there to exclude such evidence?

**A. The Court of Appeals Holding that Missouri Law is Concerned with ‘Perjury’ in Avoiding Extrinsic Evidence of a Settlor’s Intent is Belied by More Recent Statutes and Policies.**

The Court of Appeals below held that, “evidence as to the settlor’s intent is susceptible to perjury and violates the rule that testamentary instruments should be reduced to writing.” (Ct. of Appeals Opinion, Appellants’ Appendix at 15, citing Breckner v. Prestwood, 600 S.W.2d 52, 56 (Mo. App. E.D. 1980).) While this principle accurately follows the public policy embodied by the original Statute of Wills of 1540 and later iterations in this country, it is not reflective of modern public policy. For

example, Section 491.010 RSMo. replaced Missouri’s longstanding version of the “Dead Man’s” statute which formerly served to “seal the lips” of a decedent such that he or she could not be quoted in a later proceeding in a variety of circumstances. The present statute, enacted in 1985 after Breckner and, perhaps more importantly, after Helmer, represented an abrupt reversal in course to that public policy and now actually increases the occasions under which the statements of a deceased declarant can be allowed into evidence.<sup>7</sup> “The current Dead Man Statute has no purpose of excluding evidence historically admissible under ‘firmly rooted’ exceptions to the hearsay rule.” Coon v. American Compressed Steel, Inc., 207 S.W.3d 629, 636 (Mo. App. W.D. 2006), citing Idaho v. Wright, 497 U.S. 805, 816, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (1990). “The purpose of the 1985 amendment ‘was to permit the receipt of previously inadmissible evidence, and not at all to require the exclusion of evidence otherwise admissible.’” Coon, 207 S.W.3d at 636.

Moreover, with the enactment of the Missouri Uniform Trust Code in 2005, Missouri law now includes in Section 456.1-103(27), a definition of “terms of a trust” that describes such terms as “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*

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<sup>7</sup> Of significance to the present case is the Breckner court’s statement that it was “constrained to follow the rules of evidence peculiar to patent ambiguities...” and were it not so constrained by existing law, it would “make admissible here the scrivener’s testimony of the testatrix’s intent.” Breckner, 600 S.W.2d. at 56-57. (Emphasis added.)

*that would be admissible in the judicial proceeding.*” (Emphasis added.) No Missouri decision has dealt with this statute since its enactment to instruct as to what evidence should now be admissible for this purpose. But if Section 491.010 RSMo., amended after Helmer but before passage of the MUTC, makes some of a decedent’s declarations admissible in evidence that formerly were not, then that would seem to support a reading of the MUTC’s definition of “terms of a trust” to include more than the words on the page.

Section 4 of the Restatement (Third) of Trusts, at comment (d) recites as follows:

*“If a trust is created by a transaction inter vivos and is evidenced by a written instrument, the terms of the trust are determined by the provisions of the governing instrument as interpreted in light of all the relevant circumstances and such direct evidence of the intention of the settlor with respect to the trust as is not denied consideration because of a statute of frauds, the parol-evidence rule, or some other rule of law.”*

(Respondents’ App., at A-38) (Emphasis added). The rule announced by the Helmer decision and applied by the Court of Appeals below, is much akin to the parol evidence rule except that it goes the extra step of mandating a finding of no ambiguity unless, in the case of a condition precedent, the language employed is “compelling.” But subsequent changes to the law, such as the statutory enactments referenced above, call into question the rule’s continuing viability.

In addition to these statutory changes in the law it is also noteworthy to consider what the General Assembly has chosen *not* to do. As referenced *supra*, Missouri’s

enactment of the Uniform Trust Code – known officially as the Missouri Uniform Trust Code, specifically omitted UTC section 1-112, dealing with trust construction. That section provided that all rules of construction applicable to wills would be applicable to trusts as well. 4C Mo. Prac., Trust Code & Law Manual, Section 456.1-112 at p. 90-91 (2013-14). The Missouri Comment to the statute enacted in its place, Section 456.1-112 RSMo. (limited to situations involving disinheritance of a former spouse and related issues), recites that “there was no clear consensus (with one exception) as to what current rules of construction should be made applicable to trusts.” Id.

In other contexts with equally important interests at stake, Missouri law has no barrier to the introduction of extrinsic evidence to determine the meaning of an ambiguous document. Thus, for example, where disputed language in a contract could reasonably be susceptible of more than one meaning, Missouri courts have no hesitation in looking to extrinsic evidence to determine the document’s intended meaning. *See, e.g., U.S. Neurosurgical, Inc. v. Midwest Division–RMC, LLC*, 303 S.W.3d 660, 665 (Mo. App. W.D. en banc 2010). The interests at stake in a contract dispute can undoubtedly be just as great as those in dispute in a trust case. Even if one party to a contract has died, he or she can be freely quoted by the proponent of their declarations, subject only to the normal judgment of credibility provided by the finder of fact. *See Estate of Dennis v. Dennis*, 714 S.W.2d 661 (Mo. App. W.D. 1986) (Extrinsic evidence allowed to determine the meaning of a prenuptial agreement affecting inheritance rights), *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Company*, 306 S.W.3d 185, 191-192 (Mo. App. E.D. 2010) (Extrinsic evidence allowed to interpret even an

unambiguous contract). The Court of Appeals below referenced a concern for perjury in allowing in extrinsic evidence. But the risk of perjury is inherent with every case and courts and juries are routinely allowed to consider testimony that is in dispute in order to determine credibility and, ultimately, the truth. “When the reason for a rule of law disappears, so too should the rule. Helsel v. Noellsch, 107 S.W.3d 231, 233 (Mo. banc 2003).

The problems presented here and the very significant injustice that may occur because of the formalistic and wooden rules applicable to wills crafted before the modern era were recognized in this state more than a generation ago. And yet they remain unaddressed. Both lawyers and judges are bound to follow the law and likewise to do justice in their work as part of the legal system. It has appeared to the undersigned that the two goals are usually congruent and that fealty to one is generally consistent with the other. But here, a situation is presented where there can be little if any doubt what the decedent wanted with respect to the disposition of his estate and yet there is a result that is directly contrary to that end. While the case law proclaims loudly that the intent of a settlor is paramount, the plain meaning rule is unquestionably anathema to that ideal. With this case this Honorable Court is afforded the opportunity to address these inconsistencies in the law and the poor public policy underlying that rule.

- B. It is Simplistic and Poor Public Policy to Apply the Same Rules and Analysis to Trusts as Those Applied to Wills Because the Two Instruments Are Created Under Markedly Different Circumstances and Derive From Markedly Different Legal Origins.**

As previously recited, the Court of Appeals in this case made the assumption that the rules of construction applied to a joint will in Helmer would be automatically applicable to the trust instrument in this case. Indeed, Missouri case law indicates that *generally* wills and trusts are construed in the same fashion. Assuming that is the correct analysis for the sake of argument, Missouri's rules with respect to the construction and interpretation of wills are based on old legal policies and principles that are anachronistic and inconsistent with modern views. And the policies that underlie those rules, although questionable for wills, are even more insupportable in the context of trusts. Even if this Honorable Court were to apply the holding under Helmer that extrinsic evidence may not be considered where a patent ambiguity is present, that case dealt specifically with the construction of a will and the formalities for creating a valid will and codicil are very different than those for creating a trust and trust amendment.

The American statutes of wills are derived from the English Statute of Wills, passed by King Henry VIII in 1540. 32 Hen. VIII. C. 1; *Black's Law Dictionary* 1546 (9th ed. 2009). Prior to its passage, it was not possible to pass land by will in England. William Blackstone, *Commentaries on the Laws of England*, p. 11. The law "introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we, therefore, emphatically style his *will*." Blackstone, *Commentaries*, p. 12, emphasis in the original. Missouri adopted a Statute of Wills in 1807. 5 Mo. Prac., Probate Law & Practice, Section 10 (3d ed. 2013).

The American law of trusts developed out of English forms that predate both the Statute of Wills and the Statute of Frauds. Landowners wanting to pass land outside of primogeniture prior to the Statute of Wills utilized the *use*, the predecessor to today's law of trusts. John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 Ala. L. Rev. 1069, 1071-1072 (2006-2007). Trusts were recognized and upheld in English law as early as the fourteenth century. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 629 (1995).

Wills and trusts both deal with the transfer and conveyance of property but, unlike wills, trusts also have their basis in the law of contracts. Langbein, *Contractarian Basis*, at 627. "The distinguishing feature of the trust is not the background event, not the transfer of property to the trustee, but the trust deal that defines the powers and responsibilities of the trustee in managing the property.... The settlor and the trustee may express their deal in detailed terms drafted for the particular trust, or they may be content to adopt the default rules of trust law. Either way, the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract." Langbein, *Contractarian Basis*, at 627. As a result, looking to the law of contract "illuminates, and at times helps us improve upon, what we do with the trust." Langbein, *Contractarian Basis*, at 627. Langbein is not alone in his analysis: "When a nontrust jurisdiction confronts an attempted trust, the standard analysis is to assimilate the trust to the contract law of the nontrust jurisdiction" Langbein, *Contractarian Basis*, at 629.

Wills and trusts are also distinguishable in that, at the same time English common law courts prohibited testimony by parties to an agreement, English Chancery courts

were in charge of enforcing trusts, and the Chancery courts could, and did, “examin[e] individual witnesses, including the parties, under oath.” Langbein, *Contractarian Basis*, at 635, *citing* 2 J.H. Wigmore, *Evidence* § 575 (3d ed. 1940); Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 *Ky. L.J.* 91 (1981-82); and W.T. Barbour, *The History of Contract in Early English Equity*, 4 *Oxford Studies in Social and Legal History*, 1, 147-149 (Paul Vinogradoff ed., 1914). The imprint of these origins remains on the law in these areas today.

In Missouri today there are three essential requirements that must be satisfied in order to create a valid will: (1) it must be in writing, (2) signed by the testator, or by some person by his direction, in his presence, and (3) it must be attested by two or more competent witnesses who sign their names to the will in the presence of the testator. Section 474.320 RSMo. Although the capacity required to create, revoke or amend a trust is the same as that required to make a will, the similarities end there. *See* Section 456.6-601 RSMo. Trusts can be created with far less formality than a will and under the MUTC a trust is created if the following elements are met: (1) the settlor has capacity to create a trust; (2) the settlor intends to create a trust; (3) the trust has a definite beneficiary (4) the trustee has duties to perform; and (5) the settlor is not also the sole trustee and sole beneficiary. Section 456.4-402.1 RSMo. (As referenced *supra*, extrinsic evidence is allowed to determine a settlor’s intention to *create* a trust but not the settlor’s intentions with respect to its meaning if the fact of the trust’s existence is a given!) A trust can become operative before death and can be administered without the involvement of a probate court. A will, in contrast, which essentially is a mechanism for

making gifts at death, must be probated with a probate court and is legally ineffective if not presented to the court within one year of death. See Sections 473.050 and 473.087 RSMo. The MUTC allows for the creation of substantial *oral* trusts—involving potentially millions of dollars, whereas a will must always be in writing and must always be witnessed by two witnesses (Section 473.053 RSMo.) if it involves more than \$500. See Sections 456.4-407 and 474.340 RSMo, the latter pertaining to “nuncupative wills” which require an “imminent peril of death” and are unenforceable in any event over the \$500 limit. It is beyond argument that the 2002 Writing at issue here would never even arguably qualify as a valid will codicil.

Under the Missouri Probate Code, the definition of a “will” includes a “codicil,” meaning that a codicil must satisfy the same requirements of a will in order to be valid. Section 472.010 (30) RSMo., *see also* Reynolds v. Central Health Care Centers, Inc., 669 S.W.2d 74 (Mo. App. S.D. 1984). A revocable trust, on the other hand, may be revoked or amended by the settlor by complying with a method provided in the terms of the trust. Section 456.6-602.3 (1) RSMo. In other words, the settlor can write his or her own rules for amendment. If the terms of the trust do not provide a method of revocation or amendment then the trust can be amended by any other method manifesting “clear and convincing evidence of the settlor's intent,” including even a later executed will or codicil that identifies the trust being revoked or the trust terms being amended. Section 456.6-602.3(2) RSMo.

Similarly, while a codicil must follow the same formal requirements of a will, there are a variety of other ways that a trust can be amended under the MUTC. For

example, a trust can be reformed after becoming irrevocable to completely change a key provision, “even if unambiguous, to conform the terms to the settlor's intention,” so as to correct a mistake of law or fact. Section 456.4-415 RSMo. (Subject to a clear and convincing evidence standard). A trust can be modified “in a manner that is not contrary to the settlor's probable intention” to achieve a settlor’s tax objectives. Section 456.4-416 RSMo. The MUTC also allows for the modification of certain irrevocable trusts upon consent of the settlor and all beneficiaries, without court approval. Section 456.4A-411 RSMo. Similarly, Section 456.1-111 RSMo allows for non-judicial settlement agreements in which “interested persons” can interpret and construe the terms of a trust. A trustee may unilaterally terminate a trust having a total value less than one hundred thousand dollars if “the value of the trust property is insufficient to justify the cost of administration.” Section 456.4-414.1 RSMo. A court may also otherwise modify or terminate a trust “if it determines that the value of the trust property is insufficient to justify the cost of administration.” Section 456.4-414.2 RSMo. Finally, a court may modify the dispositive and management provisions of a trust or terminate a trust because of unanticipated circumstances by the settlor or an inability to administer the trust effectively. Section 456.4-412 RSMo.

Given these significant differences, it is simplistic to apply the rules of construction applicable for a will and codicil to a trust or trust amendment. Wills are strict, formalistic instruments created by statute that cannot be casually amended. Trusts involve rights enforceable (originally) in equity, “to the beneficial enjoyment of property to which another person holds the legal title.” *Black’s Law Dictionary*, (7th ed. 1999).

Trusts are much more like contracts—specifically third party beneficiary contracts, with regard to the method for their creation (by agreement) and amendment. As referenced earlier, our law provides no hesitation in allowing extrinsic evidence to interpret a contract. Further, as referenced above, the purported document in question here would never pass muster as a will or codicil since it lacks a key element of the basic formalities of a will: it was never attested by two witnesses in the presence of Dr. Conklin (or Jo for that matter). As such, the Helmer holding should at the very least be limited to will construction cases, and this Honorable Court should follow the modern view by rejecting the different treatment of patent and latent ambiguities in trust construction and allow extrinsic evidence for either type of ambiguity.

**C. Consideration of the Extrinsic Evidence Applicable to this Case Removes All Doubt as to what the Grantor Intended.**

The trial court’s analysis that the 2002 Writing was indeed conditional recites a wide variety of evidentiary sources leading to his “firm” belief of its conditional nature. That court’s discussion is so complete that the undersigned is unable to match it by way of paraphrasing or with a parallel analysis. Accordingly, resort to the trial court’s verbatim legal analysis is called for here:

*The heart of the 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.*

*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.*

\* \* \*

*Taken as a whole, the facts of this case lead the court to conclude that Decedent intended to state a condition and to make the effectiveness of the remainder of the 2002 writing contingent on the occurrence of that condition. Numerous facts may be recited in support of this conclusion. First, the language of the second paragraph itself – “if you are reading this it means that Jo and I have met our demise either going to or coming back from Phoenix.” – suggests that Decedent never intended his children or stepchildren to read the letter at all, unless the condition was met. This conclusion is strengthened by the fact that Decedent never appears to have caused his children and stepchildren (or anyone else, as far as the record indicates) to read the 2002 writing during his lifetime.*

*Moreover, this conclusion is consistent with the observations of Adam Davis shortly before Decedent and Jo left on the Arizona trip; the tenor of Decedent's own comments by telephone to Cari and Carli on or about the day the 2002 writing was created; his comments to his brother Kenneth, an attorney who had earlier handled some of Decedent's estate planning matters and with whom he continued to discuss estate planning matters throughout his lifetime; and his comments to his brother Ronald following the 2002 trip to Arizona. All of these, taken together, lead the Court to conclude that Decedent's primary intent was simply to keep the peace with Jo during the long trip to and from Arizona in November 2002 – in his forthright words to Kenneth, to forestall “2,000 miles of bitching.” Decedent did not view the 2002 writing as a permanent alteration to his deliberately and carefully established estate planning. Rather, he viewed it as a contingency document to be used if, and only if, both he and Jo were killed on the trip. The stated contingency not having been met, the Court concludes that Decedent viewed the document as having no further significance.*

*The Court further notes that, although Decedent retained the 2002 writing in his files, he did not do so in a manner consistent with the remainder of his estate planning work. The testimony at trial indicates that the 2002 writing languished for over a year in the glove box of his car, before being rediscovered. After Decedent's death, it was found not with*

*the trust, but in a large file folder containing life insurance information along with “a lot of random stuff.” Decedent, having been noted for being “a big pack rat,” it does not strike the Court as unusual that he would have kept the document, as he is reported to have kept nearly everything. The Court also notes that the 2002 writing was placed in an envelope (Plaintiff’s Ex. 3) addressed to Carli and with a stamp on it, but it was never mailed. At some point after December 2002, it appears Decedent had opened it (and in all likelihood looked at it), but still did not place it with the other document pertaining to the Trust or actually send it to Carli or anyone else, but simply put it away again.*

*In addition, Decedent did not end his estate planning efforts in November 2002. Significantly, sometime in 2004, he travelled to Columbia to meet with his estate planning attorney - - a fact which he purposely concealed from Jo, according to the credible testimony of Adam Davis. This demonstrates the Decedent continued to be involved in matters relating to his own estate, well after the trip to Arizona. Although Decedent had ample opportunity to incorporate some or all of the ideas set forth in the 2002 writing into his more formal estate planning documents, he never did so.*

*What he did do, however, is highly persuasive in leading the Court to conclude that Decedent never viewed the 2002 writing as having been more than conditional. What Decedent actually did, and also told his*

*attorney brother Kenneth he had done, was continue to manage his substantial property in such a way that he generously provided for Jo in the event that he should predecease her. These property management activities were generally inconsistent with the dispositions set forth in the 2002 writing.*

*Through retitling of existing assets, titling of new assets as tenants by the entireties, and holding of insurance policies, Decedent insured that Jo would receive nearly one million dollars' worth of assets and cash upon his death. It is reasonable to conclude through this device, he expected that any benefit that he may have wished to confer upon his stepchildren, David and Alisha, would ultimately be accomplished through his having amply provided for their mother. It is reasonable to further conclude that he expected the assets remaining in the Trust to serve as an inheritance for his natural children, Cari and Carli.*

*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.*

(L.F. 117-121, Respondents' Appendix at A-25-A-29).

It should be noted that even under the Court of Appeals' interpretation of current Missouri law, a portion of this evidence—other than Dr. Conklin's declarations of intent, can still be considered. Even with a patent ambiguity, "extrinsic evidence of objective, operative facts concerning events in the testator's life may be introduced...to ascertain his exact intent, and to give precise and explicit meaning to the language used in the instrument." (Court of Appeals Opinion, Appellants' Appendix at A-16, citing Schupbach v. Schupbach, 760 S.W.2d 918, 923 (Mo. App. S.D. 1988). Thus, in addition to the language of the 2002 Writing, Dr. Conklin's separate actions to title assets for his wife, his meeting with an estate planning attorney, his failure to include the document with other legal documents nor to give it to any of his family members, should be considered in tandem with the language of the document to support the trial court's ruling.

**IV. THE TRIAL COURT DID NOT ERR IN AUTHORIZING RESPONDENTS TO PAY THEIR ATTORNEY’S FEES AND COSTS FROM THE CORPUS OF THE K.R. CONKLIN LIVING TRUST, BECAUSE AN AWARD OF FEES IS PROPER FOR LITIGANTS WHO ARE DEFENDING THE TRUST, AND THIS LITIGATION TO CONSTRUE THE TRUST DOCUMENT IS INDISPENSABLE TO THE PROPER ADMINISTRATION OF THE FUND.**

**A. Trial Courts have Discretion to Award Attorney’s Fees and Such Awards are to be Reversed Only if Clearly in Error.**

The judgment of an award of attorney’s fees in a case such as this “may not be disturbed unless clearly erroneous.” First Nat’l Bank v. Danforth, 523 S.W.2d 808, 825 (Mo. 1975). “We shall reverse the trial court’s award only where we find an abuse of discretion.” Klinkerfuss v. Cronin, 289 S.W.3d 607, 614 (Mo. App. E.D. 2009).

**B. Attorney’s Fees are Proper for Beneficiaries in Construing A Trust.**

The Appellants are simply incorrect in asserting that attorney fees are only recoverable when litigants are defending the Trust, as opposed to their own interests. The plain language of Section 456.10-1004 RSMo., of the Missouri Uniform Trust Code provides that attorney’s fees may be awarded to any party “*as justice and equity may require.*” As the trial court specifically found, the Respondents’ intention was to “*defend the integrity of the Trust, as they have now successfully done.*” (L.F. 122, App. 30).

The Appellants also argue that this case did not benefit the Trust and cite to a number of cases dealing with judicially created exceptions to the American Rule

regarding legal fees. But Missouri courts have consistently held, even before the enactment of Section 456.10-1004, that a lawsuit seeking judicial construction of an ambiguous trust term provides a benefit to the trust, even if beneficiaries bring the lawsuit, and even if beneficiaries benefit directly from the lawsuit. The Appellants cite Hamerstrom, which clearly allows a beneficiary to receive attorney’s fees from the Trust for construction of an ambiguous trust:

*[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.*

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

*“The fact that [the beneficiary’s] endeavors served its own interests as well as the interests of the estate does not defeat its right to an allowance out of the estate of a reasonable attorney’s fee.”* Lang v. Taussig, 194 S.W.2d 743, 748 (Mo. App. E.D. 1946). Such fee awards are *“well entrenched in Missouri law.”* In re Estate of Chrisman, 723 S.W.2d 484, 487 (Mo. App. E.D. 1986). Importantly, Chrisman clarifies the common benefit to be had from resolving the construction of the trust terms: *“the theory being that the litigation is indispensable to the proper administration of the fund.”* Id. Further, the recent cases based on the 2005 MUTC statute cited above make clear that trial courts now have even greater discretion to award fees in litigation *“brought and*

*defended in good faith*” dealing with “*issues raised which could only have been settled via judicial determination.*” In re Gene Wild Revocable Trust, 299 S.W.3d 767, 783 (Mo. App. S.D. 2009); *see also* O’Riley v. U.S. Bank, N.A., 412 S.W.3d 400, 419 (Mo. App. W.D. 2013).

In the case at bar, the warring interpretations of the document created a dispute between the parties, “*which could only have been settled via judicial determination,*” and which the Respondents have “*brought and defended in good faith.*” Id. Proper administration of the Trust would not have been possible without construction of the document.

**V. RESPONDENTS' DEFENSE OF THE TRUST AND THEIR CONSTRUCTION OF ITS TERMS BY NO MEANS TRIGGERED THE NO CONTEST CLAUSE BECAUSE THEY HAD VALID REASONS TO RESIST APPELLANTS' CLAIMS.**

Even had Respondents efforts proved unsuccessful in the court below, which was not the case, their actions in defending their interpretations of the Trust's scope and meaning do not amount to a trust contest. First, as trustees, they could rely on Article 11, Section 1(q) of the Trust that provided the trustees "*the power to prosecute or defend actions, suits, claims or proceedings for the protection or benefit of the Trust and my Trustee in the performance of my Trustee's duties.*" (L.F. 49). Further, forfeitures based on such clauses are not favored by the law and are to be enforced, as the trial court found, only where it is clear that the grantor (or testator) intended that the conduct in question should forfeit a beneficiary's interest under the indenture or will in question. Cox v. Fisher, 322 S.W.2d 910, 914-15 (Mo. 1959); *see also* 49 A.L.R.2d 198, 203-04. In the present case two things are clear on this point: (1) the no contest clause at issue was invoked by the Appellants to create settlement pressure on the Respondents; and (2), the very last thing the late Dr. Conklin would ever have wanted would be for his daughters, with whom he had a "wonderful" relationship, to be disinherited from his estate under these circumstances.

**CONCLUSION**

This unfortunate case echoes countless others that have gone before it that speak to the anguish and heartache of family members who have felt slighted by a loved one's

tangible legacy. The emotions here are compounded by the complex relationships that are sometimes found between a step-parent and his step-children. Sadly, the Appellants' mother, and then the Appellants, began a bare knuckle fight within days of Keith Conklin's passing based on their apparent feelings that the Appellants had been ignored by their step-father or that their mother's seven figure inheritance was simply not enough. But they were not ignored and Keith Conklin made substantial provisions for his wife of nine years in his final estate planning, provisions that will likely inure to Appellants' benefit some day in the future.

While these emotional drivers may be well understood both inside and outside of the legal profession, they lend no credence to a legal position that is tethered by the thin reed of a letter that was handwritten, in haste, and with no expectation that it would endure beyond the authors' safe return from their trip. Appellants have attempted to prop up this long-forgotten letter and present it as something entirely different from what it was obviously intended to be. On its face, the letter was exactly what the able trial judge below found it to be—a conditional expression. If resort need be made to what was in the declarant's heart at the time he wrote it, then the overwhelming evidence underscores once again that his intentions were conditioned upon both he and his wife meeting their demise on their journey.

Dr. Conklin is on another journey now. His clearly expressed wishes should be respected and confirmed one last time.

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE WITH RULE 84.06(C)**

COMES NOW Robert J. Selsor and hereby certifies, pursuant to Rule 84.06(c), as follows:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. There are 15,840 words contained in this brief.
4. There are zero lines of monospaced type in this brief.

/s/Robert J. Selsor

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Respondents Cari Renee Wise and Carli Nicole Conklin's Subsitute Brief and accompanying Appendix were served on the following individuals, to-wit:

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through the Missouri Courts' electronic filing system, on this 18<sup>th</sup> day of February 2014.

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