IN THE SUPREME COURT OF MISSOURI

In re the Estate of **OLA H. BLODGETT,** Deceased, **HENRY W. BLODGETT,** Appellant, v. **NORINE MITCHELL and** **BANK OF AMERICA, N.A.,** Respondents.	))))))))))))	Appeal No. SC84699

Appeal from the Circuit Court of the County of St. Louis
Twenty-First Judicial Circuit
Probate Division
Honorable Bernhardt C. Drumm, Jr.

SUBSTITUTE BRIEF OF RESPONDENT NORINE MITCHELL

On Transfer from the Eastern District
of the Missouri Court of Appeals

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM, LLP
Mark J. Bremer #24696
Jeremy D. Shook #50412
One US Bank Plaza, Suite 2410
St. Louis, Missouri 63101
(314) 241-3963
(314) 241-2509 (fax)

Attorneys for Respondent
Norine Mitchell

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JURISDICTIONAL STATEMENT

On April 17, 2001, the Probate Division of the Circuit Court of St. Louis County ("the Probate Court") entered its Order granting the motion of respondent Norine Mitchell ("respondent" or "respondent Mitchell") for summary judgment with respect to her claim for distribution of the personal property of Ola H. Blodgett ("decedent") and denying appellant Henry W. Blodgett's ("appellant" or "appellant Blodgett") motion for same. On August 7, 2001, the Probate Court entered its Order and Final Judgment granting respondent Mitchell's motion for summary judgment with respect to her remaining claim for discovery of assets. The August 7 Order was entered pursuant to Supreme Court Rule 74.01(b), determining that both the April 17 and August 7 Orders were final and appealable.

On September 14, 2001, appellant Blodgett filed his Notice of Appeal to the Missouri Court of Appeals for the Eastern District. The Missouri Court of Appeals had jurisdiction to review the Probate Court's judgment under R.S. Mo. § 472.160.1, which allows appeal in all "cases where there is a final order or judgment of the probate division of the circuit court," and under Article V, §3 of the Missouri Constitution, because exclusive jurisdiction for this case is not vested in the Supreme Court. On May 21, 2002, the Missouri Court of Appeals affirmed the Probate Court's judgment.

Following the appellate court's decision, appellant Blodgett filed a Motion for Rehearing and Alternative Application for Transfer on June 4, 2002. The Court of Appeals denied appellant's requests for post-opinion review on July 29, 2002. Thereafter, appellant filed an Application for Transfer in the Supreme Court of Missouri on August 13,

2002. On September 24, 2002, the Court sustained appellant Blodgett's application. The Court therefore has jurisdiction over this matter under Article V, Section 10 of the Missouri Constitution and Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS[1]

The Proceedings Below

Appellant filed his petition for partial distribution in the Probate Court on November 17, 2000, seeking distribution of all of decedent's tangible personal property to himself (LF 14-23).[2] On December 5, 2000, respondent filed her answer and cross petition, praying, inter alia, that the court order appellant to return property he had wrongfully taken from decedent's estate (count I) and that respondent be awarded all of decedent's tangible personal property, to be distributed according to instructions given to

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[1] In his opposition to summary judgment below, appellant Blodgett consistently failed to adduce evidence to properly dispute respondent's proffered uncontroverted material facts (LF 308-16). See Rule 74.04(c); ITT Commercial Finance v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc 1993) (nonmovant "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided . . . shall set forth specific facts showing that there is a genuine issue for trial") (emphasis added). Appellant's response only objected to respondent's facts (LF 308-16). Appellant did not submit an affidavit or cite to any deposition testimony which set forth evidence to the contrary (LF 308-16 passim). Appellant is accordingly deemed to have admitted such facts. Rule 74.04(c); ITT Commercial Finance, supra.

[2] "LF __" refers to the pertinent page(s) in appellant's Legal File. Similarly, "SLF __" refers to the pertinent page(s) in respondent's Supplemental Legal File (filed with her brief before the Missouri Court of Appeals).

respondent by decedent (count II) (LF 29-63). Respondent predicated her claim on the simple fact that the Second Article of decedent's Will provides that decedent's tangible personal property shall be distributed in accordance with a "list" signed and dated by decedent, and that Paragraph F of Article VI of the Third Amendment to the Revocable Living Trust of Ola Blodgett ("Paragraph F"), which precisely met the requirements for such a "list," explicitly provides that all such property shall go to respondent for distribution according to instructions given to respondent by decedent (id.). Respondent also made the alternative claims that if Paragraph F was not determined to be a "list" as a matter of law, then decedent's testamentary instruments should be construed (count III) or reformed (count IV) to comport with decedent's clear intention of leaving all of her tangible personal property to respondent and not to appellant (id.).

On April 17, 2000, after hearing the parties' cross motions for summary judgment, the Probate Court issued a memorandum order holding that Paragraph F was a "list" within the meaning of decedent's Will and R.S. Mo. §474.333, and that respondent was therefore entitled to all of decedent's tangible personal property (LF 323). The Probate Court sustained respondent's motion for summary judgment to this extent and denied appellant's motion for summary judgment. Thereafter, on August 7, 2001, the Probate Court conducted a hearing on respondent's motion for summary judgment on her sole remaining claim – for discovery and return of assets taken from decedent's residence by appellant (LF 359). The Probate Court granted summary judgment in respondent's favor, ordered appellant to file a sworn written list identifying and accounting for all property he had removed from decedent's residence, and further ordered him to surrender all such

property to the personal representative for ultimate distribution to respondent and the persons indicated in decedent's instructions to respondent (id.).

On May 21, 2002, the Missouri Court of Appeals affirmed the Probate Court's judgment, albeit on other grounds. See In re Estate of Blodgett, Sl.Op. No. ED80137 (Mo. App. E.D. 5/21/02). The Appellate Court held that although Paragraph F of decedent's Trust was not a "list" within the meaning of the Article Second of her Will and Section 474.333 R.S.Mo., the language of her Will was in direct conflict with the provision of Paragraph F of her Trust. Id. at 7. After concluding that the Will and Trust must be construed together since they formed part of the same estate plan, the Appellate Court found that the language of the Article Second of her Will was latently ambiguous. Id. at 7-8. Consequently, the Appellate Court examined direct evidence of decedent's intent, including declarations made by her to others, and specifically, testimony of decedent's scrivener. Id. at 8. The Appellate Court found that the scrivener's affidavit clearly demonstrated decedent's intent to bequeath her tangible personal property to respondent Mitchell. Id. at 9. Thus, the Appellate Court affirmed the Probate Court's judgment on this ground, including the Probate Court's decision granting summary judgment in favor of respondent Mitchell on her cross-claim for discovery of assets. Id.

Undisputed Evidence Regarding

The Parties' Relationships With Decedent

Appellant is the adopted son of decedent and her late husband (LF 79). As established in the un-refuted affidavit and deposition testimony of decedent's sister (respondent), niece Pamela Padgett (respondent's daughter), friends June Michael and Kathy

Kilo, and personal physician Dr. Charles Kilo, decedent had repeated conflicts with appellant regarding his behavior, including appellant's refusal to honor decedent's request regarding changes to a legal document, and appellant's alleged theft of an antique watch from her safe deposit box (LF 79-80 and evidentiary materials there cited). With respect to the watch, it is undisputed that appellant refused to return it and decedent was very upset with him (id.). It is also undisputed that, in the years before her death at age 91, decedent repeatedly expressed to Dr. Kilo and to respondent that she was physically afraid of appellant (LF 81 and evidentiary materials there cited). Decedent requested that Dr. Kilo not give appellant any information about her health condition and stated that appellant had subjected her to "verbal abuse" (LF 289-90). Decedent also told respondent that appellant had said to decedent, "I could bash your head in" (LF 81 and evidentiary materials there cited).[3]

Appellant acknowledged at deposition that decedent expressed her unhappiness with him by revoking a power of attorney she had granted to him, and by putting new locks on her condominium and refusing to give him a key (LF 81-82 and evidentiary materials there cited). Decedent explained to Dr. Kilo, respondent, Kathy Kilo, and June Michael that she had changed the locks to prevent appellant from entering her apartment (id.). She stated that she did this to protect herself from appellant and to prevent him from taking her property after her death (id.). At one point, decedent threatened to sue

[3] Notably, appellant has failed to disclose any of this un-contradicted evidence in his Substitute Brief.

appellant for his failure to return a legal document to her (LF 142). In his suit challenging decedent's testamentary trust (discussed below), appellant specifically admitted that decedent had "disparag[ed]" him (LF 152).

Over the years, decedent systematically changed her estate plan to reduce the amount that appellant and his family would receive upon her death (LF 82-83). The First Amendment to her trust, executed on August 15, 1995, provided for distribution of one million dollars outright to appellant's children and placed virtually all of the remainder of her estate in trust for the benefit of appellant and his children (LF 104-113). The Second Amendment to decedent's trust, executed on November 9, 1995, made several substantial gifts to charities and a gift of one million dollars to respondent and her children (LF 117-118). Then in Article VI of the Third Amendment to decedent's trust, executed on October 3, 1997, decedent gave appellant only her condo and otherwise effectively disowned him:

> E. [Decedent's] condominium being used as her residence shall be distributed to her son, HENRY W. BLODGETT, if said property is contained among the assets of the Trust Estate at the death of [decedent], and <u>[decedent] intentionally makes no other provisions for her said son or any of his descendants</u>.

LF 102 (emphasis added). The Third and Fourth Amendments to decedent's trust left her estate to various individuals (including respondent and her daughters) and charities and left nothing further to appellant (LF 35-37 & 202-3).

Decedent did not tell appellant of most of the above changes to her estate plan (LF 82 and evidentiary materials there cited). She expressed to others that appellant would be angry when he found out about the changes (id.). After decedent's death, appellant filed a petition in St. Louis County Circuit Court to have all amendments to the trust declared invalid and asked the court to award him all of decedent's estate (LF 146-155).

By contrast, it is undisputed that decedent had an excellent relationship with respondent Mitchell, her sister (LF 83 and evidentiary materials there cited). Though living in Georgia, respondent and her daughters often telephoned and visited decedent and helped care for her (id.). When decedent developed breast cancer, respondent quit her job in Georgia and spent three months caring for decedent around the clock (id.). Appellant has acknowledged that respondent was a good sister to decedent and that respondent and her daughters provided good care to decedent (id.). As discussed above, decedent left a substantial portion of her estate to respondent and respondent's daughters (LF 35-37 & 202-3).

Decedent's Estate Plan With Respect

to Tangible Personal Property

Decedent executed her Will on August 15, 1995 (LF 5-10). The Second Article of her Will, entitled "Tangible Personal Property List," states:

> I give each item of tangible personal property described by me on a list either prepared in my handwriting or signed by me, and dated, to the persons, organizations, corporations or entities designated therein to receive the same. If at the time of my death I do not have the power of disposition by

> Will over one or more of the items of tangible personal property described in said list, such items shall lapse. If more than one such list is found, then the list bearing the most recent date shall be the only one in force and effect, all others being superseded. If letters testamentary are issued for my estate, no such list shall dispose of the tangible personal property set forth therein unless such list is found by my Personal Representative within sixty (60) days following the issuance of such letters testamentary. Each and every item of tangible personal property not effectively disposed of by such list, or not specifically bequeathed in any other provision of this Will, shall go to my son, HENRY W. BLODGETT, if living, otherwise the same shall go as part of the residue of my Estate.[4]

LF 5-6 (emphasis added). The Third Article of her Will specifically refers to "a certain Indenture of Trust dated September 7, 1993, as amended, executed by myself as Grantor

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[4] Such "lists" are authorized by R.S. Mo. §474.333, which states in pertinent part:

> A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will . . . . [T]he writing must either be in the handwriting of the testator or be signed by the testator, must be dated and must describe the items and the devisees with reasonable certainty.

R.S.Mo. 474.333 (emphasis added).

and by myself as Trustee," and disposes of the residue to the Successor Trustee under the Trust (LF 6).

On October 3, 1997, decedent executed the Third Amendment to her Indenture of Trust (LF 101-102). Paragraph F of the Third Amendment directs that:

> All of [decedent's] tangible personal property and other personal effects shall be distributed to [decedent's] sister, NORINE MITCHELL, if living, otherwise to her daughter, PAMELA PADGETT, to be distributed in accordance with instructions given by [decedent] to them during her lifetime.

LF 102 (emphasis added). This statement was in writing, was dated and signed by decedent, and explicitly identified both the items bequeathed ("[a]ll of [my] tangible personal property and other personal effects") and the recipient ("[my] sister, NORINE MITCHELL") (id.). Furthermore, all of decedent's trust amendments, including the Third Amendment containing Paragraph F, were necessarily in the possession of decedent's personal representative within sixty days following the issuance of letters testamentary (SLF 2-5). This is so because the Bank of America, N.A. ("the Bank"), decedent's personal representative under the will, was also simultaneously co-trustee under her trust "as amended" (id.). (The Bank is a nominal party to this appeal and has indicated that it will neither file a brief nor participate in oral argument. See Letter to Clerk of the Supreme Court from Bryan D. LaMoine, dated November 4, 2002).

Decedent's Will and amendments to her Trust were drafted by Robert E. Trame, a member of the Missouri Bar and an experienced trust and estate attorney (LF 298-99). Mr. Trame's competent and unrebutted affidavit states that, pursuant to decedent's

request, he drafted the Third Amendment containing Paragraph F, which was intended to distribute all of decedent's tangible personal property to respondent upon decedent's death (id.). Mr. Trame made contemporaneous notes of decedent's instructions, attached as an exhibit to his affidavit, which specifically indicated decedent's stated desire to distribute her personal property "to NORINE [respondent]" and only her condo "to son [appellant]" (LF 102). Mr. Trame's affidavit also states that decedent's clear intent, as she related it to him, was that all of her tangible personal property should go to respondent, that he drafted Paragraph F to carry out decedent's intention, and that decedent executed the provision in his presence, "with the mutual intent and understanding that the effect thereof was that all of Decedent's tangible personal property would be distributed upon Decedent's death to her sister Norine Mitchell, in accordance with Decedent's wishes." (LF 299). Moreover, Mr. Trame stated that Paragraph F was, in his opinion, a "list" within the meaning of R.S. Mo. §474.333 and decedent's Will (LF 298-99).

Finally, it was undisputed in the evidence below that, before her death, decedent explained to respondent Mitchell that she would receive all of decedent's tangible personal property and gave her the following explicit instructions as to how the property should be distributed after respondent received it:

> Personal family items relating to Decedent's late husband, Harry Blodgett, including letters signed by Abraham Lincoln and Teddy Roosevelt, the baby picture on the wall and other pictures, Harry's Masonic ring and other Masonic items, Harry's watch, a Congressional Medal of Honor, cane, newspaper article from England, the Blodgett family history book and other

Blodgett artifacts, all to be donated to the Downers Grove Park District Museum in Illinois.

Desk to her niece ([respondent's] daughter) Pam Padgett.

Crystal to Pam Padgett and Decedent's good friend Kathy Kilo, in equal shares.

Glass curio display piece in den to Decedent's niece ([respondent's] daughter) Yvonne Eubanks.

Contents of curio and of dining room china cabinet to Yvonne Eubanks, Pam Padgett, Kathy Kilo, good friend June Michael and friend and hairdresser Kim Doake in accordance with their wishes, so they can have a special memento of Decedent, but with [respondent] to have ultimate discretion to distribute these items to them or other persons.

Bedroom suite to someone who wants it, as [respondent] determines in her discretion.

Guest bed to Pam Padgett.

Figurines on mantle and bust in guest bathroom to Yvonne Eubanks.

Living room furniture to [respondent].

Elephant collection to Decedent's niece's husband Mark Eubanks ([respondent's] son-in-law), "a loyal Republican."

Pearl picture in living room to Decedent's sister Agnes Myers.

Linen to someone who wants it, as [respondent] determines in her discretion.

Tiffany lamp in bedroom to her son Henry Blodgett, who had requested it.

Brown fur coat to [respondent].

Dining room suite (with bowl) to Pam Padgett.

Old Victrola to Decedent's niece's husband Chuck Padgett ([respondent's] son-in-law).

Clothing to Decedent's sister Doris O'Gletree if she wants it, otherwise donated to a charity for battered women.

All other collectibles (not specified above) to persons who want them, as [respondent] determines in her discretion, but giving priority to Yvonne Eubanks, Pam Padgett and Kathy Kilo.

All remaining items to individuals or entities who want or may benefit from them, as [respondent] determines in her discretion, but nothing to Decedent's daughter-in-law Leila Blodgett.

LF 83-85 (and evidentiary materials there cited). Decedent also communicated with two museums regarding the donation of several personal family artifacts (LF 85 and evidentiary materials there cited).

Appellant's Unauthorized Removal

of Personal Property from Decedent's Residence

Following decedent's death, appellant immediately left the hospital, returned to decedent's condominium and, within hours, had the locks changed, effectively preventing anyone else from gaining access (LF 88 and evidentiary materials there cited; LF 247-48). Within the next few days, he removed certain items of personal property from

decedent's condominium, including the letters signed by Abraham Lincoln and Theodore Roosevelt (id. and SLF 43-45). While appellant told decedent's personal representative that he had taken some family pictures from the condominium, he did not disclose that he had also taken the Lincoln and Roosevelt letters and other items of value (LF 89 and evidentiary materials there cited). As a result, the Lincoln and Roosevelt letters and other items were neither inventoried nor appraised as part of decedent's estate (id.).

Until the Probate Court issued its August 7 Order, requiring appellant to file a sworn accounting of all items he removed from decedent's condominium and to turn over the items to the personal representative, he kept the items at his home and refused to surrender them (id. & LF 359). Appellant belatedly filed his accounting on August 29, 2001 and did not return the items to the personal representative until months later, long after the court ordered deadline to do so (id. & SLF 43-45).

POINTS RELIED ON

I. THE PROBATE COURT'S JUDGMENT WAS CORRECT AND SHOULD BE AFFIRMED BECAUSE, AS A MATTER OF LAW, PARAGRAPH F IS A "LIST" DISPOSING OF DECEDENT'S TANGIBLE PERSONAL PROPERTY WITHIN THE MEANING OF HER WILL AND §474.333 IN THAT (1) IT WAS IN WRITING AND SIGNED BY DECEDENT, (2) IT WAS DATED, (3) IT DESCRIBES THE ITEMS WITH REASONABLE CERTAINTY ("ALL [MY] PERSONAL PROPERTY"), (4) IT DESCRIBES THE DEVISEE WITH REASONABLE CERTAINTY ("[MY] SISTER, NORINE MITCHELL"), AND (5) IT WAS UNDISPUTEDLY IN THE POSSESSION OF AND "FOUND BY" DECEDENT'S PERSONAL REPRESENTATIVE – THE SAME BANK THAT WAS SIMULTANEOUSLY SERVING AS TRUSTEE OF DECEDENT'S TRUST IN WHICH PARAGRAPH F APPEARED – WELL BEFORE SIXTY DAYS FOLLOWING THE ISSUANCE OF LETTERS TESTAMENTARY.

In re Bernheimer's Estate, 176 S.W.2d 15 (Mo. 1943)

Central Trust Bank v. Scrivner, 963 S.W.2d 383 (Mo. App. W.D. 1998)

Estate of Webster, 920 S.W.2d 600 (Mo. App. W.D. 1996)

R.S. Mo. §474.333

4 Francis M. Hanna, Missouri Practice, Probate Code Manual §474.333 (2d ed. 2000)

II. IN THE ALTERNATIVE, THE PROBATE COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE, EVEN IF, AS APPELLANT INCORRECTLY CONTENDS, PARAGRAPH F WERE NOT A COMPLIANT "LIST" AS A MATTER OF LAW, PARAGRAPH F CAN AND SHOULD BE CONSTRUED TO BE A "LIST" WITHIN THE MEANING OF ARTICLE TWO OF DECEDENT'S WILL, THEREBY RESULTING IN DECEDENT'S TANGIBLE PERSONAL PROPERTY BEING BEQUEATHED TO RESPONDENT, IN THAT (1) DECEDENT'S TESTAMENTARY INSTRUMENTS AND IN PARTICULAR THE TERM "LIST" (UNDER APPELLANT'S CONTENTION) WOULD THEN BE LATENTLY AMBIGUOUS, (2) DIRECT EVIDENCE OF DECEDENT'S INTENT, INCLUDING THE SCRIVENER ATTORNEY'S AFFIDAVIT, WOULD ACCORDINGLY BE ADMISSIBLE, AND (3) THE UNDISPUTED EVIDENCE ESTABLISHED THAT DECEDENT INTENDED THAT ALL OF HER TANGIBLE PERSONAL PROPERTY GO TO RESPONDENT AND NOT TO APPELLANT AS SET FORTH IN PARAGRAPH F.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. banc 1993)

Schubel v. Bonacker, 331 S.W.2d 552 (MO. 1960)

Schupbach v. Schupbach, 760 S.W.2d 918 (Mo. App. S.D. 1988)

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

R.S. Mo. §474.520

III. IN THE ALTERNATIVE, THE PROBATE COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE, EVEN IF, AS APPELLANT INCORRECTLY CONTENDS, PARAGRAPH F WERE NOT A COMPLIANT "LIST" AS A MATTER OF LAW OR FACT, PARAGRAPH F AND ARTICLE TWO OF DECEDENT'S WILL CAN AND SHOULD BE CONSTRUED TO BEQUEATH DECEDENT'S TANGIBLE PERSONAL PROPERTY TO RESPONDENT IN THAT (1) PARAGRAPH F AND ARTICLE TWO (UNDER APPELLANT'S CONTENTION) WOULD THEN BE IN DIRECT CONFLICT AND LATENTLY AMBIGUOUS, (2) DIRECT EVIDENCE OF DECEDENT'S INTENT, INCLUDING THE SCRIVENER ATTORNEY'S AFFIDAVIT, WOULD ACCORDINGLY BE ADMISSIBLE, AND (3) THE UNDISPUTED EVIDENCE ESTABLISHED THAT DECEDENT INTENDED HER PERSONAL PROPERTY TO GO TO RESPONDENT AND NOT TO APPELLANT, AS PROVIDED IN PARAGRAPH F.

Odom v. Langston, 195 S.W.2d 463 (Mo. 1946)

Schupbach v. Schupbach, 760 S.W.2d 918 (Mo. App. S.D. 1988)

ARGUMENT

I.

THE PROBATE COURT'S JUDGMENT WAS CORRECT AND SHOULD BE AFFIRMED BECAUSE, AS A MATTER OF LAW, PARAGRAPH F IS A "LIST" DISPOSING OF DECEDENT'S TANGIBLE PERSONAL PROPERTY WITHIN THE MEANING OF HER WILL AND §474.333 IN THAT (1) IT WAS IN WRITING AND SIGNED BY DECEDENT, (2) IT WAS DATED, (3) IT DESCRIBES THE ITEMS WITH REASONABLE CERTAINTY ("ALL [MY] PERSONAL PROPERTY"), (4) IT DESCRIBES THE DEVISEE WITH REASONABLE CERTAINTY ("[MY] SISTER, NORINE MITCHELL"), AND (5) IT WAS UNDISPUTEDLY IN THE POSSESSION OF AND "FOUND BY" DECEDENT'S PERSONAL REPRESENTATIVE – THE SAME BANK THAT WAS SIMULTANEOUSLY SERVING AS TRUSTEE OF DECEDENT'S TRUST IN WHICH PARAGRAPH F APPEARED – WELL BEFORE SIXTY DAYS FOLLOWING THE ISSUANCE OF LETTERS TESTAMENTARY.

Although not labeled "list," Paragraph F clearly complies with the requirements of both decedent's Will and R.S. Mo. §474.333 ("Missouri List Statute"). According to the statute:

> A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, securities and

property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by the testator, must be dated and must describe the items and the devisees with reasonable certainty.

Id. (emphasis added). The Committee Comment to R.S. Mo. §474.333, published in 4 Francis M. Hanna, Missouri Practice, Probate Code Manual §474.333, at 605 (2d ed. 2000), states that the statute is based on §2-513 of the Uniform Probate Code and is specifically "designed to meet the problem of the testatrix who changes her mind from time to time about which of her friends should receive jewelry, china, silver and bric-a-brac."[5] Since the Missouri List Statute permits a testatrix to designate who shall receive her personal property "as frequently as she wishes, without executing a codicil each time," it evidences a relaxation of the formalities of the wills statute. Id. As the official Comment to §2-513 of the Uniform Probate Code observes, this section is "part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution." Id. at 703 (reprinting selected Uniform Probate Code sections with official comments) (emphasis added).

[5] Missouri courts have relied on Committee Comments to ascertain legislative intent with respect to the various provisions of the Probate Code. See Moran v. Kessler, 41 S.W.3d 530, 536 n.24 (Mo. App. W.D. 2001) (citing the Committee Comment to §474.155); State Ex Rel. Baumbach v. Kamp, 922 S.W.2d 411, 417 (Mo. App. S.D. 1996) (relying on the Committee Comment to § 475.083).

Paragraph F, contained in the Third Amendment of decedent's trust, satisfies the requirements of the Missouri List Statue because it was obviously written, dated and signed by decedent. It also described with reasonable certainty both the items to be bequeathed ("[a]ll [my] tangible personal property") and the devisee ("[my] sister, NORINE MITCHELL"). For the same reasons Paragraph F satisfies the terms of decedent's Will, and also because it was unquestionably in the possession of (and therefore "found by") decedent's personal representative within sixty days of the issuance of letters testamentary. This is so because the same entity (the Bank) serving as decedent's personal representative under the Will had been simultaneously serving as trustee under her Trust, as amended (LF 95 & 105). Based on the law and these incontrovertible facts, the Probate Court correctly held that Paragraph F was a "list" as a matter of law, and that it effectively distributed all of decedent's tangible personal property to respondent.

Response to Appellant's Point Relied on I.

In his effort to defeat the Probate Court's straightforward analysis and conclusion, appellant argues in his Substitute Brief that Paragraph F is not a list because it provides for a "generic distribution" rather than specifying each item of property, that it applies only to "trust" property rather than "probate" property, and that it fails to describe the devisee with reasonable certainty. Appellant further contends that, despite the requirement that the list need only be "found by" the personal representative within 60 days of the issuance of letters testamentary, Paragraph F did not satisfy this requirement because respondent Mitchell failed to "raise[ ] her contention" or "show her hand" within that

requisite time period. Each of these contentions lacks merit. They will be discussed in turn.

Nothing in the Will or the Missouri List Statute prohibits the use of "generic descriptions" such as the word "all." To the contrary, it is well-settled Missouri law that the term "all," used in the same context as in Paragraph F ("[a]ll [my] tangible personal property"), is a sufficient and perfectly proper description of property to be devised. See e.g., In re Bernheimer's Estate, 176 S.W.2d 15 (Mo. 1943) (bequest of "all property" was sufficient to convey all non-excepted property). This principle is consistent with the general proposition that language used in testamentary documents, unless otherwise modified, has its usual and ordinary meaning. Central Trust Bank v. Scrivner, 963 S.W.2d 383, 385 (Mo. App. W.D. 1998). Nor do the Will or statute require, as appellant erroneously contends, that decedent must separately identify each and every item of tangible personal property. As the statute makes clear, any form of "written statement" will suffice, and it does not even have to be in the form of a "list" per se. See R.S. Mo. §474.333 ("A will may refer to a written statement or list") (emphasis added). Especially where, as here, decedent bequeaths all of her personal property to the same individual, there is no need for a specific itemization.[6] Not only would such a requirement, as urged by appellant, violate the statute's express language, it would also contravene the statute's

[6] This firmly explains why respondent did not use the exemplar attached to her Will. Moreover, there is absolutely no requirement in law or in her Will that respondent must use that form in order to bequeath tangible personal property.

acknowledged purpose, which is to relax the formalities of devising personal property. See Committee Comment, supra.

Moreover, Missouri law has never required, as appellant contends, that the word "all" must be further restricted to mean only "trust" or "probate" property. Here, it is clear that decedent used the phrase "[a]ll [my] tangible personal property" to describe exactly that. That the term "all" is broad, comprehensive, unrestricted and, indeed, unlimited, does not render it vague or uncertain. Nor is the plain meaning of the term altered by the fact that it happens to appear in a trust instrument. Appellant has not cited a single case (nor are we aware of any) holding or even suggesting that the term "all" means anything other than all, much less for the purposes of R.S. Mo. §474.333, which was codified as part of the broader policy of effectuating a testator's intent and of relaxing the formalities of the wills statute with respect to tangible personal property. Furthermore, if decedent had intended to only bequeath her trust property to respondent Mitchell, she would have written it that way, but she did not. Her literal choice of words - "[a]ll of [my] tangible personal property" - is clear, unambiguous and fully speaks for itself. In contrast, under appellant's contention, the word "all" must be reads to mean "nothing," which utterly defies the clear intendment of her chosen words.

Similarly, appellant cites no authority for the proposition that a person's name is not a reasonably certain description of a devisee in order to satisfy the Missouri List Statue. Indeed, Missouri courts have consistently awarded property to persons identified in a list by name alone. See e.g., Estate of Webster, 920 S.W.2d 600, 602-3 (Mo. App. W.D. 1996) (list bequeathing items to "Trainor Evans" and "Joe & Clayton Evans" was

effective). Paragraph F identifies respondent not only by name ("NORINE MITCHELL"), but also as "[my] sister." Appellant does not – and cannot – contend that such identification is unclear. Instead, he argues that the additional language – "to be distributed in accordance with instructions given by [decedent] during her lifetime" – fails to identify "the ultimate recipient" of the property, rendering the identification of respondent uncertain, thus defeating any gift to respondent. This argument is facially invalid, and must be rejected at the threshold, because it obviously cannot be squared with decedent's clearly expressed intent as stated in Paragraph F to bequeath her tangible personal property to respondent.

Furthermore, under the Restatement of the Law (Second) of Trusts, instructions like these in Paragraph F, which demonstrate an intention that one person receive property for the benefit of others (not identified in the writing), are perfectly valid and serve to create a "constructive trust" in favor of the ultimate beneficiaries. See Restatement (Second) of Trusts §55 (named devisee or legatee is "chargeable as a constructive trustee. . . . for the intended beneficiary").[7] Thus, while decedent's instructions may be enforceable by the intended recipients as against respondent, this does not change the fact that appellant is not entitled to the property. This is especially clear when Paragraph F is read in concert with Paragraph E, which, after devising only decedent's condominium to appellant, states that decedent "intentionally makes no other provisions for her said son or

[7] Missouri follows the Restatement (Second) of Trusts. See, e.g., Strype v. Lewis, 180 S.W.2d 688 (Mo. 1944).

any of his descendants" (emphasis added). In any event, contrary to appellant's argument, Paragraph F's provision regarding decedent's "instructions" does not detract in the slightest from the clarity with which respondent is named as the devisee (whether as constructive trustee or otherwise) of decedent's personal property.[8]

Appellant's final contention, that respondent had to "raise[ ] her contention" or "show her hand" in regard to Paragraph F within sixty days of the issuance of letters testamentary, is simply outside and unsupported by anything in the Will. The only requirement in the Will is that the list be "found" by decedent's personal representative (the Bank), which undisputedly occurred here. Indeed, the Bank was also serving as trustee under decedent's trust as amended, which contained Paragraph F, even before decedent's death. In common parlance, "find" means "to come upon often accidentally." See e.g., Merriam-Webster's New Collegiate Dictionary 463 (9th Ed. 1986). It is undisputed that the Bank possessed, had "come upon" and "found" Paragraph F within sixty days of the issuance of letters testamentary and, indeed, long before. Neither the Will nor any of the Trust amendments contains any further requirement that respondent Mitchell had to assert her claim, make her position known, or "show her hand," much less within any particular time period. Moreover, appellant did not "show his hand" or make his own claim for the personal property until November 17, 2000, when he filed his petition

[8] Appellant attempts to disparage respondent's affidavit as "inadmissible self-serving hearsay." Appellant's contention misses the mark, because the instructions were specifically contemplated and referred to in Paragraph F of the Trust.

for partial distribution (LF 14-23). That was months after respondent made her demand, by letter dated March 24, 2000 to the personal representative (LF 139-40). In any event, as noted, the Will imposes no affirmative requirements upon anyone, necessitating rejection of appellant's final contention. (It should also be noted that no distribution of decedent's tangible personal property has been made to date.)

For the foregoing reasons, Paragraph F is a "list" as a matter of law and appellant's contentions to the contrary lack merit and should be rejected. The final judgment and stated rulings and rationales of the Probate Court were correct in every respect and should be affirmed on this basis.

II.

IN THE ALTERNATIVE, THE PROBATE COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE, EVEN IF, AS APPELLANT INCORRECTLY CONTENDS, PARAGRAPH F WERE NOT A COMPLIANT "LIST" AS A MATTER OF LAW, PARAGRAPH F CAN AND SHOULD BE CONSTRUED TO BE A "LIST" WITHIN THE MEANING OF ARTICLE TWO OF DECEDENT'S WILL, THEREBY RESULTING IN DECEDENT'S TANGIBLE PERSONAL PROPERTY BEING BEQUEATHED TO RESPONDENT, IN THAT (1) DECEDENT'S TESTAMENTARY INSTRUMENTS AND IN PARTICULAR THE TERM "LIST" (UNDER APPELLANT'S CONTENTION) WOULD THEN BE LATENTLY AMBIGUOUS, (2) DIRECT EVIDENCE OF DECEDENT'S INTENT, INCLUDING THE SCRIVENER ATTORNEY'S AFFIDAVIT, WOULD ACCORDINGLY BE ADMISSIBLE, AND (3) THE UNDISPUTED EVIDENCE ESTABLISHED THAT DECEDENT INTENDED THAT ALL OF HER TANGIBLE PERSONAL PROPERTY GO TO RESPONDENT AND NOT TO APPELLANT AS SET FORTH IN PARAGRAPH F.

The standard of review on appeal of summary judgment is de novo, and an order of summary judgment will not be set aside on review if it is supported on any theory. Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 243-44 (Mo. banc 1984). The Court may affirm the trial court's judgment on any of the grounds presented below that are properly supported by the record. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993). During the summary judgment proceed-

ings in this case, respondent presented, and both parties argued, the alternative contention that respondent is entitled to summary judgment because, if Paragraph F were not a "list" as a matter of law (as appellant incorrectly contends), then an ambiguity would exist which, in turn, rendered admissible undisputable extrinsic evidence that decedent intended her personal property to go to respondent (see, e.g., LF 67 & 72-3). The Probate Court did not reach this argument because it determined that Paragraph F is a "list" as a matter of law. However, absent affirmance on this issue, this Court can and should affirm the judgment on the alternative ground that Paragraph F can and should be construed to comport with decedent's intent of creating a "list" pursuant to her Will and R.S. Mo. 474.333, and bequeathing her tangible personal property to respondent and not to appellant.

When read separately, Article Second of decedent's Will and Paragraph F of the Trust do not contain ambiguities. As this Court has previously made clear, however, where, as here, a will and a trust form parts of the same estate plan, a court must construe both documents together. Commerce Trust Company v. Starling, 393 S.W.2d 489, 494 (Mo. 1965); see also Schupbach v. Schupbach, 760 S.W.2d 918, 923-24 (Mo. App. S.D. 1988). When decedent's Will and Trust are read together, and assuming arguendo Paragraph F of the Trust is not clearly a "list" within the purview of the Will as a matter of law, then, at a minimum, an ambiguity exists based on the purported reasons given by appellant as to whether decedent intended Paragraph F to be the type of "list" she referred to in her Will. See Schupbach, 760 S.W.2d at 923 (finding ambiguity when language in a trust was compared with the language in a will forming part of the same estate plan).

Because any such ambiguity in the word "list" (under appellant's incorrect position) arises only by virtue of the existence of the separate instrument containing Paragraph F, the ambiguity is "latent." Schupbach, 760 S.W.2d at 923 (when a will and trust, read separately, do not contain any ambiguities, but become unclear when read together, the will is latently ambiguous). A latent ambiguity is one that is not apparent on the face of the Will, but "becomes open to more than one interpretation when applied to the factual situation in issue."[9] Id.

In resolving any ambiguity, the court must construe the terms of a will to comport with the testator's intent. "All technical rules of construction must give way to this controlling rule." Theodore Short Trust v. Fuller, 7 S.W.3d 482, 488 (Mo. App. S.D. 1999) (internal quotations omitted). Evidence demonstrating relationships, motives and the existence of property is admissible to "give precise and explicit meaning to the language used by the testator." Breckner v. Prestwood, 600 S.W.2d 52, 55 (Mo. App. E.D. 1980); see also Matter of Estate of Katich, 565 S.W.2d 468, 470-71 (Mo. App. St.L. 1978) (court properly admitted evidence regarding relationship between testator and

[9] Appellant erroneously contends in his Substitute Brief that there are only two types of latent ambiguities. Apart from the fact that appellant's cited cases say no such thing, and place no restrictions whatsoever on the number or types of permissible latent ambiguities, Schupbach clearly recognizes that a latent ambiguity arises where, as here (under appellant's incorrect position), words of a will or trust forming parts of the same estate plan are open to more than one interpretation when construed together.

beneficiary in case of patent ambiguity). This inferential or relationship evidence is admissible regardless of the type of ambiguity. Breckner, 600 S.W.2d at 55.

In cases involving latent ambiguities, however, the court is also permitted to examine direct evidence of the intent of the testator, including declarations made by the testator to others regarding her intent and, specifically, testimony by the scrivener. Schubel v. Bonacker, 331 S.W.2d 552 (Mo. 1960) (court properly admitted evidence of testator's expressed intent when identity of stock in bequest was latently ambiguous); Schupbach, 760 S.W.2d at 923 (scrivener's testimony admissible).

In this case, both inferential and direct evidence are admissible, and both irrefutably prove decedent's intent to draft a list compliant with Article Second of her Will and to leave her personal property to respondent. As to the first kind of evidence, the record is replete with references to the conflicts between decedent and appellant and decedent's fear of him (see pp. 12-15 above and the evidentiary materials there cited). Appellant himself acknowledges that decedent accused him of theft, locked him out of her apartment and disparaged him to others (id.). By contrast, it is undisputed that respondent and decedent enjoyed a close and trusting relationship (id.). The clear inference from this evidence is that decedent's view of her relationships with the parties were such that she would entrust respondent with her personal belongings, but not appellant.

The direct evidence, admissible here due to the latent ambiguity, unequivocally confirms that decedent intended to leave her personal property to respondent, and not to appellant. The competent, incontrovertible affidavit and contemporaneous notes of attorney Robert Trame, who drafted and supervised the decedent's Will and Trust in-

struments, demonstrate decedent's clear intent regarding her desire to treat Paragraph F as her written statement bequeathing her personal property to respondent and not to appellant (see pp. 17-18 above and evidentiary materials there cited). Mr. Trame's affidavit indisputably demonstrates that decedent told him she wanted all of her tangible personal property to go upon her death to her sister and that Paragraph F was specifically drafted to accomplish those wishes (id.). Respondent's incontrovertible affidavit also establishes that decedent specifically expressed her intent to leave respondent the property and, further corroborating that intent, gave respondent clear and specific instructions for further disposition of particular items to other individuals or entities (id.), as expressly contemplated by the language of Paragraph F. Finally, the Third Amendment itself makes decedent's intent unquestionably clear, both in Paragraph F (giving all the tangible personal property to respondent) and in Paragraph E ("[decedent] intentionally makes no other provisions for her said son [appellant]") (emphasis added) (LF 102).

Response to Appellant's Point Relied On II.

In response to the clear and undisputed extrinsic evidence of decedent's intent, appellant repeats his contention that the word "all" should be restricted to mean "trust" property - a contention that simply cannot withstand analysis. See Argument I, at 27-29 supra. In further support of his position, appellant directs the Court's attention to Article Third of decedent's Will which bequeaths the residue of decedent's estate, including items of personal property not effectively disposed of under Article Second, to the Trust. Appellant contends that this provision supports his belief that Paragraph F of the Trust only gives respondent the tangible personal property that was passed to the Trust through

the residuary clause of the Will, after appellant has taken his share pursuant to Article Second. Once again appellant's argument is without merit. Indeed, it merely begs the question, because the Article-Third residue clause is inapplicable if Paragraph F is a "list" within the meaning of Article Second.

Appellant also mistakenly contends that if the Court construes Paragraph F of the Trust to be a list under the Will, it would unlawfully revoke provisions of the Will pursuant to R.S. Mo. §474.400, would be an untimely will contest pursuant to R.S. Mo. §§ 473.081 and 473.083 and would improperly circumvent the statutory requirements of R.S. Mo. §474.333. Each of these arguments lacks merit. Fundamentally, construing Paragraph F of the Trust to be the "list" that decedent intended it to be under her Will does not revoke any word or provision of either testamentary instrument. Rather, such a construction merely gives effect to the very words used by decedent in her testamentary instruments, and leaves them all in full force and effect. Nor, similarly, is respondent "contesting" the validity of any portion much less the entirety of the Will. She has merely asked the Probate Court to construe an admittedly valid word in decedent's Will ("list") to comport with decedent's intent, which the court may do "at any time during the administration" of the estate. See R.S. Mo. §474.520. Indeed, "[q]uestions concerning the property rights of devisees, legatees, heirs and others, which might arise out of a construction of the terms of the will cannot be resolved in a [will contest] proceeding." State Ex Rel. O'Connell v. Crandall, 562 S.W.2d 746 (Mo. App. St.L. 1978). Finally, construing Paragraph F to be the "list" that decedent intended it to be would not in any respect circumvent or violate the statutory requirements of R.S. Mo. §474.333. Rather,

the Court would merely be construing a particular set of testamentary provisions pursuant to decedent's intent in order to resolve an ambiguity.

Because there is and can be no genuine issue of fact as to decedent's intent to bequeath the property in question to respondent, and because the term "list" in decedent's Will can and should be construed to include the language in Paragraph F to comport with that intent, respondent was and is entitled to summary judgment on this alternative ground, and the Probate Court's judgment may be affirmed on this ground as well.

III.

IN THE ALTERNATIVE, THE PROBATE COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE, EVEN IF, AS APPELLANT INCORRECTLY CONTENDS, PARAGRAPH F WERE NOT A COMPLIANT "LIST" AS A MATTER OF LAW OR FACT, PARAGRAPH F AND ARTICLE TWO OF DECEDENT'S WILL CAN AND SHOULD BE CONSTRUED TO BEQUEATH DECEDENT'S TANGIBLE PERSONAL PROPERTY TO RESPONDENT IN THAT (1) PARAGRAPH F AND ARTICLE TWO (UNDER APPELLANT'S CONTENTION) WOULD THEN BE IN DIRECT CONFLICT AND LATENTLY AMBIGUOUS, (2) DIRECT EVIDENCE OF DECEDENT'S INTENT, INCLUDING THE SCRIVENER ATTORNEY'S AFFIDAVIT, WOULD ACCORDINGLY BE ADMISSIBLE, AND (3) THE UNDISPUTED EVIDENCE ESTABLISHED THAT DECEDENT INTENDED HER PERSONAL PROPERTY TO GO TO RESPONDENT AND NOT TO APPELLANT, AS PROVIDED IN PARAGRAPH F.

Assuming arguendo, as appellant incorrectly contends, Paragraph F is not a "list" either as a matter of law or as a matter of (extrinsic) fact, the Court should still affirm the Probate Court's decision, because Paragraph F and Article Two of decedent's Will (under this scenario) would then be in direct conflict and they therefore can and should be construed together to bequeath decedent's tangible personal property to respondent and

not to appellant.[10] See Schupbach, 760 S.W.2d at 923 (finding ambiguity where language in a trust was in direct conflict with the language in a will forming part of the same estate plan).

As previously noted, Article Second of decedent's Will states that, absent a "list," "each and every item of tangible personal property . . . shall go to my son, HENRY W. BLODGETT" (LF 5-6). In direct conflict, Paragraph F of the integrated Trust unconditionally states that "All of [my] tangible personal property and other personal effects shall be distributed to [my] sister, NORINE MITCHELL" (LF 102). Further, Paragraph E states that, apart from the condo, decedent "intentionally makes no other provisions for her said son [appellant]" (LF 102). Thus, under appellant's (incorrect) contention that there is no "list," we are left with directly conflicting provisions in testamentary instruments comprising the same integrated estate plan, thereby creating an ambiguity. See Schupbach, supra.

More specifically, since the ambiguity only arises when the Will and Trust are read together, the ambiguity is "latent." Schupbach, 760 S.W.2d at 923 (when a will and trust, read separately, do not contain any ambiguities, but become unclear when read together, the will is latently ambiguous). Id. Therefore, as previously discussed, both inferential and direct evidence are admissible to prove decedent's intent and to resolve

[10] As previously noted, where, as here, a will and a trust form parts of the same estate plan, a court must construe both documents together. See Commerce Trust Company, 393 S.W.2d at 494; Schupbach, 760 S.W.2d at 923-24.

the ambiguity and both irrefutably prove decedent's intent to leave her personal property to respondent (see pp. 35-37). For this third independently sufficient and alternative reason, the Probate Court's judgment should be affirmed.

Further Response to Appellant's Point Relied On II.

Appellant erroneously contends that any substitution of the distribution provisions in Article Second of the Will with the terms of Paragraph F of the Trust will result in the effective revocation of all or part of Article Second, contrary to the terms of R.S. Mo. 474.400. Respondent is not asking the Court to revoke, rewrite or invalidate any provisions in decedent's Will. Respondent is merely asking the Court to construe two admittedly valid, but conflicting, provisions to comport with the decedent's intent.

Nor, contrary to appellant's argument, is respondent seeking to pursue an untimely partial will contest under R.S. Mo. §§ 473.081 and 473.083. In this regard, In Re Estate of Moore, 889 S.W.2d 136 (Mo. App. E.D. 1994), and In Re Estate of Hutchins, 875 S.W.2d 564 (Mo. App. S.D. 1994), cited by appellant, are fundamentally distinguishable. In this case, respondent is specifically named as one of the devisees of decedent's personal property (in Paragraph F) and merely seeks (alternatively) construction of two testamentary provisions that are in direct conflict with each other. In contrast, in both Moore and Hutchins, the plaintiffs who were neither heirs nor distributees under the challenged provisions of the wills, sought to have testamentary provisions declared void so they could become heirs at law. Moore, 889 S.W.2d at 137; Hutchins, 875 S.W.2d at 566-67. Both courts concluded that since the plaintiffs had no interest in the provisions as written, they did not seek construction of the clauses, but rather challenged the clauses

as void. Moore, 889 S.W.2d at 137; Hutchins, 875 S.W.2d at 568. In this sense, unlike respondent Mitchell, they were "strangers" to the testamentary instruments, and their only remedy was therefore via will contest. See Hutchins, 875 S.W.2d at 568 (quoting Odom v. Langston, 195 S.W.2d 463, 464 [Mo. 1946]).

Respondent, by contrast, does not ask the Court to declare any provision of decedent's testamentary instruments "void," nor has she challenged the admission of the will to probate, or any part of it. Respondent, rather, is merely asking the Court to "determine the intention of the testator as set forth in an ambiguous but lawful provision of the will." Odom, 195 S.W.2d at 464 (quoted in Moore and Hutchins).

A Case In Point.

In Schupbach, as here, the testator executed a will and a separate trust agreement that formed part of the same estate plan. 760 S.W.2d at 920. Article III of the testator's will provided that the trust was to be funded by all of the residuary estate (approximately $925,000). Id. at 920-21. Article Three of the trust, in contrast, stated that the trust was to be funded by a sum equal to the largest amount that can pass free of federal estate tax ($325,000). Id. at 921. The court found a latent ambiguity existed because, although the instruments were separately unambiguous on their face, they became open to more than one interpretation when compared with each other. Id. at 923-24. Specifically, the court held that when the will was construed with the trust, which was required since they formed part of the same estate plan, "[t]he provisions in the will directing that an unlimited amount be placed in the family trust [was] in direct conflict with the specifically limited funding of the family trust that [was] set out in the trust agreement." Id. at 924.

Having thus found a latent ambiguity, the appellate court affirmed the trial court's consideration of direct testimony of the testator's intent. Id. As the court reasoned, "[t]he rationale supporting this evidentiary rule is that evidence of declarations of the testator's intent does not add to or replace an explicit designation in the instrument as to who the beneficiaries are or what property or instrument is being described [which here is all of decedent's personal property], but merely gives to the designation the precise meaning intended by the testator." Id. at 923. The court therefore permitted the testimony of the accountant, the widow and the scrivener to ascertain the testator's intent. Id. at 923-24. Since the testimony revealed that both the testator and his lawyer intended to limit the funding of the family trust to the maximum exemption equivalent, the appellate court affirmed the trial court's finding that the trust was to be funded pursuant to the language in the trust (which limited the amount to $325,000) as opposed to the conflicting provision in the will (which would have funded the trust with the full $925,000). Id. at 922, 924.

Schupbach is thus analytically in point, and dictates the same result. Here, as there, the Will (Article Second) and Trust (Paragraph F) are in direct conflict (again, assuming arguendo appellant's incorrect contention that there is no "list"). Because there is and can be no genuine issue of fact as to decedent's intent to bequeath the tangible personal property to respondent Mitchell as provided in Paragraph F, she was and is entitled to summary judgment on this alternative ground. The Probate Court's judgment may be affirmed on this ground as well.

CONCLUSION

The Probate Court's judgment should be affirmed in its entirety because Paragraph F is a "list" as a matter of law, as defined by both decedent's Will and §474.333. In the alternative, the Probate Court's judgment should be affirmed because the word "list" in Article Second of decedent's Will is latently ambiguous (under appellant's position), and the undisputed evidence below proved that decedent clearly intended Paragraph F to be a "list." The Probate Court's judgment should also be affirmed on the alternative ground that the Will and Trust (under appellant's position) are latently ambiguous because they are in direct conflict, and the incontrovertible evidence established that decedent intended to bequeath her tangible personal property to respondent and not to appellant.[11]

Absent affirmance the cause should be remanded for trial on the merits. This is so because appellant has made no showing, nor is it true, that respondent's claims must be rejected as a matter of law and undisputed fact. At a minimum, if the judgment is not

[11] Appellant's final point (III), that the Probate Court erred in requiring him to submit a sworn list of all items he had taken from decedent's residence and to return such items to the personal representative, becomes moot upon this Court's affirmance of the judgment below. Absent affirmance the case would need to be remanded for trial (as discussed in the next paragraph in the text), which would mean that appellant's final point would not be ripe for consideration on this appeal. In either event the point need not be reached or decided by this Court.

affirmed, respondent would be entitled to a jury trial on her claim for construction of decedent's testamentary instruments.

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM, LLP

Mark J. Bremer #24696

Jeremy D. Shook #50412
One U.S. Bank Plaza, 24th Floor
St. Louis, MO 63101
(314) 241-3963
(314) 241-2509 (fax)

Attorneys for respondent
Norine Mitchell

Certificate of Service

The undersigned certifies that, on this 21st day of November, 2002, two copies of the Substitute Brief Of Respondent Norine Mitchell and one copy on disk were sent via first class mail, postage prepaid, to Lawrence S. Denk, 18 South Kingshighway, St. Louis, Missouri 63108, attorney for appellant, and Helmut Starr, 7733 Forsyth Boulevard, Twelfth Floor, St. Louis, Missouri 63105, attorney for respondent Bank of America, N.A.

CERTIFICATE PURSUANT TO RULE 84.06(c) and (g)

I, Mark J. Bremer, hereby depose and state as follows:

1. I am an attorney for respondent Norine Mitchell.

2. I certify that the foregoing Substitute Brief of Respondent Norine Mitchell contains 10,098 words (including footnotes) and thereby complies with the word limitations contained in Supreme Court Rule 84.06(b).

3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word 97 (SR-2) word processing software.

4. I further certify that the accompanying floppy disk containing a copy of the foregoing Brief, required to be filed by Rule 84.06(g), has been scanned for viruses and is virus-free.

_____

Mark J. Bremer