

NO. A12-0565

State of Minnesota
In Court of Appeals

IN RE THE MATTER OF THE
 JAMES BERNARD IRREVOCABLE TRUST

KEVIN SPENCER, JAMES SPENCER AND JOSEPH SPENCER,
Appellants,

vs.

KATHLEEN M. MOSLOSKI AND CHRISTINE M. KOCH,
Respondents.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

- 1. Whether the trial court erred when it determined that the Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust document executed by James Bernard Spencer was a valid exercise of a testamentary power of appointment.**

Raised to the Trial Court: Appellants moved for summary judgment on the issue. (Add. 1-2.)

Trial Court's Ruling: The district court held that the testamentary power of appointment was a valid exercise of the power reserved to James Bernard Spencer. (Add. 1-2.)

Preservation for Appeal: Appellant filed its appeal pursuant to Minn. R. Civ. App. P. 103.03, subd. (a) within sixty days following the trial court's Order of January 13, 2012. (App. 33.)

Apposite Authorities: *In re Estate of Arend*, 373 N.W.2d 338, 342 (Minn. Ct. App. 1985).

MINN. STAT. § 502.64 (2012).

MINN. STAT. § 524.1-201 (58) (2012).

- 2. Whether the trial court erred when it determined that the Testamentary Power of Appointment the Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust document executed by James Bernard Spencer was not an attempt to modify the irrevocable trust.**

Raised to the Trial Court: Appellants moved for summary judgment on the issue. (Add. 1-2.)

Trial Court's Ruling: The district court held that the testamentary power of appointment was not an attempt by James Bernard Spencer to modify his trust. (Add. 1-2.)

Preservation for Appeal: Appellant filed its appeal pursuant to Minn. R. Civ. App. P. 103.03, subd. (a) within sixty days following the trial court's Order of January 13, 2012. (App. 33.)

Apposite Authorities: *Matter of Schroll*, 297 N.W.2d 282, 248 (Minn. 1980).

Matter of Wiedemann, 358 N.W2d 139, 141 (Minn. Ct. App. 1984).

STATEMENT OF THE CASE

This dispute is among the beneficiaries of the James Bernard Spencer Irrevocable Trust. James Bernard Spencer (“JBS”) established the James Bernard Irrevocable Trust (“Trust”) on December 31, 1996. (App. 16.)¹ Appellants are the sons of JBS’s deceased son, Charles J. Spencer. (Add. 3) Upon the death of Charles J. Spencer, Appellants became beneficiaries of the Trust by right of representation. (Add. 21.) Respondents are the daughters of JBS, are beneficiaries of the Trust, and jointly serve as trustees of the Trust. (Add. 3.)

On April 8, 2011, without knowledge of the execution of an alleged testamentary power of appointment by JBS on August 16, 2009, Appellants requested a formal accounting from Respondents as trustees of Trust. (Add. 4.) On April 29, 2011, Respondents filed a petition pursuant to Minn. Stat. § 501B.16 (3) (2012), requesting a determination of interested persons in the Trust. (Add. 4; App. 9.) Appellants filed an Answer in opposition to the petition on June 27, 2011. (Add. 4; App. 2.) Subsequently, both parties moved for summary judgment pursuant to Minn. R. Civ. P. 56. (Add. 4.)

On December 22, 2011, a hearing was held before the Honorable Karen J. Asphaug in Dakota County District Court. (Add. 1.) In an Order dated January 12, 2012, Judge Asphaug held that the document signed was a valid exercise of the power reserved to JBS in the Trust and that the use of the document was not an attempt to modify the Trust. (Add. 1.) Judge Asphaug additionally held there were material issues of fact related to whether JBS was subject to undue influence when he executed the document.

¹ References to Appellant’s Appendix are cited as “App” and reference to Appellant’s Addendum are cited as “Add.”

(Add. 2.) On March 7, 2012, the parties stipulated to dismissal with prejudice of the undue influence claim. (App. 30.)

This matter is now before the court on appeal pursuant to Minn. R. Civ. App. 103.03 (a) (2012).

STATEMENT OF THE FACTS

I. THE SPENCER FAMILY

James Bernard Spencer was married to Blossom Mary Spencer (“BMS”) and together, they had four children: Charles J. Spencer, born December 11, 1946; Charlene A. Spencer, born October 26, 1950; Kathleen M. Mosloski, born November 3, 1953; and Christine M. Koch, born October 21, 1959. (Add. 18.) On February 14, 1970, Charles S. Spencer, the eldest son of JBS and BMS, married Jackie Tenhoff. (App. 6.) Charles S. Spencer and Jackie Spencer have three children, the Appellants in this matter: Kevin Spencer (age 39), James Spencer (age 36), and Joseph Spencer (age 32). (App. 6.) During their marriage, Charles and Jackie Spencer lived and farmed in Martin County, Minnesota. (App. 6.) Their sons, Kevin, James, and Joseph helped on the farm as they were growing up and often returned home as adults to help with the farming when their parents needed help. (App. 6-7.) James Spencer was most actively involved with the farming operation and it was Charles’ and Jackie’s intent that he would take over the farm upon their retirement. (App. 7.) On August 7, 2001, following a battle with cancer, Charles S. Spencer passed away, survived by his wife Jackie and his three sons. (App. 8.) At the time of his death, Charles was farming his land with James. (App. 8.)

II. THE JAMES BERNARD SPENCER IRREVOCABLE TRUST

JBS as Grantor established the Trust on December 31, 1996. (Add. 16.) When JBS established the Trust he stated his purpose was to “primarily benefit the Grantor’s children, or their issue by right of representation.” (Add. 17.) As of December 31, 1996, the Trust held acreage of bare farmland in Martin County, Minnesota. (Add. 30.) The Trust was designated by JBS as irrevocable and JBS reserved no right to amend or modify the Trust terms. (Add. 18-19.) JBS did reserve a limited power to modify the Trust through a Testamentary Power of Appointment exercisable in his Last Will and Testament. (Add. 19.) The testamentary power was reserved to allow JBS to appoint the Trust income and corpus to a designated class of beneficiaries of his choosing. (Add. 19.)

Under the original designation of the Trust, Charles S. Spencer and Kathleen M. Mosloski were designated as Co-Trustees. (Add. 16.) Following the death of Charles S. Spencer in 2001, JBS nominated and appointed his daughter Christine M. Koch to serve as Co-Trustee with Kathleen M. Mosloski. Additionally, the Trust provided that following the death of JBS, and the death of his spouse BMS, the Trust principal was to be distributed to JBS’ children, or their issue by right of representation, in equal shares, after a 44.28 tract of land was first given to Christine M. Koch. (Add. 21.)

III. THE “TESTAMENTARY POWER OF APPOINTMENT JAMES BERNARD SPENCER IRREVOCABLE TRUST” DOCUMENT AND THE DEATH OF JAMES BERNARD SPENCER.

JBS traveled to Ohio in August 2009, to attend the funeral of his grandson, Donald Sutphin, the son of Charlene A. Spencer. (App. 8.) While in Ohio, JBS fell critically ill

and was transported via air ambulance to the Mayo Hospital, in Rochester, Minnesota. (App. 8.) At that time JBS was diagnosed with esophageal cancer. (Add. 3; App. 8.)

While JBS was in the hospital, terminally ill and in intensive care, Co-Trustees, Trust beneficiaries and Appellants Kathleen Mosloski and Christine Koch presented JBS with a document titled, "Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust" ("TPOA") (App. 4; Add. 14-15.) At the request of Kathleen Mosloski and Christine Koch, Dawn J. Renner, a Certified Public Accountant working at an accounting firm in Minnetonka, Minnesota, drafted the TPOA. (Add. 3.) The terms of the TPOA removed Charles S. Spencer and the Appellants as beneficiaries of the Trust. (App. 14-15.) It further changed the distribution of the Trust corpus so that Respondents received the portion of the Trust previously designated to Charles S. Spencer and his children. (App. 14-15.) Further yet, the TPOA reduced Charlene A. Spencer's share of the trust by \$90,000.00 and re-distributed it to the Respondents who were acting as Trustees. (App. 14-15.) Charlene A. Spencer was the only living child of JBS who was not acting as a trustee when the TPOA was executed. The execution of the TPOA served to increase Respondent's share of the Trust by approximately \$39,896.44 each. (App. 19.)

On August 16, 2009, JBS executed the TPOA from his death bed in intensive care. (Add. 14-15.) JBS died four days later, on August 20, 2009. (Add. 3.)

ARGUMENT

I. STANDARD OF REVIEW

The district court's interpretation of an unambiguous written document is reviewed by the Court of Appeals de novo.² A district court's decision is not binding on the Court of Appeals when the question is one of law.³ The Court of Appeals must review conclusions of law de novo.⁴ However, findings of fact made by the district court should not be set aside unless clearly erroneous.⁵

This court should independently review the district court's interpretation of the trust document and testamentary power of appointment. In this case, the Trust established by JBS provided that a testamentary power of appointment was reserved to JBS in his Last Will and Testament to appoint the trust income and corpus to a designated class of beneficiaries. (Add. 18-19). The district court judge determined that the document signed by JBS and witnessed by two individuals was effective as a will or codicil and that it served to appoint the trust assets to the beneficiaries, but it did not attempt to amend the irrevocable trust. (Add. 5-8.) Accordingly, on review of the documentary evidence, this court can make its own determination of the legal meaning and effect of the documents.

² See *In re Trust Created by Hill*, 499 N.W.2d 475, 482 (Minn. Ct. App. 1993), review denied (Minn. July 15, 1993). See also *Meister v. Western Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992) (interpretation of the language of a written document is independently reviewed where there is no dispute of material fact).

³ *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 335 (Minn. Ct. App. 1991).

⁴ See *In re Trust Created Under Agreement with Lane*, 660 N.W.2d 421, 425-26 (Minn. Ct. App. 2003) (citing *In re Simpkins*, 446 N.W.2d 188, 190 (Minn. Ct. App. 1989)).

⁵ See *id.*; MINN. R. CIV. P. 52.01 (2012).

II. THE DOCUMENT EXECUTED BY JAMES BERNARD SPENCER ON HIS DEATH BED IS NOT AN EFFECTIVE TESTAMENTARY POWER OF APPOINTMENT.

A. The Testamentary Power of Appointment is Ineffective because the Power was not Exercised in the Last Will and Testament of James Bernard Spencer.

In his Trust, JBS expressly reserved onto himself a testamentary power of appointment to be exercised only in his Last Will and Testament. (Add. 18-19.) Generally, a testamentary power of appointment is a power that can only be exercised by a will.⁶ Additionally, any testamentary power must be exercised only in the prescribed mode and manner as designated in the document creating the power.⁷ An attempt to exercise a power of appointment in any other mode or manner is ineffective.⁸

By its express terms, the Trust required JBS to exercise the power in his Last Will and Testament. (Add. 18-19.) A will is a document by which a person directs his or her estate to be distributed upon death.⁹ A properly executed will in Minnesota requires that the will is in writing, signed by the testator, and is signed by two individuals who signed within a reasonable time of witnessing the testator sign.¹⁰ For the reasons set for below, the document executed by JBS four days prior to his death was not an effective exercise of his testamentary power because the document is not a will, nor is it a codicil to his already existing will.

⁶ See *Black's Law Dictionary* 1209 (8th ed. 1999).

⁷ See MINN. STAT. § 502.64 (2012); *In re Burnham's Will*, 347 N.Y.S.2d 995, 996 (N.Y. Sur. Ct. 1973).

⁸ See *Matter of Smith's Estate*, 585 P.2d 319, 321 (Co. Ct. App. 178).

⁹ See *Black's Law Dictionary*, 1628 (8th ed. 1999).

¹⁰ See MINN. STAT. § 524.2-502 (2012).

1. There must be a document that is intended to be a “will”, before applying the statutory requirements for will execution.

The district court erred when it determined that the document signed on August 16, 2009, was effective as a will on the sole basis that it meets the statutory requirements of will execution. (Add. 7-8.) There must first be a document that the testator intended to be a will, i.e., it disposes of the testator’s assets following his death.¹¹ Then, for that document to be effective, it must have been executed in a manner that meets the statutory requirements.¹² Signing a document as “testator” and having it witnessed by two people does not, in and of itself, create a will without the intent that document act as a will.

In this case, the trial court missed a critical point when it was considering the TPOA as a will. The court should have first determined whether the document was intended by the JBS to act as his last will and testament and then subsequently examined the statutory requirements of will execution. The trial court instead focused only on the formalities of will execution without examining the intent of JBS when he executed the document. (Add. 7-8). Even if the TPOA meets the requirements of will execution, the TPOA document does not reflect that JBS intended it to act as a will.¹³ While it is not

¹¹ See RESTATEMENT (THIRD) PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 3.1, cmt. f (1999) (stating that “executing a valid will requires the testator manifest intent to make a will . . . and to comply with specified statutory formalities.”). See also, *Wiggins v. Wiggins*, 2 So.2d 402, 403 (Ala. 1941) (noting that testamentary intent “must exist when the instrument is executed and the intent must apply to the particular instrument produced as a will.”).

¹² See MINN. STAT. § 524.2-502 (2012). See also, *Matter of Estate of Bowe chop*, 764 P.2d 657-59 (Wash. Ct. App. 1988) (along with the customary burden of proving that the will met formal requirements, the proponents of the document also had the burden of proving that Mr. Bowe chop intended it to be his last will.)

¹³ See RESTATEMENT (THIRD) PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 3.1, cmt. g (1999) (providing that to “be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent’s death.”).

necessary that technical words make a disposition of property, testamentary character is satisfied only if the document makes a disposition of property *after death*.¹⁴

In this case, the TPOA references in its title only the James Bernard Spencer Irrevocable Trust and does not reference the death of JBS or how property should be disposed of at the time his death. (Add. 14-15). Additionally, the TPOA states that Charles S. Spencer and his children are excluded from “this agreement”, indicating the document is not a will and JBS did not intend it to act as such. (Add. 14-15). The TPOA additionally does not reference that it is amending, revoking or otherwise operating to affect the will JBS previously executed in 1977. (Add. 14-15.) Further, the TPOA is signed by the “Grantor”, not the testator, as required by Minnesota law.¹⁵ (Add. 14-15.) All of these facts are contrary to the district court’s finding that the TPOA document is a will. The TPOA cannot be a will because JBS did not have the intent that the document act as his last will and testament nor is the document testamentary in nature. Where the required testamentary intent is lacking, the document cannot operate as a will.¹⁶

2. James Bernard Spencer had a valid will in existence at the time he executed the “Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust.”

On July 13, 1977, JBS executed a formal document that was titled his “Will”. (Add. 15.) This will meets all the requirements of Minnesota law: it evidences intent the document act as a will, it is written, signed by JBS and witnessed by two persons. (Add. 15-17.) Despite the existence of this valid will, the court nonetheless found that the one page

¹⁴ See *Matter of Nelson’s Estate*, 274 N.W.2d 584, 587 (S.D. 1978) (citations omitted).

¹⁵ See MINN. STAT. § 524.2-502 (2012).

¹⁶ See *In re French’s Estate*, 351 P.2d 548, 550 (Mont. 1960).

document entitled “Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust” operated as JBS’s will or an amendment to his will.

The TPOA states that “As per ARTICLE III, Section 2, I, James Bernard Spencer exercise my right to designate the following class of beneficiaries to the Trust.” Assuming that that “ARTICLE III, Section 2” refers to the James Bernard Spencer Irrevocable Trust, its provision states as follows:

Grantor reserves unto himself a Testamentary Power of Appointment exercisable in the Last Will and Testament of Grantor to appoint the Trust Income and corpus to a designated class of beneficiaries chosen by the Grantor, but specifically excluding, the Estate of the Grantor, the Grantor’s spouse, the Estate of the Grantor’s spouse, and any creditors of the above.

(App. 18-19).

As the Trust is written, JBS reserved unto himself a power that could only be exercised in his Last Will and Testament. Respondents have provided no document purporting to be James Bernard Spencer’s Last Will and Testament in which he exercised his testamentary power of appointment. Instead, Petitioners have presented the TPOA, a document drafted by a CPA and apparently hastily executed from JBS’s hospital bed just days before his death.

The TPOA significantly increases the Petitioners’ shares in their late father’s estate by completely eliminating the Appellants as beneficiaries and taking an additional \$90,000.00 from their sister, Charlene A. Spencer. (Add. 14-15.) The TPOA is not the Last Will and Testament of James Bernard Spencer, nor was the power exercised in the Last Will and Testament of JBS. Therefore, JBS did not exercise his testamentary powers of appointment when he signed the document on August 16, 2009, just days

before his death. The attempted exercise of the testamentary power of appointment is ineffective.

B. The “Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust” is not a valid codicil to the Will of James Bernard Spencer.

The district court also erred in its conclusion that the document executed by JBS is effective because it acts like a codicil. (Add. 8.) A codicil by definition is a “supplement or an addition to a will. . . .”¹⁷ It is not necessary that a codicil be physically attached to the will.¹⁸ However, it is only when the codicil specifically refers to the will that they may be kept in separate places.¹⁹

The purpose of the court in construing a will is to ascertain the actual intention of the testator as it appears from a full and complete consideration of the entire will and any codicils.²⁰ The documents should be read in light of the surrounding circumstances at the time of the execution of the will.²¹ Accordingly, the provisions of either document should not be read in isolation.²²

Here, the district court failed to acknowledge that JBS had a valid will at the time he executed the TPOA. Instead, the court noted that a “decedent can have more than one document which operates as a will, such as when a will and codicil are submitted to probate together.” (Add. 8.) But, there are no facts or evidence in the record to support

¹⁷ *Black’s Law Dictionary* 258 (6th ed. 1991). See also, Restatement (Third) Property: Wills & Other Donative Transfers § 3.1 cmt a. (1999) (“The term ‘will’ includes a codicil. A codicil is simply a will that amends or supplements a *prior will*.”) (emphasis added).

¹⁸ See *In re Thompson’s Will*, 196 N.C. 271, 275 (N.C. 1928).

¹⁹ See e.g., *In re Estate of Erbach*, 164 N.W.2d 238, 243 (Wis. 1969) (citing 57 AM. JUR. *Wills* § 605, p. 415).

²⁰ See *In re Estate of Arend*, 373 N.W.2d 338, 342 (Minn. Ct. App. 1985).

²¹ *Id.* (citing *In re Ordean’s Will*, 261 N.W. 706, 708 (1935)).

²² *In re Wyman*, 308 N.W.2d 311, 315 (Minn. 1981).

the conclusion that the document in this case was probated, either as a will separately, or as a codicil to the 1977 will executed by JBS.

Further, if the document is a codicil as the district court states, the court failed to read the two documents together and in light of the surrounding circumstances at the time of the execution of the will and TPOA. If the TPOA is a codicil, this Court must consider the circumstances under which the TPOA was prepared and executed. The TPOA was obtained, witnessed and notarized by interested parties: a beneficiary/trustee and the significant other of a beneficiary/trustee. The document was signed while JBS was dying at the Mayo Hospital, on medication to ease his pain. The Respondents received a substantial benefit by taking those actions. Respondents should not be allowed to profit from their greedy actions.

Additionally, the TPOA cannot be a codicil because it is not a testamentary instrument that serves to “revoke or revise another *will*” as defined in Minnesota law.²³ The legal definition of the word codicil indicates that the document is used to supplement a *will*.²⁴

The TPOA at issue here does not supplement the will of JBS, it supplements his *Trust*. The TPOA document itself was titled “Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust”. (Add. 14.15.) It was purporting to change beneficiaries and distribution of trust assets as provided in JBS’s Trust, not in his will. (Add. 14-15.) Nothing about the TPOA references that it is amending or supplementing a

²³ See MINN. STAT. § 524.1-201 (58) (2012) (emphasis added).

²⁴ See *Black’s Law Dictionary* 258 (6th ed. 1991) (emphasis added).

prior will of JBS. In fact, it does the opposite. It states that James Bernard Spencer was exercising his right per Article III of the *trust*, to designate the class of beneficiaries. (Add. 14-15.) (emphasis added). Additionally, if the TPOA was to serve as a codicil to the 1977 will, it failed to make that reference and additionally was not attached to and kept with the 1977 will or any other will it was purporting to amend. For these reasons, the TPOA can not operate as a codicil.

In conclusion, the document executed by JBS just days before his death is not effective as a will or as a codicil. The Trust reserved the right for JBS to designate beneficiaries only in his Last Will and Testament. The document presented by Respondents is not the Last Will and Testament of JBS and accordingly it does not operate as a testamentary power of appointment. The document also does not serve as a codicil to any existing will because it is an attempt to amend and supplement the terms of a trust, not a will. The document also does not reference the existence of any will and was not attached to and kept with the will of JBS. For these reasons, Appellants request that this Court reverse the district court's ruling.

III. THE TRIAL COURT ERRED WHEN IT DETERMINED THE EXECUTED TPOA WAS NOT AN ATTEMPT TO MODIFY THE TERMS OF THE TRUST.

A. The James Bernard Spencer Irrevocable Trust Explicitly States that the Trust Terms may not be Modified, Amended, or Revoked.

The grantor of a trust has the power to revoke the trust if and to the extent he reserves upon himself such power in the trust document.²⁵ The grantor is not permitted to

²⁵ RESTATEMENT (SECOND) TRUSTS § 330 (1) (1959).

revoke the trust if he did not reserve such power.²⁶ Similarly, a grantor has the power to modify the trust if and to the extent he reserved the power to do so in the trust document.²⁷ A grantor can not modify the trust if he did not reserve the right to make a modification.²⁸ Without the power of modification, the grantor cannot take away the interest of any beneficiary without the consent of that beneficiary.²⁹

Additionally, the terms of a trust created by a written, inter vivos trust, are the provisions of the instrument as interpreted in light of all the circumstances and other admissible evidence relating to the trust.³⁰ In a general sense, the terms of a trust are the manifestation of the intent of the grantor expressed in a manner which is admissible as proof in judicial proceedings.³¹

In his Trust, JBS reserved a Testamentary Power of Appointment, the power to appoint beneficiaries by his will. But, he specifically disclaimed any other power or authority to otherwise amend or revoke the terms of his Trust. The Trust, Article III, Section 1 states:

The Grantor has carefully considered the desirability of reserving unto himself the right to modify, amend, or revoke this Trust Indenture, and he now declares that the trust as herein constituted is IRREVOCABLE and that there is no right in him to amend or modify its terms.

(Add. 18.) (emphasis in original).

²⁶ *Id.* at (2).

²⁷ RESTATEMENT (SECOND) TRUSTS § 331 (1) (1959).

²⁸ *Id.* at (2).

²⁹ *Id.* at cmt. a. See also *Matter of Schroll*, 297 N.W.2d 282, 284 (Minn. 1980) (citing *In re Warner's Trust*, 117 N.W.2d 224, 229 (Minn. 1962)).

³⁰ See RESTATEMENT (SECOND) TRUSTS § 4 cmt. a (1959).

³¹ *Id.*

In addition to designating the Trust as irrevocable, the purpose of the Trust is also clear. JBS stated that in addition to providing for the income beneficiaries of the Trust, the Trust is “intended to primarily benefit Grantor’s children or their issue by right or representation.” (Add. 18.) Articles V and VI of the Trust contain the irrevocable terms of the distribution to the income beneficiaries and the children of JBS. (Add. 20-23.) Additionally, Trustees were allowed in their discretion to apply the principal of the Trust for the benefit any of the children of JBS or any issue of a deceased child for their maintenance, comfort and general welfare. (Add. 20.) It is not until after the death of BMS that the rest, residue and remainder of the Trust must be distributed outright to “Grantor’s children, or their issue by right of representation, *in equal shares*.”³² (Add. 20-21.)

The language of the trust is unambiguous. The terms of the Trust as stated in the Trust document manifest the intent of JBS to reserve onto him only the power to appoint the Trust corpus to a limited class of beneficiaries of his choosing in his Last Will and Testament. (Add. 18-19.) JBS “carefully considered” the possibility of reserving the right to amend or revoke the Trust; however, he declined the right to modify, amend, or revoke any of the Trust terms or provisions. (Add. 18-19.)

The TPOA presented by Respondents is contrary to the intent of JBS as manifested in his Trust. The TPOA would modify the terms of the Trust and operate contrary to the intent of JBS in a number of ways. First, the TPOA would exclude the

³² Article V, Section 2 of the Trust also provides that Christine M. Koch would receive a 44.28 acre tract of land from the estate before the rest, residue and remainder of the Trust was distributed in equal shares to remaining living children or their issue by right of representation.

issue Charles S. Spencer, the son of JBS and the Appellants in this matter. Doing so would be contrary to the intent as expressed in the purpose of the trust-- to “primarily benefit Grantor’s children or their issue by right or representation.” (Add. 18.) Further, JBS intended to provide any rest, residue and remainder of the Trust in equal shares to his children or deceased children’s issue. (Add. 18.) But, the TPOA, if effective, would change this distribution. Specifically, it would provide nothing for the issue of Charles Spencer and it would give 1/3 of the Trust residue to Kathleen M. Moloski, Christine M. Koch, and Charlene A. Spencer. (Add. 14.)

Further, the Trustees and persons responsible for presenting the TPOA to JBS on his death bed, would each receive an additional \$45,000.00 (a total of \$90,000.00) from the share of Charlene A. Spencer, the only other living child of JBS. Charlene A. Spencer was not appointed a Trustee and was not involved in the preparation or witnessing of the TPOA. (Add. 3; Add. 14-15.) This is suspect. The TPOA does not provide an explanation as for the decrease and there is no other evidence that would justify the departure from the Trust terms. The decrease in the share to Charlene A. Spencer and the complete elimination of Appellants from the share of the Trust is contrary to the intent of JBS to not change, alter, or amend the trust terms and to provide the residue of the Trust in equal shares to his children or deceased children’s issue.

In conclusion, the court should find that the TPOA is ineffective. It is ineffective because it operates to amend, modify and alter the terms of the irrevocable Trust established by JBS. As this court has stated, the trustor’s intent, “as expressed in the

language of the trust, dominates construction.”³³ The Trust language is clear: JBS did not reserve the right to modify the terms of the Trust. The TPOA would do just that. The terms of the TPOA are contrary to the intent of JBS and accordingly this Court should reverse the district court’s finding that the TPOA was not an attempt to modify the terms of an irrevocable trust.

CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court reverse the district court in its entirety. Appellants request that this court find that the Testamentary Power of Appointment James Bernard Spencer Irrevocable Trust is neither a valid exercise of a testamentary power of appointment nor a valid modification or amendment of the James Bernard Spencer Irrevocable Trust. As such, Appellants are beneficiaries of the James Bernard Spencer Irrevocable Trust and are entitled to all rights and benefits.

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³³ See *Matter of Wiedemann*, 358 N.W.2d 139, 141 (Minn. Ct. App. 1984) (citing *In Re Ordean's Will*, 262 N.W. 706 (Minn. 1935)).

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, Subd. 3, for a principal brief produced using 13 point proportional font.

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