

A12-0565

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re the Matter of the James Bernard Spencer Irrevocable Trust,

Kevin Spencer, James Spencer and
Joseph Spencer,

Appellants,

vs.

Kathleen M. Mosloski and
Christine M. Koch,

Respondents.

RESPONDENTS' BRIEF, ADDENDUM 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).

TABLE OF CONENTS

Table of Authorities ii

Statement of the Case.....1

Statement of the Facts3

The Parties.....3

Trust Creation.....4

Death of Charles J. Spencer and Nomination and Appointment of Co-Trustees5

Changes to the Beneficiaries of the Trust5

Death of James Bernard Spencer6

Request for an Accounting.....6

Legal Argument7

Standard of Review7

 I. The District Court Correctly held the TPOA Executed August 16, 2009
 was a valid Exercise of the Testamentary Power of Appointment
 Reserved in the James Bernard Spencer Irrevocable Trust8

 A. The TPOA is a valid exercise of the testamentary power of
 appointment8

 B. James Bernard Spencer’s previous execution of a will in 1977 does
 not prevent him from exercising his testamentary power of
 appointment.....12

 C. In the alternative, the TPOA satisfies the substantial compliance
 requirements to be a valid exercise of the reserved testamentary power
 of appointment16

 II. The District Court Correctly Found the TPOA was not an Attempt to
 Revoke or Modify the Terms of the James Bernard Spencer Irrevocable
 Trust18

Conclusion.....20

Certificate of Brief Length.....22

TABLE OF AUTHORITIES

MINNESOTA STATUTES

Minnesota Statutes § 501B.162
Minnesota Statutes § 502.648, 20
Minnesota Statutes § 524.1-201 (58).....11, 15
Minnesota Statutes § 524.2-502.....8 – 9, 15, 17, 20
Minnesota Statutes § 524.2-50514

MINNESOTA CASES PUBLISHED

Dahlin v. Kroening, 796 N.W.2d 503 (Minn. 2011).....7
DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997).....7
First Nat’l Bank v. Comm’r of Taxation, 250 Minn. 122, 84 N.W.2d 55 (1957)18 – 19
In re the Estate of Pakarinen, 178 N.W.2d 714 (Minn. 1970)8 – 9
In the Matter of Florance, 343 N.W.2d 297 (Minn. Ct. App. 1984).....18
In the Matter of Trust Created by Hill, 499 N.W.2d 475 (Minn. Ct. App. 1993)7

ARIZONA CASES PUBLISHED

In the Matter of Meyer, 987 P.2d 822 (Ariz. Ct. App. 1999)16 – 17

INDIANA CASES PUBLISHED

Lumbard v. Farmers State Bank, 812 N.E.2d 196 (Ind. Ct. App. 2004)13

SOUTH DAKOTA CASES PUBLISHED

In the Matter of Nelson’s Estate, 275 N.W.2d 584 (S.D. 1978).....10 – 11

WISCONSIN CASES PUBLISHED

In re Estate of Erbach, 164 N.W.2d 238 (Wis. 1969).....14 – 15

SECONDARY SOURCES

Restatement of the Law (Second) of Trusts § 37.....	18 – 19
Restatement of the Law (Second) of Trusts § 331.....	18
Restatement of the Law (Second) of Trusts § 332.....	18 – 19
Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 3.1.....	10 – 11
Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.1.....	9, 12
Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.9.....	12 – 13
Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.10.....	16 – 17

STATEMENT OF THE CASE

On December 31, 1996, James Bernard Spencer created the James Bernard Spencer Irrevocable Trust (hereinafter the “Trust”). (Appellants’ Add. 16). The original beneficiaries of the Trust were James Bernard Spencer’s children or their issue by right of representation. (Appellants’ Add. 20 – 21, Art. V). Respondents, as daughters of James Bernard Spencer, were beneficiaries of the Trust. (Id.). Appellants are the children of James Bernard Spencer’s son, Charles Spencer. (Respondents’ App. 2, ¶ 7). Charles Spencer died on August 7, 2001. (Respondents’ App. 8). Upon Charles Spencer’s death, Appellants became contingent beneficiaries of the Trust by right of representation. (Appellants’ Add. 20 – 21, Art. V).

In Article III, Section 2 of the Trust, James Bernard Spencer reserved unto himself a Testamentary Power of Appointment to appoint the Trust Income and Corpus to a designated class of beneficiaries. (Appellants’ Add. 18 – 19). In the winter of 2008 – 2009, James Bernard Spencer determined that he, as the Grantor of the Trust, wished to make changes to the beneficiaries of the Trust. (Respondents’ App. 9). James Bernard Spencer determined that since his son Charles J. Spencer had pre-deceased him and that since he and his wife, Blossom Mary Spencer, had given Charles J. Spencer and his children adequate funds previously, he wished to remove them as beneficiaries under the Trust. (Appellants’ Add. 14). The spouse of James Bernard Spencer, Blossom Mary Spencer, stated in undisputed testimony that it was James Bernard Spencer’s desire to remove Appellants as beneficiaries of the Trust using his testamentary power of appointment. (Respondents’ App. 11, ¶ 6).

On August 16, 2009, James Bernard Spencer executed his testamentary power of appointment (hereinafter the “TPOA”) for the Trust. (Appellants’ Add. 14). In the TPOA, James Bernard Spencer, among other things, removed Appellants as beneficiaries because Charles J. Spencer pre-deceased him and Appellants had previously received adequate funds. (Id.). James Bernard Spencer passed away on August 20, 2009. (Respondents’ App. 1, ¶ 3).

On April 8, 2011, Respondents received a demand from Appellants claiming they were beneficiaries under the Trust and demanding a formal accounting. (Respondents’ App. 3, ¶ 12). On April 29, 2011, Respondents filed a Petition pursuant to Minnesota Statute § 501B.16 (3) requesting a determination of the persons having an interest in the income or principal of the Trust. (Respondents’ App. 1 – 4).

Appellants filed their Answer in opposition to the Petition on June 27, 2011. (Appellants’ App. 2 – 4). In their Answer, Appellants asserted four theories opposing the Petition. Both parties moved for summary judgment pursuant to Minnesota Rules of Civil Procedure 56.¹ Respondents argued there were no genuine issues of material fact that the TPOA was validly executed, was not the product of undue influence and as such, Appellants were no longer beneficiaries under the Trust and thus, not entitled to an accounting. Appellants argued the TPOA was not a valid testamentary power of appointment, the TPOA was an invalid modification of the Trust, and that James Bernard Spencer was subjected to undue influence when he signed the TPOA. (Id.).

¹ Prior to the summary judgment motions being filed, Appellants dismissed their claim that James Bernard Spencer lacked the necessary capacity to enter into the TPOA. (Respondents’ Add. 1 – 3).

A hearing was held on both motions on December 22, 2011 at the Dakota County Judicial Center, Hastings, Minnesota, before the Honorable Karen J. Asphaug, Judge of District Court. (Appellants' Add. 1 – 2). In an Order and Memorandum dated January 12, 2012, Judge Asphaug denied Appellants' motion for summary judgment and granted in part and denied in part Respondents' motion for summary judgment. (Id.) With respect to Respondents' motion, Judge Asphaug held the TPOA was a valid exercise of the power and the TPOA was not an attempt to modify the Trust but that genuine issues of material fact existed as to whether James Bernard Spencer was subject to undue influence in executing the TPOA. (Appellants' Add. 5 – 13).

Appellants subsequently withdrew the undue influence claim and on March 7, 2012, Judge Asphaug dismissed, with prejudice, Appellants claim that James Bernard Spencer was under undue influence when he executed the TPOA. (Appellants' App. 30 – 32). This appeal followed when Appellants filed the Notice of Appeal. (Appellants' App. 33, ¶ 2).

STATEMENT OF THE FACTS

THE PARTIES

Respondents Kathleen Mosloski and Christine Koch (collectively “Respondents”) are the daughters of James Bernard Spencer and are co-trustees of the Trust.

(Respondents' App. 2, ¶ 7).

Appellants Kevin Spencer, James Spencer and Joseph Spencer (collectively “Appellants”) are the sons of Charles J. Spencer and the grandsons of James Bernard Spencer. (Id.).

James Bernard Spencer, who is deceased, is the Grantor of the Trust.

(Respondents' App. 1, ¶¶ 3, 5).

TRUST CREATION

On December 31, 1996, James Bernard Spencer, as Grantor, created the Trust.

(Appellants' Add. 16): The Trust

is intended to primarily benefit Grantor's children, or their issue by right of representation. However, one of the primary purposes of [the] Trust is to provide for the income beneficiary(ies) and the rights and interests of the remaindermen are subordinate to that purpose. The provisions of [the] Trust shall be construed liberally in the interests of and for the benefit of the income beneficiary(ies).

(Appellants' Add. 18, Art. II). At the time the Trust was created, it held three parcels of real estate worth an estimated \$289,550. (Appellants' Add. 30).² Article III, Section 2 reserved certain powers to the Grantor:

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 Grantor's spouse, and any creditors of the above.

(Appellants' Add. 18 – 19, Art. III, § 2).

Articles IV and V of the Trust provide for payment and application of Trust Income and Principal during the lifetime of the Grantor and after the death of the Grantor.

(Appellants' Add. 19 – 21, Art. IV, V). James Bernard Spencer's son Charles J. Spencer,

² The Trust now owns real property located in the City of Fairmont, County of Martin, State of Minnesota; other real property in the State of Arizona; and various other instruments. (Respondents' App. 2, ¶ 8).

the father of Appellants, and Kathleen M. Mosloski, James Bernard Spencer's daughter, were appointed as Co-Trustees. (Appellants' Add. 26, Art. XV). The Trust provides the Grantor with "[t]he power to remove and replace Trustees with anyone other than the Grantor or the Grantor's spouse." (Appellants' Add. 19, Art. III, § 3, B).

DEATH OF CHARLES J. SPENCER AND NOMINATION AND APPOINTMENT OF CO-TRUSTEES

Co-Trustee Charles J. Spencer died on August 7, 2001. (Respondents' App. 7). On January 3, 2003, James Bernard Spencer, as Grantor of the Trust and pursuant to Article III, § 3, B, nominated and appointed his daughter, Christine M. Koch, to serve as Co-Trustee, along with Kathleen Mosloski. (Respondents' App. 7). Christine M. Koch accepted the appointment on August 19, 2005. (Respondents' App. 8).

CHANGES TO THE BENEFICIARIES OF THE TRUST

In the winter of 2008 – 2009, James Bernard Spencer determined that he, as the Grantor of the Trust, wished to make changes to the beneficiaries of the Trust using his testamentary power of appointment. (Respondents' App. 9). James Bernard Spencer determined that since his son Charles J. Spencer had pre-deceased him and that since he and his wife, Blossom Mary Spencer, had given Charles J. Spencer and his children adequate funds previously, he wished to change the beneficiaries under the Trust using his power of appointment. (Respondents' App. 11, ¶ 6). Pursuant to James Bernard Spencer's instructions, Respondents contacted Dawn J. Renner, CPA, MBA, and obtained a testamentary power of appointment. (Respondents' App. 11, ¶ 7). Dawn Renner drafted the TPOA. (Respondents' App. 17, ¶ 2).

On August 16, 2009, James Bernard Spencer, signed the TPOA, which states:

As per ARTICLE III, Section 2, I James Bernard Spencer exercise my right to designate the following class of beneficiaries to the Trust.

Beneficiaries will be as follows, 1/3 of the trust to Kathleen M. Mosloski or her heirs, 1/3 of the trust to Christine M. Koch or her heirs, 1/3 of the trust less \$90,000 to Charlene A. Spencer or her heirs. The \$90,000 will be distributed (\$45,000 each) to Ms. Mosloski and Ms. Koch in addition to their 1/3 shares.

Since my son, Charles J. Spencer has pre-deceased me and his children and heirs have received adequate funds previously, they are specifically excluded from this agreement.

(Appellants' Add. 14) (as written in original). James Bernard Spencer's signature was witnessed by Thomas J. Hunt, III, who notarized the signature as well, and by Kathleen M. Mosloski. (Appellants' Add. 14 – 15). Thomas J. Hunt, III, testified there was no undue influence put on James Bernard Spencer. (Respondents' App. 13, ¶ 4). Kathleen Mosloski testified there was no undue influence put on James Bernard Spencer. (Respondents' App. 16, ¶ 4).

DEATH OF JAMES BERNARD SPENCER

On August 20, 2009, James Bernard Spencer, died. (Respondents' App. 1, ¶ 3).

REQUEST FOR AN ACCOUNTING

On April 8, 2011, Respondents received a demand from Appellants demanding a formal accounting. (Respondents' App. 3 ¶ 12). Respondents then filed a Petition to determine whether Appellants have a current interest in the Trust. (Respondents' App. 1 – 4).

LEGAL ARGUMENT

The District Court did not err when it determined the TPOA was a valid exercise of the testamentary power of appointment James Bernard Spencer reserved for himself in the Trust and determined the TPOA was not an invalid attempt to revoke or modify the terms of the Trust. As a result, this Court should sustain the District Court's Order granting summary judgment in favor of Respondents.

STANDARD OF REVIEW

This Court should affirm the District Court. The standard of review where the district court grants summary judgment is de novo. In the Matter of Trust Created by Hill, 499 N.W.2d 475, 482 (Minn. Ct. App. 1993). "On appeal from summary judgment, [the reviewing court] must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." Dahlin v. Kroening, 796 N.W.2d 503, 504-05 (Minn. 2011). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997).

The District Court properly concluded there are no genuine issues of material fact that James Bernard Spencer executed the testamentary power of appointment reserved unto himself in the Trust, did not err in its application of the law when it determined the TPOA is an effective exercise of that power and did not err in its application of the law

when it determined the TPOA is not an invalid attempt to revoke or modify the terms of the Trust. As a result, this Court should affirm the decision of the District Court.

I. THE DISTRICT COURT CORRECTLY HELD THE TPOA IS A VALID EXERCISE OF THE TESTAMENTARY POWER OF APPOINTMENT JAMES BERNARD SPENCER RESERVED UNTO HIMSELF IN THE TRUST.

The District Court correctly determined the TPOA is a valid exercise of the testamentary power of appointment which James Bernard Spencer reserved unto himself. First, the TPOA is a valid exercise of the testamentary power of appointment as it meets the requirements of a will. Second, James Bernard Spencer's execution of a will in 1977 does not render the TPOA invalid. Third, in the alternative, the TPOA satisfies the substantial compliance requirements and is valid. As a result, the District Court should be affirmed.

A. The TPOA is a valid exercise of the testamentary power of appointment.

The TPOA meets the requirements of a will and is a valid exercise of the testamentary power of appointment. Minnesota Statutes § 502.64 states:

A donee may exercise a power of appointment only by an instrument executed with sufficient formalities to pass title to the property covered by the power. When a power of appointment is exercisable only by will, a donee may not exercise it by deed. When a power of appointment is exercisable by deed, a donee may exercise it by will.

Article III, Section 2 of the Trust reserved in the Grantor "a Testamentary Power of Appointment exercisable in the Last Will and Testament of Grantor." (Appellants' Add. 18 – 19). The TPOA signed by James Bernard Spencer meets the requirements of Minnesota Statutes 524.2-502 to constitute a will. Generally a person is free to leave his

property to whomever he wishes through a will. In re Estate of Pakarinen, 178 N.W.2d 714, 717 (Minn. 1970). The statutory requirements of a will relevant to this matter are that it be: (1) in writing; (2) signed by the testator; and (3) signed by at least two individuals, each of whom signed within a reasonable time after witnessing the signing of the will as described in clause (2). Minn. Stat. § 524.2-502. All three elements are present in the TPOA. First, it is in writing. Second it was signed by James Bernard Spencer. Third and lastly, it was witnessed and signed by two individuals, Thomas J. Hunt, III and Kathleen M. Mosloski. (See Appellants' Add. 14 – 15; Respondents' App. 13 – 16).

James Bernard Spencer also intended that the TPOA act as an exercise of his Testamentary Power of Appointment. Under the Restatement of the Law, the first requirement for a valid exercise of a testamentary power of appointment is that the donee “manifest an intent to exercise the power in an otherwise effective document.” (Appellants' Add. 6; citing Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.1 (2011)). Appellants allege the District Court failed to examine whether the TPOA was intended by James Bernard Spencer to be a last will and testament. (Appellants' Brief p. 9). The District Court did not, as Appellants allege, focus solely on the formalities of will execution without examining James Bernard Spencer's intent when he executed the TPOA. To the contrary, the District Court stated “Decedent [sic] clearly and explicitly manifested an intent to exercise the power.” (Appellants' Add. 6). The District Court noted the TPOA is entitled “Testamentary Power of Appointment of James Bernard Spencer Irrevocable Trust” and that “the first

sentence unequivocally states that he is exercising his right to designate the class of beneficiaries to the trust.” (Appellants’ Add. 6). The undisputed facts support this finding of the District Court. (Appellants Add. 14).

Appellants claim the TPOA does not reflect that James Bernard Spencer intended the TPOA to act as a will. (Appellants’ Brief p. 9). Intention of the TPOA to act as a will is not the question. Rather, the question is whether the TPOA was intended to act as an exercise of the testamentary power of appointment, and whether it meets the requirements of a will. As the District Court noted, Appellants’ definition of a will – a document which transfers property upon death – is too narrow. (Appellants’ Add. 7). The Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 3.1 cmt. a (1999) explicitly defines a will as, among other things, a document which exercises a testamentary power of appointment. The Restatement of the Law (Third) of Property: Wills & Donative Transfers § 3.1 cmt. A (1999); see also Appellants’ Add. 7). The TPOA meets the definition of a will because James Bernard Spencer intended it to be an exercise of the testamentary power of appointment he reserved unto himself in the Trust and the TPOA meets the requirements of a will. (Appellants Add. 14 – 15).

Even if the definition of a will is as narrow as Appellants assert, the TPOA still satisfies the requirements necessary to constitute a will as discussed above. Appellants cite to the South Dakota case of In the Matter of Nelson’s Estate, 274 N.W.2d 584, 587 (S.D. 1978) for the holding that “testamentary character is satisfied only if the document makes a disposition of property *after death*.” (Appellants’ Brief pp. 9 – 10) (emphasis in original). “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." Restatement of the Law (Third) Property: Wills & Other Donative Transfers § 3.1, cmt. g (1999). A will includes any codicil or any other testamentary instrument. Minn. Stat. § 524.1-201 (58). Here, the TPOA is titled "**Testamentary** Power of Appointment James Bernard Spencer Irrevocable Trust," leading to only one conclusion, the TPOA has a testamentary effect. (Appellants' Add. 14) (emphasis added). Any remaining questions are addressed in the first line of the TPOA, as noted by the District Court, which unequivocally states that James Bernard Spencer is exercising his right to designate the class of beneficiaries to the Trust under his reserved testamentary power of appointment. (Id.).

Additionally, in In the Matter of Nelson's Estate, the South Dakota Supreme Court held a document is not testamentary in nature when the document "advises or recommends a disposition but leaves the actual disposition of the property within the discretion of another." 274 N.W.2d at 587. In this matter, the TPOA explicitly states how the property shall be disposed of and does not leave that decision in the discretion of another. (Appellants' Add. 14). In the Matter of Nelson's Estate actually supports the conclusion that the TPOA is testamentary in nature.

Furthermore, the TPOA cannot be read in isolation because it references the Trust. Contrary to Appellants' assertions, the TPOA references the Trust in its title wherein it states "Testamentary Power of Appointment **James Bernard Spencer Irrevocable Trust.**" (Appellants' Add. 14) (emphasis added). The TPOA also references the Trust in the first sentence where it states "As per ARTICLE III, Section 2, I, James Bernard

Spencer exercise my right to designate the following class of beneficiaries to the Trust.” (Appellants’ Add. 14). The Trust explicitly provided for the disposition of the property at the death of James Bernard Spencer (Appellants Add. 20 – 21, Art. V) and the TPOA unequivocally refers to the Trust. (Appellants’ Add. 14). Thus, James Bernard Spencer had the requisite intent to exercise his testamentary power of appointment as required by Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.1 and found by the District Court, and he met the requirements to exercise his testamentary power of appointment. Thus, the District Court should be affirmed.

B. James Bernard Spencer’s previous execution of a will in 1977 does not prevent him from exercising his testamentary power of appointment.

The previous execution of a will in 1977 does not prevent James Bernard Spencer from exercising his testamentary power of appointment in 2009. Appellants allege the District Court erred based solely on the fact that James Bernard Spencer had previously executed a document that was titled his “Will.” (Appellants’ Brief pp. 10 – 12).³ Appellants fail to provide any authority to support their position that because James Bernard Spencer had previously executed a document titled “Will,” the TPOA is somehow ineffective.⁴ In fact, the Restatement of the Law (Third) of Property: Wills &

³ The “Will” which Appellants reference was executed on July 13, 1977, more than thirty years prior to when James Bernard Spencer executed the TPOA. (Appellants App. 17).

⁴ Rather than provide any authority for their argument, Appellants make a vague reference to their previously dismissed undue influence claim (“[t]he TPOA significantly increases Petitioners’ shares in their late father’s estate...”), without any explanation as to how that relates to their assertion that the document entitled “Will” somehow makes the TPOA ineffective. (Appellants’ Brief p. 11). In fact, James Bernard Spencer’s wife, Blossom Mary Spencer indicated in undisputed testimony that Charles Spencer and his children had received adequate gifts previously. (Respondents App. 11, ¶ 6). Thus,

Other Donative Transfers § 19.9 cmt. B (2011) explains that a testamentary power of appointment “is exercised even if the will is not submitted for admission to probate.” Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.9 cmt. B (2011); see also Lumbard v. Farmers State Bank, 812 N.E.2d 196, 203 (Ind. Ct. App. 2004). Therefore, the existence of a previously executed will has no bearing on whether the TPOA can be effective.⁵

Appellants also argue the TPOA is not a valid codicil to the will that James Bernard Spencer previously executed. First, the District Court did not find that the TPOA was a codicil to the will; rather the District Court merely stated 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.” (Appellants’ Add. 8). The District Court only noted that similar to a codicil, “the TPOA merely supplements decedent’s will.” (Appellants’ Add. 8).

Appellants allege that if the TPOA is a codicil, the Court must consider it in light of the surrounding circumstances. Appellants note the TPOA was obtained, witnessed and notarized by interested parties. (Appellants’ Brief p. 13). First, one of the witnesses, Thomas Hunt, III, is not a beneficiary of the Trust and therefore, not an interested party.⁶

while the TPOA increased Respondents’ share of the Trust, it did not give them more than James Bernard Spencer believed Appellants’ family had received.

⁵ Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.9 cmt. B (2011) goes on to state that only if a will is admitted to probate and probate is denied, is the testamentary power of appointment contained therein unexercised.

⁶ Respondents acknowledge that Thomas Hunt, III is Respondent Christine Koch’s significant other. However, that does not make him an interested party because both

Second, Minnesota Statutes § 524.2-505 provides that a person who is generally competent to be a witness may act as a witness to a will and “[t]he signing of a will by an interested witness does not invalidate the will or any provision of it.” Minn. Stat. § 524.2-505 (West 2012). The fact that Kathleen Mosloski and Thomas Hunt, III are the ones who witnessed James Bernard Spencer signing the TPOA does not affect the validity of the TPOA.

Appellants next note that James Bernard Spencer signed the TPOA when he was in the Mayo Hospital, on medication to ease his pain. (Appellants’ Brief p. 13). First, there is no evidence in the record to support the assertion that James Bernard Spencer was heavily medicated and Appellant’s cite to no such evidence. Second, this argument relates to Appellants’ claim that James Bernard Spencer lacked the necessary capacity at the time he signed the TPOA. Appellants previously dismissed the claim of lack of capacity and any such argument on that issue is not properly before the Court. (See Respondents’ Add. 1 – 3).

Appellants misstate the law with respect to a codicil’s location and the requirement that if not physically attached to a will, that it specifically refer to the will. (Appellants’ Brief p. 12). Appellants cite to the Wisconsin case of In re Estate of Erbach, 164 N.W.2d 238, 243 (Wis. 1969) in support of their position that the TPOA, if a codicil, must reference the will in order to be valid because it was not physically attached to the will. (Appellants’ Brief p. 12). This case is completely inapplicable to the present

before and after the TPOA was executed, he did not stand to receive any benefits under the Trust.

situation. The requirement of physical attachment is a requirement of the doctrine of incorporation by reference. Incorporation by reference allows a document that does **not** meet the formal requirements for a will to be incorporated into the will, if among other things, the will references it. In re Estate of Erbach, 164 N.W.2d at 241. Here, the TPOA itself meets the statutory requirements for a will as set forth above. (Appellants' Add. 14 – 15). Another element of incorporation by reference is that it applies only to documents that are in existence at the time a will was written. Erbach, 164 N.W.2d at 241. In the present matter, the TPOA was **not** in existence at the time the “1977 Will” was executed. (See Appellants' Add. 14 – 15; Appellants' App. 15 – 17). Accordingly, the doctrine of incorporation by reference does not apply and there is no requirement that the TPOA be physically attached to the 1977 Will or that it reference the 1977 Will.

Appellants also assert “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.” (Appellants' Brief p. 13) (emphasis in original). The definition of “ ‘Will’ includes codicil and **any** testamentary instrument which merely appoints an executor or revokes or revises another will.” Minn. Stat. § 524.1-201 (58) (emphasis added). The TPOA may serve as a will in that it supplements the 1977 Will because it exercises a power which by its terms can only be done in a testamentary capacity.

In this matter it is undisputed that the TPOA meets all of Minnesota's statutory requirements under Minnesota Statutes § 524.2-502 to be a will. (Appellants' Add. 14 – 15; Respondents' App. 13 – 16). Accordingly, this Court should affirm the District Court's finding that the TPOA is a valid exercise of the testamentary power of

appointment James Bernard Spencer reserved unto himself in the Trust. As a result, the decision of the District Court that the TPOA is a valid exercise of the testamentary power of appointment should be affirmed by this Court and the appeal should be dismissed.

- C. In the alternative, the TPOA satisfies the substantial compliance requirements to be a valid exercise of the reserved testamentary power of appointment.

In the alternative, the TPOA satisfies the substantial compliance requirements of Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.10 (2011), which states:

Substantial compliance with formal requirements of an appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power, is sufficient if (i) the donee knew of and intended to exercise the power, and (ii) the donee's manner of attempted exercise did not impair a material purpose of the donor in imposing the requirement.

Any alleged deficiencies in the execution of the TPOA fall within the substantial compliance requirements of Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.10 (2011) and therefore are sufficient. James Bernard Spencer unequivocally intended to exercise his testamentary power of appointment and did so in a manner that did not impair the material purpose he had in imposing the requirement that it be set forth in his "Last Will and Testament." (Appellants' Add. 14).

The Arizona case of In re the Matter of Meyer, 987 P.2d 822 (Ariz. Ct. App. 1999) provides guidance as to why an individual may require the exercise of a testamentary power of appointment in a last will and testament.

We can readily understand that [the donor] might have restricted the exercise of the power of appointment to one by will because she wanted the assurance that [the donee] would defer the decision as to who would receive the assets of the trust for as long as possible. In other words, she might have wanted to ensure that what occurred was in accord with [the donee's] last thoughts on the subject.

Id. at 826. In the TPOA, James Bernard Spencer designated the beneficiaries of the Trust and did so by having his wishes put in writing and by signing the writing. (Appellants' Add. 14 – 15). He did so four days prior to his passing. (Id.; Respondents' App. 1, ¶ 3). This demonstrates, like in Meyer, that he was ensuring that what occurred was in accord with his last thoughts on the subject. At a minimum, there was substantial compliance with the formal requirements for the exercise of the testamentary power of appointment and pursuant to Restatement of the Law (Third) of Property: Wills & Other Donative Transfers § 19.10 (2011), the TPOA should not be held invalid.

The District Court properly concluded that the TPOA met the formalities for a will as required by Minnesota Statutes § 524.2-502. (Appellants Add. 6 – 9). James Bernard Spencer manifested his intent to exercise the testamentary power of appointment and followed through by doing so in an instrument that satisfies the formalities required of a will. The law requires nothing more to exercise a testamentary power of appointment reserved in a trust. As such, the Court should affirm the District Court's finding that the TPOA is a valid exercise of the testamentary power of appointment reserved by James Bernard Spencer in the Trust.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE TPOA IS NOT AN ATTEMPT TO REVOKE OR MODIFY THE TERMS OF THE TRUST.

The District Court correctly found the TPOA is not an attempt to revoke or modify the terms of the Trust. James Bernard Spencer unequivocally reserved unto himself the power to “appoint the Trust Income and Corpus to a **designated class of beneficiaries chosen by [James Bernard Spencer]**, but specifically excluding, the Estate of [James Bernard Spencer], [James Bernard Spencer’s spouse], the Estate of [James Bernard Spencer’s] spouse, and any creditors of the above.” (Appellants’ Add. 18 – 19, Art. III, § 2) (emphasis added). Appellants assert that based on the stated purpose of the Trust and the fact that the Trust is “irrevocable,” the TPOA is an invalid attempt to modify the terms of the Trust. (Appellants’ Brief p. 14 – 18). Appellants are wrong.

It is telling that Appellants failed to cite to a single case where a power unequivocally reserved in a trust and subsequent exercised, was determined to be an invalid modification of the trust. (Appellants’ Brief p. 14 – 18). Respondents, and it would appear Appellants as well, are not aware of any cases holding that the exercise of a power reserved in a trust is an invalid attempt to modify the terms of an irrevocable trust.

The settlor has the power to modify the trust if and to the extent that by the terms of the trust he reserved such a power. Restatement of the Law (Second) of Trusts § 331 (1959); see Matter of Florance, 343 N.W.2d 297, 301 (Minn. App. 1984) (modification of trust allowed by instrument containing same formalities as trust agreement). Minnesota specifically recognizes that a testamentary power of appointment may be used in an

irrevocable⁷ trust. See First Nat'l Bank v. Comm'r of Taxation, 250 Minn. 122, 122, 84 N.W.2d 55, 56 (1957).

Respondents agree with Appellants on one aspect – the language of the Trust is unambiguous. It is unambiguous in that James Bernard Spencer reserved unto himself the power to designate the class of beneficiaries through a testamentary power of appointment. (Appellants Add. 18 – 19, Art. III, § 2). The designated class of beneficiaries was not unlimited. It excluded the Estate of James Bernard Spencer, James Bernard Spencer's spouse, the Estate of James Bernard Spencer's spouse, and any of their creditors. (Id.). Had the TPOA designated one of the above as a beneficiary, then the TPOA would be an invalid attempt to revoke the terms of the Trust. However, the power reserved by James Bernard Spencer allowed him to designate the class of beneficiaries as he did in the TPOA. (Id.; Appellants' Add. 14 – 15).

In an attempt to support their position, Appellants throw in conjecture and speculation related to their previously dismissed arguments of undue influence and lack of capacity. (Appellants' Brief p. 17). These issues are not before the Court on appeal and should not be considered in determining whether the TPOA was a valid exercise of the testamentary power of appointment and whether the TPOA is an invalid attempt to revoke the terms of the Trust. (Appellants App. 32).

⁷ Revocation of a trust is different than modification of a trust. See Restatement of the Law (Second) of Trusts, § 37, cmt. a (a settlor “may reserve a power to revoke the trust, or a power to alter or amend the trust, either in addition to the power to revoke or in exclusion of such a power.”); § 332 (1959).

The Trust is unambiguous. James Bernard Spencer reserved unto himself the power to designate the class of beneficiaries of the Trust. His exercise of that power in the TPOA is not an invalid revocation or modification of the terms of the Trust based on the Trust's unambiguous terms. Accordingly, Respondents respectfully request the Court sustain the District Court's finding that the TPOA is not an invalid attempt to revoke or modify the terms of the Trust.

CONCLUSION

The District Court correctly determined the TPOA is a valid exercise of the testamentary power of appointment James Bernard Spencer reserved unto himself in the Trust. The TPOA satisfies the statutory requirements for a will and James Bernard Spencer's intent to exercise the power is unequivocally stated. The fact that James Bernard Spencer had a will at the time he signed the TPOA is, as the District Court noted, irrelevant. The only requirement for the valid execution of the testamentary power of appointment James Bernard Spencer reserved unto himself is intent and that the instrument meets the formalities required for a will. Minn. Stat. § 502.64. James Bernard Spencer had the requisite intent and the TPOA meets each of the formal requirements set forth in Minnesota Statutes § 524.2-502 for the valid creation of a will.

The District Court also correctly determined the TPOA is not an invalid attempt to revoke or modify the terms of the Trust. The Trust unequivocally reserved unto James Bernard Spencer the power to designate the class of beneficiaries and his exercise of that power is in no way an invalid modification of the Trust. Appellants provide no binding

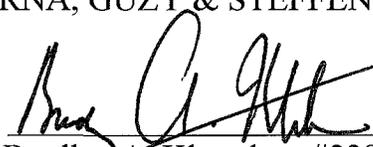
or even secondary authorities in support of their position that the exercise of a power to designate a class of beneficiaries that was reserved in the Trust is an invalid modification of the terms of a trust.

Accordingly, Respondents respectfully request this Court sustain the District Court's findings granting summary judgment in favor of Respondents.

Respectfully Submitted,

Dated: 7/2, 2012

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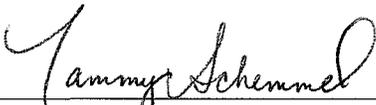
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minnesota Rules of Civil Appellant Procedure 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,857 words. This brief was prepared using Microsoft Word 2007.

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INDEX TO RESPONDENTS' ADDENDUM

October 19, 2011 Stipulation and OrderResp. Add. 1
April 2, 2012 Respondents' Statement of the CaseResp. Add. 4