Appeal No. ED108598

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

U.S. BANK N.A. AS TRUSTEE OF THE LIVING TRUST AGREEMENT OF LORENZ K. AYERS DATED MAY 3, 1967, AS AMENDED AND RESTATED,

Plaintiff-Respondent

v.

ELIZABETH MOLK,

Defendant-Appellant

Appeal from the Trial Court of the City of St. Louis
Cause No. 1722-PR00637
Hon. Rex Burlison

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF FACTS

1. Background

In 1967, Lorenz K. Ayers ("Ayers") created a trust ("Ayers Trust"). (D698). He last amended the trust instrument in 1987. (D698 p. 42). In 1987, Ayers died, at which point the Ayers Trust became irrevocable. (D697 ¶ 25). The Ayers Trust provided that upon the death of Ayers' wife, the Ayers Trust would be divided into sub-trusts for each of his two daughters. (D698 p. 11). Upon the death of each such daughter, the share of such daughter's trust would be divided among her children in equal shares and continue to be held in separate trusts for each such grandchild of Ayers. (D698 p. 14). Upon the death of the grandchild, the sub-trust for that grandchild's benefit is to terminate and its assets are to be distributed outright to the grandchild's children if they are over 21. (D698 p. 14-15). If the grandchild has no descendants, the assets in the sub-trust shall be distributed among the descendants of Ayers. (D698 p. 14-15).

Ayers had two daughters: Helen Davis and Barbara Herbst. (D698 p. 11). The trust for Helen Davis is not relevant to this matter. Barbara Herbst had four children, Elizabeth Molk ("Appellant"), Anne Herbst ("Anne"), Donald Herbst ("Donald"), and Catherine Herbst ("Catherine").[1] (D697 ¶ 3-5).

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[1] Throughout this brief the relevant grandchildren's sub-trusts will be referred to as the "Anne Trust," "Donald Trust," and "Catherine Trust." Elizabeth also goes by the name Wendy.

On October 16, 2015, Barbara Herbst died, at which point the sub-trust for her benefit was divided into four further sub-trusts, each for the benefit of one of her above-listed children. (D780 ¶ 5). The issue at hand concerns one of those trusts, the Anne Trust. Anne has no children and upon her death, if she then has no descendants, the Anne Trust will be distributed in equal shares among such of Appellant, Donald, and Catherine who are then living. (D697 ¶ 18). U.S. Bank N.A. (hereinafter "Trustee") is the Trustee of the Anne Trust. (D697 ¶ 15).

The Anne Trust is an "income only" trust, meaning a trust which provides that only income be distributed to the income beneficiary, in this case Anne. (D698 p. 15). However, the Ayers Trust agreement also permitted the trustee in some instances to treat an addition to trust principal as income, which would thus be distributable to the income beneficiary. (D698 p. 3).

In 2001, Missouri enacted the Principal and Income Act, which directs how a trustee can characterize items of trust receipt and disbursement as between income or principal. RSMo. §§ 469.401-469.467. Trustee actions taken in accordance with these statutes are presumed to be fair and impartial to all beneficiaries. RSMo. § 469.403.2. The Missouri legislature also enacted a unitrust statute, RSMo. § 469.411, which permits a trustee to convert an income-only trust to a unitrust, which in turn allows the trustee to distribute annually to the income beneficiary an amount equal to between three and five percent of the trust value. RSMo. § 469.411. A proposed election to convert the Anne Trust to a unitrust is at issue here.

2. History of Trustee's Actions

Although not required by Missouri law, Trustee out of caution follows a procedure for determining whether to make a unitrust election over any given trust. (D751). In this case, Trustee met with Anne and discussed the Anne Trust's portfolio and performance. (D753). Trustee completed its first phase of analysis, memorialized on "Form 905-A", which noted that a change in investments would be sufficient to ensure Trustee's impartiality as between Anne and the Anne Trust's remainder beneficiaries but which also recorded that Anne planned to talk to her CPA about an election. (D753). Trustee completed a similar analysis and Form 905-A for the identical Donald Trust and Catherine Trust, on which Trustee determined those respective trusts could not be impartially administered in the absence of a unitrust. (D730; D732). In early July 2016, Trustee completed its second phase of its analysis, memorialized on Form 905-D, on which Trustee, *inter alia*, mistakenly checked the box "Yes" to the question of whether Trustee was already "meeting its duty of impartiality to the income or remainder beneficiaries." (D756 No. 6; D751 ¶ 54). Form 905-D for the identical Donald Trust was properly marked "No." (D766 No. 6). An additional question on the Form asked, "If any of the answers to the questions in this section are 'Yes', then does this lead to a compelling conclusion that the Trustee is meeting its duty of impartiality and that Unitrust should NOT be exercised?" to which Trustee answered "No." (D756 No. 14).

After Trustee completed its analysis memorialized on Form 905-D for the Anne Trust, Trustee sent letters to Appellant, Donald, and Catherine asking if they would consent to a unitrust election for the Anne Trust. (D726; D756; D757). In January 2017,

Trustee completed yet another analysis, memorialized on Form 905-E, to gauge the possibility of a different approach altogether, of making various adjustments to the characterization of individual items of receipt, an approach authorized and described by the Principal and Income Act but distinct from a unitrust election. (D759). In Missouri, this "statutory power of adjustment" is authorized by RSMo. § 469.405, a different statute from RSMo. § 469.411, the unitrust statute.

Form 905-E asked a similar question to Form 905-D regarding whether the Trustee was meeting its duty of impartiality, and the Trustee marked "No." (D759 No. 6). Trustee sent additional letters to Appellant, inquiring whether she would consent to a unitrust election or to statutory adjustments. (D762; D763). Appellant consented to a unitrust election for the Donald Trust, but, without reason, refused to consent to either option for the Anne Trust. (D774). Because Trustee was unable to obtain the consent of all of Anne's siblings for a unitrust election, and even though the unitrust statute does not require court approval, Trustee filed a suit for declaratory judgment asking whether Trustee was authorized to make the unitrust election. (D697 ¶ 24).

3. Procedural History

Trustee filed its declaratory judgment action on September 28, 2017. (D697). On November 13, 2017, Appellant counterclaimed that Trustee has no authority to make a unitrust election and that the unitrust statute is unconstitutional. (D700). On March 20, 2018, Appellant filed a motion to withdraw her consent to the unrelated matters of the Donald Trust and Catherine Trust. (D714).

On November 28, 2018, Trustee filed a motion for judgment on the pleadings. (D717; D718). On December 18, Appellant filed her motion for summary judgment on Count I of her counterclaim. (D721-723; D733). Her motion for summary judgment included a request to withdraw her consent to a unitrust election for the Donald Trust and Catherine Trust. (D722).

On February 25, 2019, Trustee filed its own motion for summary judgment in response to Appellant's motion for summary judgment. (D747-750). Trustee also filed a motion to strike the portions of Appellant's summary judgment motion regarding withdrawing consent to the Donald Trust and Catherine Trust. (D778-782). In support of its motion for summary judgment, Trustee provided the affidavit of Justin Meyer, Trustee's Trust Managing Director, regarding Trustee's processes, and included the business records behind Trustee's analysis of a possible unitrust election. (D751-777). Appellant filed a motion to strike this affidavit and the accompanying exhibits. (D783-784).

The trial court heard the various motions and on June 28, 2019, granted Trustee's cross-motion for summary judgment, declaring Trustee's authority to make a unitrust election. (A3, D796). The Court noted the issue of attorney's fees would be taken up at a later date. (A3, D796).

On September 9, 2019, Appellant dismissed her remaining counterclaim count. (D797). On October 17, 2019, Trustee filed its motion for attorney's fees. (D798). Appellant filed her own motion for fees and her opposition to Trustee's motion. (D802; D803). On December 15, 2019, the trial court found that Appellant added a "divisive

element to the cause of action when she withdrew her prior consent to the conversion of Donald's separate trust." (D805). The court ordered Appellant to pay a portion of Trustee's attorney's fees to the Anne Trust, Catherine Trust, and Donald Trust. (A5, D805). This appeal followed.

ARGUMENT

POINT I

1.1. The Trial Court Did Not Err in Granting Summary Judgment in Trustee's Favor as it Correctly Interpreted RSMo. § 469.411 to Permit a Unitrust Election.

The trial court properly concluded that RSMo. § 469.411 permits a unitrust election over the Anne Trust.[2] By the terms of its subsection governing applicability, RSMo. § 469.411.5, the statute allows a trustee to elect to make such distributions where, as here, the trust became irrevocable prior to 2001 and the trust instrument does not contain a specific prohibition against such an election. Although Appellant argues the statute does not apply because the Anne Trust prohibits distributions of principal, that argument is inconsistent with the unambiguous text and purpose of the statute.

[2] While Appellant referenced her own Motion for Summary Judgment in her Statement of Facts and listed the trial court's denial of that motion on her Notice of Appeal, she does appeal that denial in any Point Under Appeal.

1.2. Standard of Review

Questions of law, including those involving statutory interpretation, are reviewed de novo. *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo. banc 2018). The court's "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. banc 2014). "The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). "Instead, the canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended." *Id.* The court "will look beyond the plain text for interpretation only 'when the meaning [of the statute] is ambiguous or [a plain text interpretation] would lead to an illogical result defeating the purpose of the legislature.'" *McMillin v. Dir. of Revenue*, 520 S.W.3d 513, 516 (Mo. App. W.D. 2017) quoting *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998).

1.3. Missouri's Unitrust Statute, RSMo. § 469.411, Allows a Trustee to Be Impartial to All Beneficiaries.

Missouri's statute authorizing unitrust conversions, § 469.411, was enacted in 2001 and codified as part of the Uniform Principal and Income Act ("UPAIA"), laws designed to grant a trustee greater flexibility in allocating a trust's items of receipt and expense to either "income" or "principal". The statute provides a trustee a means to convert an income-only trust to a unitrust and thereby distribute a portion of the principal—between three and five percent—to the income beneficiary each year. The

purpose of the unitrust statute is to allow a trustee to compensate the income beneficiary during periods of reduced trust income due to changing investment strategies and market conditions, and thereby remain impartial as between the income and remainder beneficiaries and ensure the fair treatment of both interests. Missouri was one of the first states to enact a unitrust statute, and to date caselaw across the country on unitrust conversions is limited.

1.4. The Anne Trust Is Eligible for a Unitrust Conversion Under RSMo. § 469.411 Because the Trust Became Irrevocable Before 2001 and Does Not Contain a Specific Prohibition Against a Unitrust Election.

RSMo. § 469.411 comprises seven subsections. It is the fifth subsection, RSMo. § 469.411.5, on applicability, which Appellant raises in her appeal. But even a quick review of RSMo. § 469.411.5 shows that Appellant's opposition is groundless and that the statute permits Trustee to convert the Anne Trust to a unitrust.

Paragraph (1) of Subsection 5 is not at issue here. It is the proper interpretation of Paragraph (2) which is in dispute. Paragraph (2), in relevant part, reads as follows: "This section shall apply to the following trusts: . . .

> (2) Any trust created under an instrument that became irrevocable on, before, or after August 28, 2001, if the trustee, in the trustee's discretion, elects to have this section apply *unless the instrument creating the trust specifically prohibits an election* under this subdivision. . . ..

RSMo. § 469.411.5(2) (emphasis added). In short, the statute applies to any trust—like the trust at issue here—created before August 28, 2001, for which the Trustee makes a unitrust election unless the trust instrument prohibits such an election. The question then becomes whether the Ayers Trust agreement meets the tests requisite to qualify for a

unitrust conversion. And the answer to that question is "yes", the Ayers Trust did satisfy those requirements.

RSMo. § 469.411.5(2) sets out only two elements a trust must meet to qualify for a unitrust conversion. First, the trust must have become irrevocable "on, before, or after August 28, 2001". The Ayers Trust which created the Anne Trust became irrevocable at the death of Ayers in 1987. Thus that element is satisfied. Second, the "instrument creating the trust" cannot "specifically prohibit" such an election. This trust instrument does not. Appellant has not and cannot identify any provision that specifically prohibits such an election because no such provision exists in the trust instrument. Thus the second element is satisfied. Accordingly, it is clear that as a matter of law, RSMo. § 469.411.5 permits Trustee to make a unitrust election over the Anne Trust.

1.5. Contrary to Appellant's Arguments, a Trust's Income-Only Dispositive Scheme is Not a "Specific Prohibition" Against a Unitrust Election.

Knowing that the Anne Trust lacks the "specific prohibition" language required by RSMo. § 469.411, Appellant is left to argue that the lack of principal encroachment is tantamount to the inclusion of such language. In this view, the mere fact that a trust is an income-only trust is itself the "specific prohibition" required by the statute. (Appellant's Br. Point I). She argues it is absurd to require a trust grantor to specifically prohibit a trustee power which did not then exist. She further argues that if anything is to control, it should be the intent of Ayers, which she believes would disfavor such an outcome. In all of these points, she is mistaken.

As a threshold matter, the phrase "specific prohibition" itself creates a specific requirement, one that is not open to flexible or alternative readings. RSMo. § 469.411.5(2) is not unique in raising issues of compliance with a future statute, and a recent Missouri Supreme Court case provides helpful guidance. Earlier this year, the Court heard *Hegger v. Valley Farm Dairy Co.* 596 S.W.3d 128 (Mo. banc 2020), which has a similar set of facts. In 2013, the Missouri legislature changed the workers' compensation statute to require an employer to elect into coverage that provided additional benefits for an employee who was diagnosed with the occupational disease of mesothelioma. *Id.* at 130-31. Valley Farm had workers' compensation insurance coverage at the time of plaintiff's alleged exposure to asbestos; however, the plaintiff did not develop mesothelioma until years later after Valley Farm ceased operations and after the legislature changed the statute. *Id.* at 129. The issue was whether a defunct company can "elect to accept mesothelioma liability" as required by the statute for the additional benefits to apply. *Id.* at 131.

Valley Farm argued that because it had an insurance policy that provided coverage at the time of the exposure and because it was now defunct, the prior policy should be considered to have elected into providing these additional benefits. *Id.* at 133. The Missouri Supreme Court held that adopting Valley Farm's position would require a reading of the statute "unsupported by the plain language of this provision." *Id.* "When a term is not defined by statute, this Court will give the term its 'plain and ordinary meaning as derived from the dictionary.'" *Id.* at 132 citing *Mo. Pub. Serv. Comm'n v. Union Elec. Co.*, 552 S.W.3d 532, 541 (Mo. banc 2018). The Court noted its "primary

rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Id.* at 133. The Court reviewed the definition of "elect" and found it was "axiomatic that a business entity that no longer exists cannot affirmatively select or choose to do anything." *Id* at 132. Thus, based on the statute's plain language, the Court held that defunct employers did not elect to accept the enhanced liability that provided additional benefits solely by virtue of having coverage at the time of the employee's exposure. *Id.* at 133.

This case is similar to *Hegger* as it also involves a statute that requires an affirmative act. Here, the legislature enacted a statute that required the grantor of a trust "specifically prohibit" the unitrust statute from applying. RSMo. § 469.411. The plain language of the statute requires that any given irrevocable trust specifically prohibit the election for that statute not to apply – a requirement the Ayers Trust agreement did not meet. There was no language even attempting to limit statutory adjudgments. (D698). The plain meaning of "specifically prohibits an election under this statute" supports Trustee's interpretation of the statute. "Specifically" is defined as "in a specific manner; in a definite and exact way; with precision." *See* "Specifically." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/specifically. "Prohibits" is defined as "to prevent from doing something; preclude." *See* "Prohibit." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/prohibit. The Anne Trust does not prevent or preclude a unitrust conversion. There is nothing in the Anne Trust that prohibits the application of RSMo. §

469.411, and to accept Appellant's interpretation would be contrary to the plain meaning and intent of the statute.

Appellant hopes to convince this Court that to require a "specific prohibition" of something which did not yet exist would be an "absurd or strained reading" of the statute. (Appellant's Br. 23). Trustee's position, however, does not require that past grantors were prescient of future changes. For one, it is unclear whether the opt-out phrase, "unless the instrument creating the trust specifically prohibits an election under this subdivision", is meant to apply to trusts that became irrevocable before the date of the statute. A more likely reading of the statute is that the opt-out is meant to apply only to trusts made irrevocable after that date, and not before, when the grantor would have the opportunity to know of the statute's existence. The least "absurd or strained reading" of the statute is that the opt-out phrase is not even an option. The Anne Trust, like most if not all irrevocable trusts in existence on August 28, 2001, is eligible for a unitrust conversion.

Appellant's more fundamental argument with respect to income-only trusts is that distributions of principal pursuant to a unitrust election violate the substance of the income-only provision itself. How can a trustee distribute principal where the grantor prohibited it? The unitrust statute itself provides the answer. RSMo. § 469.411.6(1) states that "Once the provisions of this section become applicable to a trust, the net income of the trust shall be the unitrust amount." That is, once the unitrust election is made over a given trust, what is distributed as a unitrust distribution *is* the trust's net income. Thus a trust which provides for distributions only of income can still be a

unitrust. Nor is this the only statutory support for this re-characterization: The UPAIA includes two relevant definitions governing the entire chapter: "Net Income" is defined in part to mean, "if section 469.411 applies to a trust, the unitrust amount", and "Unitrust Amount" is defined to mean "net income as defined by section 469.411." RSMo. § 469.401(8); RSMo. § 469.401(15). In other words, a trustee can make a unitrust election over an income-only trust and still be in compliance with that trust.

Appellant's emphasis on grantor intent suggests that she believes this is a trust construction matter. Appellant unnecessarily reminds the Court that "the paramount rule of construction in determining the meaning of a trust provision is that the grantor's intent is controlling" and warns the Court not to "'re-write an unambiguous trust under the guise of construction.'" (Appellant's Br. 23-24, internal citations omitted). But this case is not one of construing a trust. Nothing in the Anne Trust needs construction. Appellant alleges no ambiguity in the Anne Trust; indeed, there is no ambiguity (as Appellant's second quote admits). The intent of the trust grantor, paramount in such cases, is inapposite here.

To the extent Grantor's intent is relevant, the better argument is that, had Ayers known of the possibility of a unitrust election, he would have allowed it. One need look only at the scope of administrative authority he did give to the trustee. His intent to give the trustee broad powers to characterize items of receipt is made clear in Section Two of Item One of the trust:

> The Trustees shall have the power to determine whether any money or property coming into their hands shall be considered part of the principal of the trust estate or part of the income thereof, and to

> apportion between principal and income any loss or expenditure in connection with the trust estate in the manner in which they consider to be just and equitable.

(D698, Item One, Sect. 2). Contrary to Appellant, Ayers bestowed on his trustees the power to respond to future economic realities by re-characterizing certain items of receipt as income rather than as additions to principal, which is exactly what the unitrust statute does.

More generally, Appellant's argument that a unitrust election cannot be made over an income-only trust is self-contradictory. The reverse of her argument is true: by the statute's very nature, the *only* trusts it affects are income-only trusts. A trust that allowed encroachments of principal would not need to be converted to a unitrust because the trustee could already distribute principal to compensate for lowered income levels. The Missouri legislature intended the statute to reach income-only trusts such as the Anne Trust; indeed, they are the *only* trusts for which the statute makes any sense.

1.6. Conclusion

Appellant's Point I argues that summary judgment in favor of Trustee was improper because the trial court misunderstands the statute permitting unitrust elections over trusts like the Anne Trust. Appellant is wrong. The court rightly found that RSMo. § 469.411 applies to the Anne Trust. Indeed the statute does apply: the one bar on applicability, the presence of a "specific prohibition" against such an election, does not exist. Nor can Appellant succeed on her various theories why an income-only distribution plan is required specific prohibition. The grantor's intent is irrelevant to the case at hand where there is no alleged ambiguity in the trust agreement; in fact, here that

intent, if anything, would favor a unitrust election. Barring an election on the basis of an income-only distribution plan would render the entire statute meaningless given that the election permitted by the statute is necessary only with an income-only distribution plan. In short, Appellant's Point I must fail.

POINT II

2.1. Summary Judgment for Trustee Was Proper Because Trustee Established There is no Genuine Issue of Material Fact and Trustee was Entitled to Judgment as a Matter of Law.

Appellant argues in Point II that the trial court erred in granting summary judgment because of the presence of alleged issues of material fact and because Trustee's alleged failure to comply with certain trust statutes should bar judgment as a matter of law. On both she is mistaken. There are no genuine issues of material fact, because Appellant never denied Trustee's facts, thereby admitting them. Moreover, judgment is proper as a matter of law because the statutes that apply demonstrate that Trustee complied with all requirements to make a unitrust election.

2.2. Standard of Review

The standard of review of a summary judgment is essentially *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court reviews "the record in the light most favorable to the party against whom judgment was entered" and accords "the non-movant the benefit of all inferences from the record." *Id.* at 376. "Facts set forth by affidavit or otherwise in support of a party's motion are

taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *Id.*

2.3. There is No Genuine Issue of Material Fact Because Appellant Admitted All Facts by Her Failure to Deny Them as She was Required by Missouri Supreme Court Rule 74.04.

Appellant claims there are genuine issues of material fact that preclude summary judgment in favor of Trustee. There are no such issues because Appellant failed to deny Trustee's facts, thereby admitting them. Faced with no actual issue properly in dispute, Appellant impermissibly conflates procedural law with trust law to create the semblance of a dispute where none exists.

Appellant equates Trustee's alleged failure to "conclude that the trust was being administered unfairly and impartially" with a failure to establish "that there was no genuine issue of material fact." (Appellant's Br. 25). But doing so is improper. For purposes of a motion for summary judgment, a genuine issue of material fact is created by a non-movant's denial of the movant's enumerated facts, set out in the non-movant's Response in a form compliant with Missouri Supreme Court Rule ("Mo.Sup.Ct.R.") 74.04(c)(2). Mo.Sup.Ct.R. 74.04(c)(2) is clear on this point: "The response [of an adverse party to a movant] shall set forth each statement of fact in its original paragraph number and immediately thereunder admit or deny each of movant's factual statements." There is little doubt that Appellant must admit or deny Trustee's facts, and "each of" them.

Here, Trustee filed its Statement of Uncontroverted Material Facts, a list of consecutively numbered paragraphs, each with a separate material fact. (D780).

Appellant, however, never filed her Response. Appellant did move to strike the supporting affidavit and its exhibits, but Appellant never filed a pleading admitting or denying the factual statements themselves, much less each one of them separately, as she was required to do. Trustee still does not know which of its factual statements Appellant believes raise which material issues.

Appellant previously argued that her motions to strike the affidavit and the exhibits constituted a sufficient substitute Response. (D794, p. 4). She cited to *Jungmeyer v. City of Eldon*, 472 S.W.3d 202 (Mo.Ct.App. W.D. 2015) for support for her proposition that "a motion to strike is a response as required by Rule 74.04 . . ." (Appellant's Br. 4). But a closer reading reveals that *Jungmeyer* is distinguishable from the facts at hand. In *Jungmeyer*, the party opposing summary judgment filed a motion to strike, which the court found sufficient for purposes of Mo.Sup.Ct.R. 74.04, but there, unlike here, the motion included specific references to the objectionable facts. That party "identified and objected to" statements they considered legal conclusions, "identified and objected to" facts which did not specifically reference the record, "identified and objected to" affidavits; and "identified and objected to" facts that made overly general references to documents. *Jungmeyer*, 472 S.W.3d, at 205. Again and again, the party moving to strike certain facts "identified" and "objected to" those facts. Here, in contrast, Appellant did not identify the facts to which she is objecting, other than to generally deny all of them by virtue of the affiant. But a blanket objection in a motion to strike is very different from what the movants presented the trial court with in *Jungmeyer*. For a motion to strike to be an adequate substitute for an enumerated Response and thus satisfy

Mo.Sup.Ct.R. 74.04, it must at least offer some of the detail and guidance that would be offered by a proper Response. A blanket motion to strike, like a blanket Response, defeats the purpose of the Rule requiring a Response and is not an adequate substitute for what the Rule requires.

Mo.Sup.Ct.R. 74.04 is also clear about the consequences of failing to respond properly to a movant's statement of facts: "A response that does not comply with this Mo.Sup.Ct.R. 74.04(c)(2) with respect to any numbered paragraphs in movant's statement is an admission of the truth of that numbered paragraph." Mo.Sup.Ct.R. 74.04(c)(2). Therefore, Appellant admitted all of Trustee's statements.

By definition, then, there is no issue of any kind, genuine or not, material or not, in this matter. As a matter of procedural law, then, Appellant's claim of the existence of genuine issues of material fact must, on its face, fail.

2.4. Trustee is Entitled to Judgment as a Matter of Law Because an Analysis of Factors Was Not Required, Because Trustee Acted Impartially, and Because the Trustee's Determination to Make an Election is Presumed Fair and Reasonable, a Presumption Which Appellant Did Not Rebut.

Whether Trustee was entitled to judgment as a matter of law is a discrete issue from whether genuine issues of material fact preclude such judgment. The result, though, is the same: Trustee is entitled to such judgment. It is consistent with Appellant's failure to raise such issues properly that Appellant, now in search of an issue to raise, allegedly finds one in the internal rules of trust law. Putting aside that Mo.Sup.Ct.R. 74.04 does not operate as Appellant appears to believe, that body of trust law also works in Trustee's favor and entitles Trustee to judgment as a matter of law.

The "matter of law" which entitles Trustee to judgment is the unitrust statute, RSMo. § 469.411, and, when read properly, two adjacent statutes. Those two adjacent statutes do not state, imply, or function as Appellant would have the Court believe. Appellant argues that the two adjacent statutes, RSMo. § 469.403 and RSMo. § 469.405, control the unitrust statute, RSMo. § 469.411. With one exception, discussed below, they do not.

RSMo. § 469.403.1 does not govern RSMo. § 469.411. RSMo. § 469.403.1 provides a general direction to a trustee when "allocating receipt and disbursements to or between principal and income" (which refers to the statutory power to adjust, *see infra*, not a unitrust election), and to any matter "within the scope of sections 469.413 to 469.421", which obviously excludes RSMo. § 469.411. However, even if a unitrust election were considered an "allocation" of receipt, Trustee complied with the requirements of RSMo. § 469.403.1. That subsection guides trust administration in light of the UPAIA. Paragraph 1 tells a trustee to administer a trust under its terms, even if there is a different provision in the UPAIA. Here, Trustee is administering the trust under its terms, since the Ayers Trust agreement gives the trustee discretion to recharacterize items of receipt as income or principal. Moreover, RSMo. § 469.411 and RSMo. §§ 469.401(8) & (15) define the "unitrust amount" to be the trust's new "net income", so that even if the trustee may only distribute trust income under the terms of the agreement, a unitrust election is a distribution of only income. (A1, A2). That is, a unitrust election over the Anne Trust does not violate its terms. Paragraph 2 is permissive, allowing the trustee to exercise a discretionary power of administration,

which is what Trustee is doing. Paragraph 3 compels a trustee to administer a trust pursuant to the UPAIA, "if the terms of the trust do not contain a different provision or do not give the fiduciary a discretionary power of administration." Here the Ayers Trust does give Trustee a discretionary power of administration, which Trustee is choosing to exercise. Paragraph 4 requires a trustee to add an item of receipt to principal and not income, "to the extent that the terms of the trust and sections 469.401 to 469.467 do not provide a rule for allocating" that item; as discussed above, the Ayers Trust grants the Trustee discretion to add certain items to income rather that principal (*see* Section Two of Item One of the Trust, at D698). Again, all four paragraphs of RSMo. § 469.403.1 apply to SPA adjustments, not unitrust elections, but even if they did apply to unitrust elections, Trustee is in compliance with their requirements.

RSMo. § 469.405 governs a separate administrative power, altogether separate from the power to make a unitrust election. It sets out factors a trustee must analyze when considering the trustee's discretionary power to "adjust" items of a trust's receipt and expense. This statutory power to adjust ("SPA"), though similar to a unitrust conversion, is separate and distinct from the unitrust authority.

The clearest argument for the proposition a unitrust election does not require the analysis of the SPA factors is the unitrust statute itself: RSMo. § 469.411 does not refer back to, or require consideration of, RSMo. § 469.405.2. While Appellant argues that RSMo. § 469.411.5 "makes it clear" that Trustee "was required to show that it had performed the analyses and reached the conclusions enumerated in RSMo. § 469.403, RSMo. § 469.405.2, and RSMo. § 469.405.3" (Appellant's Br. 38), even a cursory review

of RSMo. § 469.411.5 shows she misrepresents the statute's purpose and contents. Contrary to Appellant, there is no reference in RSMo. § 469.411 to either RSMo. § 469.403 or RSMo. § 469.405.2. The omission of any reference to RSMo. § 469.405.2—the SPA factors--when neighboring subsections are referenced, is the best evidence that the legislature did not want to, and in fact did not, obligate a trustee to engage in the analysis Appellant now claims is required.[3]

Appellant's misconception about the scope of the statute appears rooted in her misconception of its purpose. The only effort Appellant makes at explaining the rationale for allowing unitrust conversions appears on page 27 of her Brief, where, even there, she hedges: the unitrust authority granted in RSMo. § 469.411, she writes, "was apparently intended as an aid to determine a permissible yield from trust assets rather than being a separate power to adjust from that given in RSMo. § 469.405." (Appellant's Br. 27). This is untrue. The unitrust power is indeed a "separate power" from the SPA. A unitrust election is a decision to make a single distribution each year (valued annually), a wholly distinct administrative decision from the SPA power, which requires decisions over the course of a year about allocating individual items of receipt and expense. Appellant quotes from the legislative comments for support but misses their point. Yes,

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[3] "Subsections 3 and 4" of RSMo. § 469.405 are invoked by the unitrust statute, but are irrelevant here. RSMo. § 469.405.3 includes eight enumerated clauses, most of which relate to tax consequences and none of which is at issue. RSMo. § 469.405.4 is triggered where there is "more than one Trustee", which is not the case here.

the Committee Comment to RSMo. § 469.411 explains, "This Section was added because of concerns regarding fiduciary liability for the exercise of the power to allocate between income and principal, whether granted by Section 469.405 or pursuant to a discretionary allocation provision in the governing instrument." But the unitrust statute was not created as an "aid" to the SPA power. Rather, it was created to offer an entirely different option to trustees, one that would free trustees from having to make the ongoing administrative decisions required by the SPA approach and instead address reduced income levels with one annual decision, which would in turn give the trustee more protection against disgruntled remaindermen.

Those Comments illustrate that the legislative intent was to prevent the sort of litigation before the Court now. The unitrust option was meant to offer safe harbor for trustees, to protect them from the kinds of criticisms being leveled at Trustee by Appellant. This is why the unitrust statute does not refer back to, or require consideration of, the SPA factors in RSMo. § 469.405: to require a trustee to consider the SPA factors when making a unitrust election is to ignore the whole point of the unitrust statute. In short, there is no statutory authority that requires Trustee to conduct the analyses which Appellant claims were required, and the language of the statute and the intent behind that statute demonstrate that those analyses are not required.

The one exception, mentioned above, to the division between the SPA statutes and the unitrust statute, is the second subsection under RSMo. § 469.403, which *does* reach RSMo. § 469.411. (The first subsection under RSMo. § 469.403 is discussed above.)

This subsection invokes the question of impartiality, so it is worth a close examination. RSMo. § 469.403.2 provides:

> In exercising the power to adjust pursuant to section Mo. Rev. Stat. §469.405 or a discretionary power of administration regarding a matter within the scope of sections 469.401 to 469.467, whether granted by the terms of a trust, a will, or sections 469.401 to 469.467, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intent that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with sections 469.401 to 469.467 is presumed to be fair and reasonable to all of the beneficiaries.

This statute governs not only the SPA but any "discretionary power of administration regarding a matter within the scope of sections 469.401 to 469.467", which includes RSMo. § 469.411, the unitrust statute. But this too works in Trustee's favor. For one, Trustee complied with this statute. It requires Trustee to administer the trust "impartially", "based on what is fair and reasonable to all of the beneficiaries." To be impartial to all beneficiaries is, as discussed, the point of a unitrust election in general and the particular goal of this Trustee in seeking this particular election.

In this case, Trustee testified, by affidavit, that Trustee uses a two-phase analysis when considering exercising one of its options under the Principal and Income Act. (D751, ¶¶ 13-24). Form 905-A memorializes Trustee's consideration of the impartiality of a trust's administration in light of the administrative terms of the trust instrument and applicable state law governing the allocation of items of receipt. *Id.* at ¶ 13. If in Trustee's opinion, administering a trust pursuant to those terms and that state law would not—given the trust's risk/return profile—be impartial, Trustee can consider exercising

either its power to adjust individual items of receipt or its power to convert the trust to a unitrust. *Id.* For the Anne Trust, Trustee considered such issues and concluded that, given those terms and law, distributions of only current investment returns was not fair to the income beneficiary and so one of the other options should be considered. *Id.* at ¶ 36. Trustee also took special note that portfolio changes alone "might be sufficient to achieve impartiality," but because the sale of any investment from a trust could carry negative capital gain consequences to the trust as well as to the beneficiary, Trustee deferred a decision until Trustee could speak with Anne's accountant. *Id.* at ¶ 33. Trustee then proceeded to its second round of analysis, memorialized on its Form 905-D. One of the questions on Form 905-D asked, "if income is being distributed to the beneficiaries that is less or more than the Unitrust statutory rate or range, and unitrust is not currently being exercised, is the trustee meeting its duty of impartiality to the income or remainder beneficiaries?" To this multi-part question, Trustee checked a box "yes". *Id.* at ¶ 53. That was a scrivener's error. *Id.* at ¶ 54. The box should have been checked "no." That it was a scrivener's error is supported by the facts that Trustee's own Form 905-A had already concluded that the status quo was not fair to Anne, that when the same question appeared on a different form for the Anne Trust several months later, Trustee correctly checked the box "no" (*Id.* at ¶ 56), and that when Trustee performed similar analyses on another sub-trust created by the Ayers Trust, one that was materially similar to the Anne Trust, Trustee answered "no" there. *Id.* at ¶ 108. Thus it is more likely that the box on Form 905-D was simply mis-checked than that Trustee contradicted its own earlier analysis while entering erroneous answers on other forms.

In any event, the completion of a form does not, itself, demonstrate the partiality or impartiality of a trustee. Appellant's harping on the scrivener's error is a red herring. Partiality or impartiality is located in the trustee's administrative decisions, not in its internal analysis prior to those decisions. When Trustee began its relationship with Anne—at the death of Anne's mother Barbara on October 26, 2015 (*Id.* at ¶ 8)—and presented Anne with its portfolio analysis, Trustee determined that the projected yield of the Anne Trust (roughly the net income that would be distributable to Anne) was only 2.26%. *Id.* at ¶ 30. To explore rectifying this low distributable income is not being partial to Anne; it is avoiding partiality toward the remaindermen. To decide to pursue a method authorized by statute that would raise the deemed income from 2.26% to 4%, and only 4%, treats both Anne and the remainder beneficiaries fairly. In other words, pursuing a unitrust election over the Anne Trust was itself an act of impartiality, which is what RSMo. § 469.403.2 requires.

Then again, this Court need not start from scratch in determining if Trustee was impartial. Perhaps the most important sentence in RSMo. § 469.403.2 is its final one: "A determination [to exercise a discretionary power of administration] in accordance with sections 469.401 to 469.467 is presumed to be fair and reasonable to all of the beneficiaries."[4] The statute creates a legal presumption of fairness and reasonableness,

[4] Whether the presumption creates a mere permissive inference, a mandatory but rebuttable presumption, or a conclusory presumption (*see Tuper v. City of St. Louis*, 468 S.W.3d 360, 370 (Mo. banc 2015) is unclear, but at the least, the statute permits the court

which frees this Court from having to wonder whether a certain check-mark was accurately placed or whether a yield of 2.6% is insufficient. By this sentence, the legislature effectuated the intent of its Committee, to give a trustee safe harbor when making a unitrust election. What is new and important about RSMo. § 469.403.2 is not a requirement of impartiality—common law already imposed that—but a legal presumption that compliance with the statutes is impartial--"fair and reasonable"—without needing more. The legislature created a simple path by which a trustee may make a unitrust election, and assuming the trustee complies with the statutory limitations (as Trustee did), and assuming the trust qualifies (as the Ayers Trust does), the decision to make that election is presumed to be fair and reasonable, a presumption which Appellant has done nothing to rebut.

2.5 Conclusion

In Point II, Appellant argues that Trustee did not qualify to exercise the authority to make that election. That argument does not succeed. The standard for summary judgment is clear: the absence of genuine issues of material fact and a right to judgment as a matter of law. In the case at hand, both elements are present. Appellant admitted all of Trustee's facts by her failure properly to deny them, and the law around unitrust elections—evident from the plain language of the statute and as a manifestation of

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to infer Trustee's reasonableness and fairness. If the presumption is mandatory but rebuttable, then the burden shifts to Appellant to rebut that presumption.

legislative intent—demonstrates that Trustee is entitled to make that election. Appellant's Point II must fail.

POINT III

3.1 The Affidavit is Admissible Because Objections to it Were Waived and Because the Affiant Had Adequate Personal Knowledge of its Facts.

Appellant continues to insist in Point III that Trustee should have engaged in the factor-based analysis that is required for a statutory power of adjustment but not for a unitrust election, and in Point III she adds an additional complaint that Trustee's affidavit, which in part describes that analysis, must be stricken as hearsay based on the alleged lack of personal knowledge of the affiant. As will be shown below, however, even if Appellant has standing to contest the affidavit, Trustee's affiant had more than enough personal knowledge to satisfy the statutory requirement.

3.2. Standard of Review

The standard of review of a summary judgment is essentially *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court reviews "the record in the light most favorable to the party against whom judgment was entered" and accords "the non-movant the benefit of all inferences from the record." *Id.* at 376. "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *Id.*

3.3. Appellant Admitted All of Trustee's Facts by Her Failure Properly to Deny Them.

When Appellant failed properly to file a Response to Trustee's Statement of Undisputed Material Facts and thereby admitted those facts (*see supra*, at section 2.3), Appellant also waived any right to object to the affidavit that supported those facts. She did file a motion to strike the affidavit, and a separate motion to strike the exhibits, but it is less clear whether those motions—which were denied by the trial court—were ripe given her deemed admission of the facts, which were supported by the affidavit, which was in turn supported by its exhibits. It is also unclear whether Appellant is appealing the denial of Appellant's motions to strike. Appellant lists the motions in her Notice of Appeal (rather, only the motion to strike the affidavit, not to strike the exhibits) and references the motions in her Statement of Facts in her brief, but nowhere in her Points on Appeal does she request this Court overrule the trial court's denial of those motions. (Appellant's Br. 34, 41). In short, this Court should conclude that Appellant admitted Trustee's facts and waived any objections to the affidavit or exhibits, leaving nothing for Appellant now to argue.

Thus, this Court may choose to disregard Point III (and Point IV, discussed below) and affirm the trial court's judgment solely on the basis of Points I and II. Nonetheless, the remainder of this Point III discusses the merits of Appellant's arguments about the admissibility of the affidavit and confirms admissibility because the affidavit meets all requirements set out in the applicable statute.

3.4. The Affidavit is Admissible Because it Complies with Mo.Sup.Ct.R. 74.04(e).

The affiant, Justin Meyer ("Mr. Meyer"), is a Trust Managing Director of Trustee, and a former Trust Officer of Trustee. (D751 ¶ 2). His affidavit states that his statements were made upon personal knowledge as well as on a review of Trustee records and on conversations with Trustee employees. (D751 ¶ 4). Mr. Meyer's affidavit is admissible.

Mo.Sup.Ct.R. 74.04(e), which governs affidavits attached to a motion for summary judgment, provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Mo.Sup.Ct.R. 74.04(e). Trustee's affidavit meets all of these requirements: (1) it is made on personal knowledge; (2) it sets forth such facts as would be admissible in evidence; and (3) it shows affirmatively that the affiant is competent to testify to the matters stated herein. Moreover, Mr. Meyer swore to each copy of all papers that were referred to in the affidavit, and he attached those copies to his affidavit, as required in the Rule's second sentence. Of the third element above—the affiant's competence—it is sufficient to affirm that Mr. Meyer was of majority age and in possession of full mental capacity, and that his competency in that respect is not being challenged. Accordingly, the remainder of this discussion of Point III focuses on the first and second elements of the Rule.

3.5. The Affidavit is Based on the Affiant's Personal Knowledge.

Mr. Meyer had personal knowledge of what he testified to in his affidavit, even if that knowledge came from differing means. The knowledge that supports a fact such as Number 23, "Forms 905-A, 905-D, and 905-E are not specific to Missouri and do not reference Missouri" is different from the knowledge that supports Number 30, "The projected yield of the Anne Trust was 2.26%", which is different from the knowledge which supports Number 58, "There is no power of withdrawal in the Anne Trust." (D751, Nos. 23, 30, 58). In all of these examples, however, Mr. Meyer had sufficient personal knowledge by virtue of being managing director of Trustee's trust department. He has personal knowledge of the language, use and implications of the various forms used by Trustee, of the roles of other employees in managing relationships with beneficiaries, and of how those employees engaged with those beneficiaries. These are the facts to which he was testifying, and he had personal knowledge sufficient to do so.

More broadly, Mr. Meyer is a corporate representative who testified in his affidavit to his personal knowledge, and who attached the exhibits to which he was testifying. That is enough. Contrary to Appellant's complaints, there is no requirement in the law that he explain how he knows what he knows, or when he learned what he knows, or who told him what he knows, or who told that person. It is sufficient that Mr. Meyer stated under oath that he had personal knowledge of the facts. Missouri cases, such as those cited below, have found an affidavit admissible when the only language in

the affidavit was that it was based upon the affiant's personal knowledge and there were no additional details as to why or how the person has personal knowledge.

To the extent that Appellant now attempts to point to an individual fact that described a conversation that is reflected by the business record which Mr. Meyer reviewed but of which Mr. Meyer was not actually a participant, (1) again, Appellant waived that objection by failing to enumerate that fact and describe exactly why it is hearsay; and (2) the fact is itself exempt from being hearsay by virtue of appearing in a qualifying business record, as discussed in Point IV, *infra*.

Appellant argues this case is like *Gateway Metro Fed. Credit Union v. Jones,* 603 S.W.3d 315 (Mo. App. E.D. 2020), yet she ignores some significant differences. In *Gateway Metro*, a credit union filed a vice-president's affidavit stating the amount of an outstanding loan; however, the affidavit was made exclusively upon the affiant's review of business records. No personal knowledge was applied. *Id.* at 320-21. The *Gateway Metro* affidavit also failed to attach the records it relied upon, a step required by Mo.Sup.Ct.R. 74.04(e). *Id.* This Court noted that the records, had they been attached, likely would have been admissible as business records. *Id.* at 321-22. Unlike *Gateway Metro*, here Meyer's affidavit stated that it was made upon more than just a review of records; it also testified to his reliance on his personal knowledge. Moreover, Meyer attached the documents he discussed in his affidavit, which are admissible as business records due to his knowledge of the record-keeping procedures of Trustee. *See infra* Section IV. Thus, *Gateway Metro* is distinguishable from and inapplicable to the facts of this case.

This case more closely resembles *Wood v. Proctor & Gamble Mfg. Co.*, 787 S.W.2d 816 (Mo. App. E.D. 1990). In *Wood*, P&G included an affidavit of a Team Manager based upon her personal knowledge and a review of the records. *Id.* at 820-21. Wood argued the affidavit was based only upon conclusions derived from that review and not the manager's personal knowledge. The Court, however, held that nothing in the record indicated the volume of P&G records was so great as to preclude the affiant from having personal knowledge of the issue, and as Team Manager she had access to and made use of admissible business records (which were part of the record). *Id. See also Rustco Products Co. v. Food Corn, Inc.*, 925 S.W.2d 917, 924 (Mo. App. W.D. 1996) (Court concluded that the affiant's role as "Director of Food Oils" and his statement he had personal knowledge was "sufficient to establish that he would have knowledge of the agreement . . ..", noting that the opposing party provided no evidence to contradict the affidavit.) Like in *Wood* and *Rustco*, Mr. Meyer's affidavit was based upon personal knowledge and a review of the records. Mr. Meyer is the Trust Managing Director and there has been no showing that the volume of the records was so great so as to preclude his personal knowledge. Thus, the affidavit was based upon personal knowledge and was admissible.

3.6. The Affidavit Sets Forth Such Facts as Would be Admissible in Evidence.

The second element of Mo.Sup.Ct.R. 74.04(e) requires facts "as would be admissible in evidence." That is, the facts cannot themselves contain hearsay. Appellant's argument wants it both ways: she asserts a blanket objection to the whole

affidavit as impermissible hearsay while sometimes suggesting that particular but unspecified facts may also contain a second layer of hearsay as well. But again, she offers no enumerated items or reasons. *See*, for example, her oblique criticism of "the facts of any trust transaction relating to the Herbsts" and, later in that sentence, the "events" (Appellant's Br. 37), and what she refers to as "other statements" and "other averments". (Appellant's Br. fn. 9). The Court has no obligation to separate the wheat from the chaff for her; nor does Trustee have the obligation or ability to defend some or all of its 143 facts against unarticulated allegations. The law recognizes this reality: if even a part of an exhibit is admissible where the objection to it was merely blanket, that exhibit is entirely admissible. *Ford Motor Credit Co. v. Harris*, 386 S.W.3d 864, n. 9 (Mo. App. S.D. 2012) (The "principle is well established that if any part of an exhibit is admissible an objection going to the whole of it is properly overruled.")

3.7. Conclusion

The trial court properly considered Mr. Meyer's affidavit as based upon his personal knowledge and a review of records attached to the affidavit. The records were admissible business records. Appellant inadequately argued to the trial court, and to this Court, which portions of the affidavit were not based upon personal knowledge or were otherwise allegedly inadmissible. Even if this Court went line by line and determined portions of the affidavit were inadmissible, sufficient portions of the affidavit would remain which support the trial court's grant of summary judgment.

POINT IV

4.1. Appellant's Allegations of the Affiant's Testimony as to Affiant's Exhibits Fail to Demonstrate that the Exhibits Do Not Qualify for the Business Records Exception.

In her Point IV, Appellant argues that the exhibits attached to Mr. Meyer's affidavit are, like the affidavit itself, fatally flawed. In support of striking these exhibits, Appellant lists a variety of alleged shortcomings of the affiant's testimony: he "acknowledged . . . that the exhibits . . . had been prepared by other people", he did not "purport to be the custodian of the records", and he did not state "on the basis of his own knowledge the identity, mode or timing of preparation of those records." (Appellant's Br. 42). For these reasons, Appellant concludes, the exhibits are not business records and are therefore inadmissible hearsay. These complaints are unpersuasive. None describes a disqualifying phrase. On the contrary, affiant complied in all respects with RSMo. § 490.680, the governing law on the issue. As the following will show, the exhibits are admissible.

4.2. Standard of Review

The standard of review of a summary judgment is essentially *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court reviews "the record in the light most favorable to the party against whom judgment was entered" and accords "the non-movant the benefit of all inferences from the record." *Id.* at 376. "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *Id.*

4.3. Appellant's Complaints Do Not Disqualify the Exhibits.

Appellant's reasons for the supposed disqualification of these exhibits do not disqualify the exhibits. Appellant's first complaint, that the exhibits "had been prepared by other people," can be summarily dismissed. To allow an affiant to testify to an exhibit, such as a portfolio analysis, which the affiant did not personally prepare is the very purpose of the business records rule. "The business record exception to the hearsay rule allows the introduction into evidence of records qualified as business records without the personal appearance of those who prepared the record." *Helton v. Dir. of Revenue,* 944 S.W.2d 306, 309 (Mo. App. W.D. 1997). Appellant's second complaint, that Mr. Meyer did not purport to be custodian of records, is also patently insufficient, since, as will be shown below, the affiant need not be a custodian but can instead be a qualified witness. Contrary to Appellant's third complaint, there is no such requirement that the affiant have personal knowledge of the method of record keeping for a specific record. "[P]ersonal knowledge of the sponsoring witness as to the mode of preparation of the documents sought to be admitted as business records is not required for the admission of those documents." *Ford Motor Credit Co. v. Harris*, 386 S.W.3d at 870 citing *Asset Acceptance v. Lodge*, 325 S.W.3d 525, 528 (Mo. App. E.D.2010); *see also State ex rel. Fischer v. Sanders*, 80 S.W.3d 1, 4 (Mo. App. W.D. 2002) (Personal knowledge as to when or how the record came into existence is not a prerequisite to the admission).

If the exhibits qualify for the exception, which they do, then all of these arguments of Appellant must fail. Then again, it is hard to know what her arguments are. Just as she did not enumerate which statements in the affidavit she found objectionable, she also

did not enumerate which exhibits she wants to disqualify. Appellant makes only a generalized reference to "purported bank records" (Appellant's Br. 42), but does not specify if her objection reaches all such records or just some of them, or whether the set of "purported bank records" constitutes the entirety of the set of exhibits or merely a subset. As before, her unwillingness to enumerate or specify objections forces Trustee, and this Court, to guess which items she wishes to strike. This is not how Mo.Sup.Ct.R. 74.04 operates. In a similar vein, to the extent Appellant maintains that some exhibits include a second level of hearsay too, this Court again must confront Appellant's failure to enumerate just which exhibits contain such violations and why. It is not the duty of this Court to intuit Appellant's specific objections and rationales where she has not herself set them out.

4.4 RSMo. § 490.680 Sets Out the Elements for Qualifying an Exhibit For the Business Records Exception.

As in this brief's other sections, the starting point of the analysis is the statute itself. Section 490.680 reads:

> A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RSMo. § 490.680.

The statute presents three elements: (i) the affiant must be a custodian or qualified witness; (ii) the affiant must testify to the identity and mode or timing, and if it was made in the regular course of business, at or near the time of the act, condition or event; and

(iii) in the court's opinion, this testimony was sufficiently present so as to justify the admission of the proffered exhibit.

4.5. Mr. Meyer is a "Qualified Witness" as that Phrase is Used in RSMo. § 490.680.

The first element requires that the affiant be a "custodian or qualified witness". "A qualified witness need only be someone with knowledge of the procedure governing the creation and maintenance of the type of records sought to be admitted." *Hobbs v. Tuckness*, 949 S.W.2d 651, 654 (Mo. App. W.D. 1997) citing *U.S. v. Franco*, 874 F.2d 1136, 1139 (7th Cir. 1989). "The question of whether the witness is qualified is whether that witness has sufficient knowledge of the business operation and the methods of keeping records of the business to give the records probity." *Pazdernik v. Decker*, 652 S.W.2d 319 (Mo. App. 1983) citing *Rossomanno v. Laclede Cab Company*, 328 S.W.2d 677 (Mo. banc 1959). "Such determination is largely within the discretion of the trial court." *Id.* Here, Mr. Meyer, who was Trust Managing Director for Trustee, had sufficient knowledge of the operation of the bank and of the bank's methods of keeping records. There is no reason to doubt the records' probity, and no reason to believe that the trial court abused its discretion in so finding. *See Allen v. St. Louis Public Service Co.*, 285 S.W.2d 663. (Mo. 1956) (Court found that where the affiant testified that records of insurance claims were regularly kept and made in the ordinary course of business, and he identified the files at issue as plaintiff's prior claim, despite not having any personal knowledge of the claim or of when the entries in the file were made, the affiant was a qualified witness.)

4.6 Mr. Meyer Testified to the Identity and Mode or Timing, and if it Was Made in the Regular Course of Business, at or Near the Time of the Act, Condition or Event.

Mr. Meyer satisfies the second element of the statute, the element requiring certain testimony about the records. Because the precise language of Mr. Meyer's affidavit has been thrown into question, the relevant portion of that affidavit bears quotation in full:

> Trustee's records include correspondence, reports, and completed forms (the "Records"). The information described herein and referenced below is found in Trustee's business records. The entries in those records are made at the time of the events and conditions they describe either by people with first-hand knowledge of those events and conditions or from information provided by people with such first-hand knowledge. Recording such information is a regular practice of Trustee's regularly conducted business activities. I have access to the Records with respect to the subject transactions and have knowledge of how they are maintained. Based upon my review of those records, my personal knowledge, and my conversations with other representatives of Trustee, I have gained knowledge of the facts set forth herein, and if called upon to testify as a witness, I could competently do so under the penalty of perjury.

(D751, No. 4).

Appellant complains that this testimony is insufficient, that Mr. Meyer did not make these statements "on the basis of his own knowledge." (Appellant's Br. 42). Appellant argues that Mr. Meyer was not a qualified witness because he did not have "sufficient personal knowledge" of the record-keeping process. Unfortunately, Appellant mischaracterizes the law. Appellant cites to a Missouri Supreme Court case for the proposition that "A 'qualified witness' is one with *sufficient personal knowledge* of the record-keeping facts 'to give the records probity'" (Appellant's Br. 44 citing *CACH LLC v. Askew*, 358 S.W.3d 58, 64 (Mo. banc 2012) (emphasis added)). The actual citation

states, the affiant "must have sufficient knowledge of the business operation and methods of keeping records of the business to give the records probity." *CACH LLC*, 358 S.W.3d at 64. (emphasis added, internal citations removed). Appellant interjected the word "personal" in the knowledge requirement as to the record-keeping processes where it did not exist.

What is determinative, however, is whether the affidavit satisfies the second element of the statute. It does. Mr. Meyer testifies to the identity of the documents ("Trustee's records include correspondence, reports, and completed forms") and mode and timing of the documents, and that they were made in the regular course of business, at or near the time of the act, condition or event. ("The entries in those records are made at the time of the events and conditions they describe either by people with first-hand knowledge of those events and conditions or from information provided by people with such first-hand knowledge. Recording such information is a regular practice of Trustee's regularly conducted business activities.") Thus all components of the second element of the statute are satisfied. Satisfaction of the third element of the statute, that the trial court believes that the first and second elements were met, is manifest by the trial court's admission of these exhibits. Therefore, all three elements of RSMo. § 490.680 are met. Accordingly, the exhibits qualify for the business records exception to the hearsay rule and are admissible.

4.7. Conclusion

Appellant's Point IV is her final attempt to overturn the trial court's summary judgment. But here too she comes up short. As in Point III with respect to the affidavit,

so too her with respect to the exhibits. Trustee's exhibits satisfy all elements of RSMo. § 490.680 and as such are admissible evidence capable of supporting Trustee's affidavit and motion for summary judgment.

POINT V

5.1 The Trial Court's Order That Appellant Pay the Anne Trust for the Legal Fees Incurred by the Trust Should Be Affirmed.

In her Point V, Appellant argues that the trial court erred in assessing the attorneys' fees incurred by the Anne Trust in this litigation against Appellant. As will be shown below, Appellant does not have a clear idea what "justice and equity"—the statutory standard for such awards—require, but she does know that she disagrees with what the trial court believed justice and equity require. Unfortunately for Appellant, the law in Missouri poses a higher standard on a contesting party than mere disagreement. Jurisprudence creates a presumption that the trial judge—which courts describe as an "expert" on fees—was correct, and a requirement that the appellate court defer to that trial court's expertise. Thus it was incumbent upon Appellant to bring compelling arguments that the trial court abused its discretion, and Appellant failed to do so.

5.2 Standard of Review

"Where the legislature statutorily authorizes an award of attorney's fees in the discretion of the trial court . . . the granting or refusal to grant attorney's fees is reviewable for an abuse of discretion." *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 418 (Mo. App. W.D. 2013) citing *In re Gene Wild Revocable Trust*, 299 S.W.3d 767, 782 (Mo. App. S.D. 2009). "The trial court abuses its discretion in awarding attorney's fees if

the award is either arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration." *Id.*

5.3 Caselaw Creates a Presumption of Correctness and a Requirement of Deference to the Trial Court When Reviewing an Award of Fees, Both of Which Appellant Failed to Overcome.

In Missouri, the statute governing the assessment of legal fees in trust disputes is RSMo. § 456.10-1004, which provides that "[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." Case law has expanded on this statute. Having held that the granting of fees is reviewable for an abuse of discretion and that abuse can be found if the award is "either arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration", the *O'Riley* court then added a presumption of correctness and appellate deference to the trial court. As an award of attorney's fees is presumed to be correct, the burden is on the complaining party to prove otherwise. *O'Riley*, 412 S.W.3d. at 418. When reviewing a challenge to an award of attorney's fees, "the appellate court gives deference to the discretion of the trial judge who, by virtue of his or her office and experience, is considered an expert in determining the proper amount of compensation for legal services."[5] *Id.* at 418-419.

[5] Appellant described *O'Riley* narrow elucidation of the abuse standard (Appellant's Br. 47) but neglected to mention its presumption of correctness and the appellate court's

Three applications of this reasoning deserve highlighting. First, for Appellant to show an abuse of discretion, she must demonstrate that the award is "either arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration." Second, the trial court's assessment of fees against Appellant is presumed to be correct. Third, the Court should defer to the discretion of the trial court in considering that court's assessment of fees against Appellant. Appellant has not shown any evidence that the trial court exemplified arbitrariness or unreasonableness, certainly not enough to overcome a presumption of correctness.

In short, the trial court was correct: it is Appellant, not Trustee or the Anne Trust, who should bear the legal fees of the Anne Trust. More precisely, the trial court did not abuse its discretion in not assessing the Anne Trust's legal fees against Trustee, in not assessing Appellant's fees against the Anne Trust, and in affirmatively assessing the Anne Trust's fees against Appellant. Appellant has failed to show that any of these decisions was "either arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration", and Appellant has not overcome the presumption that those decisions were the correct ones.[6]

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necessary deference to the trial court—two components of that ruling which work against Appellant.

[6] It is not clear what outcome Appellant is urging upon the Court. She posits that either Trustee or the Anne Trust should pay the fees incurred by the Anne Trust and that

5.4 Appellant Has Not Shown the Trial Court Abused its Discretion in Not Assessing the Trust's Legal Fees Against Trustee.

In a typical trust case, the question of attorneys' fees is whether they should be assessed against the assets of the trust or against the trustee's own funds. Here, Appellant cites a long passage from a 1958 case to the effect that "a trust fund should bear the expense of its own administration." (Appellant's Br. 48). This may be true insofar as the distinction is between the trust and trustee. Here, the trial court's decision did not expressly rule on this question, but because Appellant throws this option into the mix, it is worth stating that here too, the Trustee should not have to expend its own funds for the Anne Trust's legal fees. Where the Anne Trust authorizes its trustee to hire attorneys to advise in the administration of the trust and where a unitrust election is itself an administrative act, there was no abuse of discretion by the trial court, and Appellant did not show one, in deciding that the legal fees incurred by the Anne Trust in securing the authority to make a unitrust election should not be borne by Trustee.

5.5 Appellant Has Not Shown the Trial Court Abused its Discretion in Not Assessing Appellant's Legal Fees Against the Anne Trust.

Appellant cites another long passage standing for the proposition that in some instances, different parties to trust litigation can each have their attorneys' fees paid from the assets of the trust in question. (Appellant's Br. 49). Appellant's own quotation makes clear, though, that the rule applies where different beneficiaries have different but

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Appellant's own legal fees should be paid by either Trustee or the Anne Trust. *Id.* (Appellant's Br. 49).

equal claims to the same ambiguous trust agreement, and may, in those circumstances, recover its fees from the trust assets. The case at hand, however, is not such a case. This case is not one where the parties are seeking a "correct interpretation" of the trust, and here there are not two or more beneficiaries with different but equal claims. That case is inapposite. The trial court did not abuse its discretion, and Appellant did not show otherwise, in not assessing Appellant's legal fees against the Anne Trust.

5.6 Appellant Has Not Shown the Trial Court Abused its Discretion in Assessing the Anne Trust's Legal Fees Against Appellant.

The trial court's affirmative ruling was to assess the Anne Trust's legal fees against Appellant. The court concluded that justice and equity require this result, and Appellant has made no showing the trial court abused its discretion in so holding. Appellant purportedly identifies an abuse of discretion in the court's award of "attorney fees to [Trustee]". (Appellant's Br. 47). This mischaracterizes or misunderstands the ruling. The court did not award fees to Trustee. The court awarded fees to the Anne Trust. Appellant's distortion of the ruling is continued in, and perhaps explained by, the three enumerated examples of the alleged abuse of discretion. First, Appellant finds abuse in the award "to [Trustee]" when Trustee "had already been paid for fees." Trustee had not "been paid" anything. Trustee had applied trust funds to pay legal fees incurred in administering the Anne Trust, including the costs of this litigation, which was appropriate. Trustee was not "paid" any amount, and Trustee did not "pay itself" out of trust assets. (Appellant's Br. 48). The trial court is simply ruling that Appellant should bear the costs incurred by the Anne Trust in this litigation.

Second, Appellant argues that "no authority exists for the Court to order reimbursement to trusts when the Trustee pays itself out of trust assets." *Id.* The fact that assessment of those fees against Appellant means Appellant must "reimburse" the Anne Trust is irrelevant to the legal obligation imposed by the trial court. Whether the award is a reimbursement or an initial transfer is a distinction without a difference. In any event, Appellant's argument that "no authority exists" for the trial court's decision is wrong: the trial court's authority was RSMo. § 456.10-1004, which allows the court to award fees as justice and equity require, and which draws no distinction between an initial transfer and a reimbursement. *See also Brown v. Brown*, 530 S.W.3d 35, 39-40 (Mo. App. E.D. 2017) and *Brown v. Brown-Thill*, 543 S.W.3d 620 (Mo. App. W.D. 2018) (courts found no abuse of discretion in award of fees, which included reimbursements to the trusts in question.) The test for this Court is whether the trial court abused its discretion in so deciding, and, more to the point, whether Appellant overcame the presumption of the correctness of the trial court's decision, and the answer to both is that she did not.

Third, Appellant argues that "there is no record evidence to support that [Appellant] litigated in a 'divisive' manner." (Appellant's Br. 47-8). Again, Appellant attempts to shift the burden. It is not enough for Appellant to suggest the trial court was not correct in its decision. Appellant needs to show affirmatively that the trial court abused its discretion. Appellant can do so only by showing that the decision was "either arbitrarily arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration." Her arguments do not approach this standard. The most she

offers is in the negative: with respect to the trial court's conclusion that Appellant had litigated in a divisive manner, Appellant says only, "there is nothing in the record to support the Court's conclusion in this regard." (Appellant's Br. 51). There was something in the record, as even Appellant writes: the trial court believed that Appellant acted divisively "when she withdrew her prior consent to the conversion of Donald's separate trust." *Id.* The trial court further held that it concluded that Appellant's actions "were solely intended to protect her personal interest in her separate trust" (D805), which the trial court was entitled to conclude based on the discretion granted it by the statute and the record before that court. Appellant's strategy of merely claiming the trial court's decision was unwarranted falls short of her burden of showing "arbitrariness or unreasonableness to the point of indicating indifference and lack of proper judicial consideration."

5.7 Conclusion

The *O'Riley* court fortified the statute's grant of discretion with a presumption of correctness and express appellate deference to the trial court in order to prevent the sort of arguments Appellant is making here. In any award of fees, the party against whom the fees are assessed will be unhappy. The law cannot allow the usage of judicial resources by the claims that the trial court should have decided some way other than the way it did. RSMo. § 456.10-1004 gives the trial court the discretion to make these decisions, and the courts have raised the bar on those who would protest. Appellant did not clear that bar.

CONCLUSION

RSMo. § 469.411 permits a Trustee to make a unitrust election as long as certain procedural steps are followed, the trust is irrevocable, and a unitrust election is not specifically prohibited by the trust instrument. Here, the procedural steps are not at issue, the Ayers Trust sub-trusts, including the Anne Trust, are irrevocable, and the instrument does not specifically prohibit a unitrust election. To find that an income-only trust is a specific prohibition is contrary to the plain meaning of the words in the statute and to its intent. It would also render the statute essentially meaningless.

Trustee established that the Trust was irrevocable and that that Trust did not prohibit a unitrust election. It was within Trustee's discretion to decide to exercise the unitrust election, a decision which Missouri law presumes is fair and impartial. Therefore, the trial court properly granted summary judgment in Trustee's favor. Appellant did not demonstrate any genuine issue of material fact and did not refute any facts of Trustee that were supported by affidavit and exhibits. Even if Trustee were required to consider certain factors, the Meyer affidavit and attached exhibits demonstrate the analysis Trustee undertook, including reviewing whether a unitrust election was necessary for the impartial administration of the Anne Trust. The proper analysis of the affidavit in light of RSMo. § 469.411 and RSMo. § 469.403.2 shows that Trustee met its obligation to act impartially, which was, under those statutes, its sole obligation. Consequently, summary judgment was appropriate.

Furthermore, the affidavit and accompanying exhibits were admissible. Mr. Meyer's affidavit stated it was made upon personal knowledge and a review of business

records which were attached to the affidavit. The Meyer affidavit primarily describes the process Trustee uses to determine if a unitrust election should be exercised to impartially administer a trust, and he identified specific forms that were filled out in analyzing the Anne, Donald, and Catherine Trusts. As Trust Managing Director, he had personal knowledge of the process Trustee used in determining whether a unitrust election was proper, and he had knowledge of how Trustee records were kept and maintained. Thus, his affidavit was admissible, and the attached exhibits were admissible as business records.

Finally, the trial court did not abuse its discretion in awarding a portion of the attorney's fees be paid by Appellant into the Anne Trust. Trustee filed a simple declaratory judgment action over the interpretation of the unitrust statute to ensure Trustee was authorized to make a unitrust election. Appellant introduced collateral issues unnecessary to the resolution of the initial petition and did so with motives the trial court had every right to suspect. The trial court was within its discretion to require that Appellant pay a portion of the Anne Trust's attorney's fees as justice and equity require.

Thus, the trial court's orders should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with Rules 55.03 and 84.06(b). This brief contains 13,563 words, not counting the cover, Table of Contents, Table of Authorities, signature block, this Certificate, and any appendix. I have relied upon the word-counting utility of Microsoft Word in making this certification. I further certify that a copy of this brief was filed electronically on October 26, 2020 using the Court's electronic filing system, causing automated delivery to counsel of record.

/s/ James R. Ruffin