IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS E. LANHAM, Plaintiff-Appellant, and KEITH C. LANHAM, Plaintiff, vs. DOUGLAS E. FLEENOR, Defendant-Respondent.	Supreme Court Case No. 45488

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE RICHARD D. GREENWOOD

ALLEN B. ELLIS	RICHARD L. STUBBS
ATTORNEY FOR APPELLANT	ATTORNEY FOR RESPONDENT
BOISE, IDAHO	BOISE, IDAHO

ADA COUNTY DISTRICT COURT

CASE SUMMARY

CASE NO. CV-OC-2016-8252

Thomas E Lanham, Keith C Lanham	§	Location:	**Ada County District Court**
vs.	§	Judicial Officer:	**Greenwood, Richard D.**
Douglas E Fleenor	§	Filed on:	**05/02/2016**
	§		

CASE INFORMATION

Case Type: **AA- All Initial District Court Filings (Not E, F, and H1)**

Case Flags: **Bankruptcy Stay**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	CV-OC-2016-8252
Court	Ada County District Court
Date Assigned	05/02/2016
Judicial Officer	Greenwood, Richard D.

PARTY INFORMATION

Plaintiff	**Lanham, Keith C**	**Ellis, Allen Boyd** *Retained* 208-345-7832(W)
	Lanham, Thomas E	**Ellis, Allen Boyd** *Retained* 208-345-7832(W)
	Reynard, Janine P Removed: 04/07/2017 Court Order	
Defendant	**Fleenor, Douglas E**	**Stubbs, Richard L.** *Retained* 208-345-8600(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

04/29/2016	Transfer In (from Idaho Court Or County) *Transfer in from CANYON COUNTY*	
04/29/2016	Order *Order Transferring Venue*	
05/02/2016	Transcript Filed *Notice Of Reassignment - Judge Greenwood*	
05/06/2016	Motion *Defendant's Motion To Dismiss*	
05/06/2016	Affidavit *Affidavit Of Counsel In Sipport Of Motion To Dismiss*	
05/06/2016	Memorandum *Memorandum In Support Of Defendant's Motion To Dismiss*	
05/16/2016	Notice of Hearing *Notice Of Hearing*	

05/17/2016	Hearing Scheduled *Hearing Scheduled (Motion to Dismiss 06/27/2016 03:30 PM)*
05/17/2016	Notice *Notice Of Bankruptcy Filing*
05/17/2016	Civil Disposition Entered *Civil Disposition entered for: Fleenor, Douglas E, Defendant; Lanham, Keith C, Plaintiff; Lanham, Thomas E, Plaintiff. Filing date: 5/17/2016*
05/17/2016	Status Changed *STATUS CHANGED: Closed pending clerk action*
05/17/2016	Status Changed *STATUS CHANGED: inactive*
05/20/2016	Stipulation *Stipulation For Briefing Schedule For Defendants Motion To Dismiss*
05/31/2016	Amended *Amended Notice of Filing Bankruptcy*
05/31/2016	**Amended Judgment - Bankruptcy Stay** Converted Disposition: Notice of Bankruptcy Filed 5.31.16 (Amended Notice) Party (Lanham, Keith C)
06/13/2016	Memorandum *Memorandum In Opposition To Defendant's Motion To Dismiss*
06/13/2016	Declaration *Declaration Of Allen B. Ellis*
06/13/2016	Declaration *Declaration Of Keith C. Lanham*
06/15/2016	Order *Order Re Stipulation for Briefing Schedule*
06/22/2016	Hearing Vacated *Hearing result for Motion to Dismiss scheduled on 06/27/2016 03:30 PM: Hearing Vacated*
06/22/2016	Notice of Hearing *Notice Vacating Hearing*
06/23/2016	Answer *Answer And Demand For Jury Trial (Stubbs For Defendant)*
06/27/2016	*CANCELED* **Motion to Dismiss** (3:30 PM) (Judicial Officer: Greenwood, Richard D.) *Vacated*
07/18/2016	Motion *Motion For Leave To Substitute As Party Plaintiff In The Stead Of Plaintiff Keith Lanham*
08/04/2016	Notice of Hearing *8.26.2016 @ 3pm*
08/29/2016	**Motion Hearing** (3:00 PM) (Judicial Officer: Greenwood, Richard D.) Events: 08/04/2016 Notice of Hearing *for Leave Substitue*

08/31/2016	Order
09/01/2016	Miscellaneous *Response to Plaintiffs' Note of Issue*
09/02/2016	Notice of Hearing *10.17.16 @ 3:00pm*
09/07/2016	Motion for Summary Judgment
09/07/2016	Memorandum In Support of Motion *for Summary Judgment*
09/08/2016	Notice of Hearing *10.17.16@300PM*
09/12/2016	Order *for Scheduling Conference and Order Re Motion Practice*
09/21/2016	*CANCELED* **Scheduling Conference** (4:01 PM) (Judicial Officer: Greenwood, Richard D.) *Vacated*
09/21/2016	Stipulation *for Scheduling and Planning*
09/22/2016	Stipulation for Scheduling and Planning
09/28/2016	Order *Governing Proceedings and Setting Trial*
10/03/2016	Brief Filed *Plaintiffs' Answering Brief to Defendant's Motion for Summary Judgment*
10/03/2016	Memorandum *in Opposition to Plaintiffs' Motion for Partial Summary Judgment*
10/03/2016	Affidavit *Defendant Douglas Fleenor's Affidavit in Opposition of Plaintiffs' Motion for Partial Summary Judgment*
10/03/2016	Motion for Disqualification of Judge *Defendant's Motion for Disqualification of Judge G.D. Carey*
10/10/2016	Brief Filed *Plaintiffs' Reply Brief in Support of Motion for Partial Summary Judgment*
10/10/2016	Brief Filed *Defendant Douglas Fleenor's Reply Memorandum in Support of Motion for Summary Judgment*
10/17/2016	**Motion for Partial Summary Judgment** (3:00 PM) (Judicial Officer: Greenwood, Richard D.) Events: 09/02/2016 Notice of Hearing

10/17/2016	Court Minutes
11/22/2016	Order *Memorandum Decision on Motion for Summary Judgment*
12/14/2016	Order *Governing Proceedings and Setting Trial*
12/15/2016	Notice of Service
12/16/2016	Notice of Service *Notice of Service of Discovery*
12/21/2016	Request *Plaintiffs' First Request for Production*
12/21/2016	Notice of Service
12/21/2016	Motion *Joint Motion to Continue Trial Date*
01/10/2017	Notice of Hearing *(01/26/2017 03:00 pm)*
01/12/2017	Witness Disclosure *Defendant's Disclosure of Expert Witnesses*
01/12/2017	Notice *Notice of Service of Discovery*
01/12/2017	Notice *Notice of Service*
01/20/2017	Notice of Service of Discovery Requests
01/26/2017	**Motion to Continue** (3:00 PM) (Judicial Officer: Greenwood, Richard D.)
02/03/2017	Motion *to Release Court Records*
02/07/2017	Order *Governing Proceedings and Setting Trial*
02/13/2017	Stipulation *on the Issue to be Resolved in Summary Judgment Proceedings (TWO CD's IN CD STORAGE)*
02/27/2017	Notice of Service of Discovery Requests
03/24/2017	Stipulation *Stipulation for Substitution of Parties*

04/07/2017	Order *of Substitution of Parties*
04/12/2017	Notice of Taking Deposition *of Thomas Lanham*
04/12/2017	Notice of Taking Deposition *of Keith Lanham*
04/13/2017	Witness Disclosure *Defendant's Supplemental Expert Witness Disclosure*
04/18/2017	Motion *Defendant's Motion for Leave to File a Supplemental Brief in Support of Motion for Summary Judgment Based on Newly Obtained Evidence*
04/21/2017	Affidavit of Service *4/19/17*
04/24/2017	Order *Re Supplemental Briefing*
04/26/2017	Motion *Motion for Sequential Briefing*
04/26/2017	Motion to Continue *Trial*
04/26/2017	Memorandum In Support of Motion *for Continuance of Trial*
04/26/2017	Declaration *Second Declaration of Allen Ellis*
04/27/2017	Notice of Service *of Discovery*
04/27/2017	Notice *Notice of Opposition to Motion for Sequential Briefing*
04/27/2017	Notice *Notice of Non-Opposition of Plaintiffs' Motion to Continue Trial*
04/28/2017	Affidavit of Service *4/27/17*
05/01/2017	Notice of Hearing
05/03/2017	**Motion Hearing - Civil** (3:30 PM) (Judicial Officer: Greenwood, Richard D.) *To Continue Trial & Sequential Briefing*
05/03/2017	Court Minutes

05/04/2017	Memorandum In Support of Motion *Supplemental for Summary Judgment*
05/04/2017	Affidavit *of Samantha L. Lundberg in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment*
05/16/2017	Memorandum *Supplemental Memorandum in Support of Motion for Partial Summary Judgment*
05/23/2017	Reply *Defendant's Reply Brief in Support of Supplemental Memorandum in Support of Motion for Summary Judgment*
05/31/2017	*CANCELED* **Pre-trial Conference** (4:00 PM) (Judicial Officer: Greenwood, Richard D.) *Vacated*
06/07/2017	Order *Governing Proceedings and Setting Trial*
07/07/2017	Motion *to Extend Expert Disclosure Deadlines*
07/07/2017	Declaration *Third Declaration of Allen B. Ellis*
07/10/2017	*CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer: Greenwood, Richard D.) *Vacated* *4 days*
07/11/2017	Notice of Hearing *(7/31/17 @ 330 pm)*
07/12/2017	Notice *Notice of Change of Address (Attorney, Allen Ellis)*
07/24/2017	Memorandum *in Opposition to Plaintiff's Motion to Extend Expert Disclosure Deadlines*
07/31/2017	**Motion Hearing - Civil** (3:30 PM) (Judicial Officer: Greenwood, Richard D.) *To Extend Expert Disclosure Deadline*
07/31/2017	Court Minutes
08/17/2017	Order *Memorandum and Order Re: Renvewed Motion for Summary Judgment*
09/06/2017	Judgment of Dismissal
09/06/2017	Civil Disposition Entered
09/20/2017	*CANCELED* **Pre-trial Conference** (4:00 PM) (Judicial Officer: Greenwood, Richard D.) *Vacated*

09/20/2017	Memorandum of Costs & Attorney Fees
10/02/2017	Motion *Motion to Disallow Attorney Fees*
10/02/2017	Memorandum In Support of Motion *Memorandum in Support of Mtn to Disallow Attorney Fees*
10/16/2017	Notice of Appeal
10/16/2017	Appeal Filed in Supreme Court
10/30/2017	*CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer: Greenwood, Richard D.) *Vacated* *4 days*
11/03/2017	Stipulation to Dismiss *with Prejudice (Keith Lanham)*
11/03/2017	**Dismissed With Prejudice** (Judicial Officer: Greenwood, Richard D.) Party (Lanham, Keith C) Stipulation filed

DATE	FINANCIAL INFORMATION	
	Defendant Fleenor, Douglas E	
	Total Charges	258.00
	Total Payments and Credits	258.00
	Balance Due as of 12/6/2017	**0.00**

ALLEN B. ELLIS
ELLIS LAW, PLLC
12639 W. Explorer Drive, Suite 140
Boise, Idaho 83713
208/345-7832 (Tel)
208/345-9564 (Fax)
ISB No. 1626

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

*CV-OC-16-08252

THOMAS E. LANHAM and KEITH C. LANHAM,	Case No. CV-16-2623
Plaintiffs,	COMPLAINT AND DEMAND FOR JURY TRIAL
v.	
DOUGLAS E. FLEENOR,	
Defendant.	

Come now plaintiffs Thomas E. Lanham and Keith C. Lanham, through their attorney of record, and allege and complain against defendant Douglas E. Fleenor as follows:

I

At all times relevant, defendant Douglas E. Fleenor was an attorney at law duly licensed as such by the State of Idaho and was retained by plaintiff Thomas E. Lanham ("Thomas L.") to invalidate, through adjudication, a document purporting to be the last will and testament ("Will") of plaintiffs' father, Gordon T. Lanham which said Will sought to disinherit plaintiff Thomas L. and

his brother, the plaintiff Keith C. Lanham ("Keith L.").

II

At all times relevant, an attorney/client relationship existed between defendant Fleenor and plaintiff Thomas L. in the Matter of the Estate of Gordon Thomas Lanham (Gem County Case No. CV-2013-886) ("estate case") and other matters.

III

At all times relevant, the following conditions existed: (1) it was reasonably foreseeable that were plaintiff Thomas L. disinherited by the aforesaid Will, that such harmful consequence would be likewise imposed on plaintiff Keith L.; (2) the certainty that plaintiff Keith L. suffered financial loss by the conduct of defendant Fleenor as hereinafter alleged; (3) the proximate causation which existed between defendant's conduct, as hereinafter alleged, and plaintiff Keith L.'s financial loss; (4) holding defendant responsible for plaintiff Keith L.'s financial loss will serve to increase the legal profession's sense of responsibility to non-clients with a concomitant deterrent effect; (5) and to impose a duty of care toward non-client Keith L. will not unduly burden defendant, i.e., defendant's burden in fulfilling his professional duty of care to his client plaintiff Thomas L. is not enhanced by recognizing that such duty is also owed to non-client plaintiff Keith L.

IV

By reason of the relationship and circumstances alleged above in paragraphs II and III, respectively, defendant Fleenor owed a duty of care to plaintiffs.

V

On June 25, 2014, the Honorable Tyler D. Smith entered judgment in the estate case against defendant's client plaintiff Thomas L. by denying his motion for summary judgment and granting

the personal representative's motion for summary judgment, i.e., holding that the Will is "legal, valid, and binding".

VI

Notwithstanding the aforesaid judgment, the Will was defective in several respects including, *inter alia*, failing to set forth dispositive provisions, failing to include a residuary clause, bestowing unlimited donative powers of a non-charitable nature on the personal representative, failing to reflect the requisite testamentary intent, and having other foundational defects.

VII

Subsequent to entry of the aforesaid judgment and in breach of his duty to plaintiffs, defendant Fleenor negligently filed a notice of appeal on August 13, 2014, in the estate case, forty-nine days from entry of the judgment. As a proximate result of defendant's negligence, the District Court, acting in its appellate capacity dismissed the appeal on the jurisdictional grounds that the appeal was not filed within the requisite time period, i.e., forty-two days from entry of judgment. In a subsequent appeal to the Idaho Supreme Court and as a further proximate result of defendant's negligence, the Court of Appeals affirmed the District Court's dismissal.

VIII

As a further proximate result of defendant's negligence, the estate of plaintiffs' father was distributed in accordance with the defective Will, which disinherited plaintiffs, rather than by intestate succession by which succession the plaintiffs would have been the sole heirs at law, all to the plaintiffs' financial detriment in excess of the jurisdictional minimum of this Court.

IX

Plaintiffs have retained the services of Ellis Law, PLLC, to prosecute this matter and, in the

event they are the prevailing parties, they are entitled to recover their attorney fees pursuant to Idaho Code § 12-120(3).

Wherefore, plaintiffs pray for relief as follows:

1. For compensatory damages in excess of the jurisdictional minimum of this Court.

2. For costs and reasonable attorney fees;

3. For such other relief as the Court deems appropriate.

Dated this 16th day of March, 2016.

Allen B. Ellis
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in accordance with the provisions of Rule 38(b) of the Idaho Rules of Civil Procedure.

Dated this 16th day of March, 2016.

Allen B. Ellis
Attorney for Plaintiffs

ORIGINAL

NO. _____ FILED
A.M. _____ P.M. 4:30

APR 29 2016

CHRISTOPHER D. RICH, Clerk
By ROSE WRIGHT
DEPUTY

FILED
4:30 A.M. _____ P.M.

APR 20 2016

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF CANYON

THOMAS E. LANHAM and KEITH C. LANHAM,

Plaintiffs,

vs.

DOUGLAS E. FLEENOR,

Defendant.

CV OC 1608252

Case No. CV-16-2623

ORDER TRANSFERRING VENUE

The court having received the parties' stipulation, and with good cause appearing therefor,

IT IS HEREBY ORDERED that the above-captioned action shall be forthwith transferred to the Fourth Judicial District Court of the State of Idaho, in and for the County of Ada.

DATED this 19 day of April, 2016.

By _____
Honorable Bradley S. Ford
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of April, 2016, I served a true and correct copy of the foregoing ORDER TRANSFERRING VENUE by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen B. Ellis Ellis Law, PLLC 12639 W. Explorer Drive, Suite 140 Boise, Idaho 83713 Telephone (208) 345-7832	[/] [ ] [ ] [ ]	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile (208) 345-9564
Richard L. Stubbs Samantha L. Lundberg CAREY PERKINS LLP Capitol Park Plaza 300 North 6th Street, Suite 200 P. O. Box 519 Boise, Idaho 83701 Telephone: (208) 345-8600	[/] [ ] [ ] [ ]	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile (208) 345-8660

_____
Clerk

ORIGINAL

Richard L. Stubbs, ISB No. 3239
Samantha L. Lundberg, ISB No. 9992
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and KEITH C. LANHAM,

Plaintiffs,

vs.

DOUGLAS E. FLEENOR,

Defendant.

Case No. CV-OC-16-08252

AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION TO DISMISS

STATE OF IDAHO)
: ss.
County of Ada)

SAMANTHA L. LUNDBERG, having been first duly sworn upon oath, deposes and says:

1. I am a member of the law firm of Carey Perkins LLP, counsel of record for Defendant in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. Attached hereto as **Exhibit A** is a true and accurate copy of the Last Will and Testament of Gordon Lanham, which we obtained from the court file of *In the Matter of the Estate of Gordon Thomas Lanham*, Gem County Case No. CV2013-886.

3. Attached hereto as **Exhibit B** is a certified copy of Keith Lanham's Petition for Removal of Personal Representative and for Declaration of Intestacy and Other Relief from the court file of *In the Matter of the Estate of Gordon Thomas Lanham*, Gem County Case No. CV2013-886.

4. Attached hereto as **Exhibit C** is a certified copy of Memorandum in Support of Cross Motion for Summary Judgment and Motion to Dismiss from the court file of *In the Matter of the Estate of Gordon Thomas Lanham*, Gem County Case No. CV2013-886. Exhibit 3 to the Memorandum is an Affidavit of Keith Lanham dated May 22, 2014.

FURTHER your Affiant saith not.

SAMANTHA L. LUNDBERG

SUBSCRIBED AND SWORN to before me this 6 day of May, 2016.

(SEAL)

MELANIE S. HILL
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise
Commission expires Sept. 02, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of May, 2016, I served a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION TO DISMISS by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen B. Ellis Ellis Law, PLLC 12639 W. Explorer Drive, Suite 140 Boise, Idaho 83713 Telephone (208) 345-7832	[X] [ ] [ ] [ ]	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile (208) 345-9564

Samantha L. Lundberg

ALLEN B. ELLIS
ELLIS LAW, PLLC
12639 W. Explorer Drive, Suite 140
Boise, Idaho 83713
208/345-7832 (Tel)
208/345-9564 (Fax)
ISB No. 1626

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM and KEITH C. LANHAM, Plaintiffs, v. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-2016-8252 DECLARATION OF ALLEN B. ELLIS

I, Allen B. Ellis, pursuant to I.R.C.P. 7(d) and I.C. § 9-1406, declare as follows:

Attached hereto as exhibits are true and correct copies of the following documents:

Document	**Exhibit No.**
Deed to Joseph	1
Fleenor's Memorandum in Support of Mtn. for SJ	2
Callahan's Memorandum in Support of Cross Mtn. for SJ	3

Document	Exhibit No.
Fleenor's Motion for Reconsideration	4
Findings of Fact and Conclusions of Law	5
Judgment	6
Notice of Appeal	7
Memorandum Re: Appeal of Attorney Fee Award	8
Ellis summary of audio disc received from Keith Lanham	9
Inventory	10
Amended Opinion	11
Notice of Withdrawal of Petition for Removal of Personal Representative	12

Exhibit No. 9 was prepared by me while listening to the audio disc of the decedent Gordon Lanham's verbal narrative. The 2011 entries (except January 7) are my accurate paraphrasing of each entry. The Will, dated February 19, 2011, appears to be an accurate transcription of the dictation made upon multiple dates, commencing November 6, 2010 and ending January 7, 2011. Paragraph 11 of the Will which names Judd Lanham as the "executor" is not included in the dictation.

I declare under penalty of perjury pursuant to the laws of the State of Idaho that the foregoing is true and correct.

Dated this 13th day of June, 2016.

Allen B. Ellis
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 13th day of June, 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Richard L. Stubbs
Samantha L. Lundberg
Carey Perkins, LLP
300 N. 6th Street, Ste. 200.
Boise, Idaho 83702

_____ U.S. Mail, postage prepaid
__X__ Hand delivery
_____ Overnight delivery
_____ Facsimile (345-8660)

Allen B. Ellis

INSTRU. NO. 294756
PAGES 1 OF 2

Instrument # 294756
EMMETT, GEM, IDAHO
11-5-2013 03:11:08 No. of Pages: 2
Recorded for : LAW OFFICE OF NANCY CALLAHAN
SHELLY TILTON Fee: 13.00
Ex-Officio Recorder Deputy
Index to: DEED

This Deed is made on this 5th day of November, 2013, between the Grantor Gordon Thomas Lanham of 3555 Butte Road, Emmett, Idaho 83617 and the Grantee Beneficiary Joseph "Joe" Lanham of 1457 E. Park Street, Emmett, Idaho 83617.

For good and valuable consideration paid by the Grantee Beneficiary, the receipt of which is hereby acknowledged, the Grantor does transfer and convey the following described property, subject to payment of any mortgage or other encumbrance thereon, to the Grantee Beneficiary effective on the Grantor's death:

Property Address: 3555 Butte Rd, Emmett, Idaho 83617

Legal Description: Attached Exhibit A

The Grantor reserves a life estate for himself during the Grantor's lifetime coupled with an unrestricted power to convey during the Grantor's lifetime, which includes the power to sell, gift, mortgage, lease and otherwise dispose of the property, and to retain the proceeds from the conveyance.

EXECUTED this 5th day of November, 2013

Grantor Name: Gordon Thomas Lanham

Grantor Signature: Gordon Thomas Lanham

STATE OF IDAHO)
COUNTY OF GEM)

On this day, personally appeared before me, Gordon Thomas Lanham, known to be the person described in and who executed this instrument, and acknowledged that he signed the same as his voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed on this 5th day of November, 2013.

NANCY CALLAHAN NOTARY PUBLIC STATE OF IDAHO

Notary's Public Signature Nancy Callahan
Residing at Sweet Idaho
My commission expires 12/19/2013.

AMENDED TRANSFER ON DEATH DEED- 1 of 2

EXHIBIT 1

A tract of land in the NW 1/4 NE 1/4, Section 10, Twp. 7 N., R.1 W., B.M., Gem County, Idaho, more particularly described as follows: Starting at the SE corner of the NW 1/4 NE 1/4, Section 10, Twp. 7 N., R.1 W., B.M., run North 460 feet; thence N. 49° 59' W. 550 feet; thence N. 4° 24' W. 830 feet; thence S. 79° 16'W. 875 feet to the West side of NW 1/4 NE 1/4, Sec. 10, Twp. 7 N. R. 1 W., B.M.; thence South 1271 feet to the Southwest corner of the NW 1/4 NE 1/4, said Section 10; thence S. 89° 50' E. 1320 feet to the true point of beginning. Including all water and ditch rights appurtenant thereto or used in connection therewith. Subject to easements, rights of ways, reservations and exceptions, if any.

Together with the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

Exhibit A

Douglas E. Fleenor ISBN 7989
Attorney & Counselor at Law
702 W. Idaho Street, Suite 1100
Boise, ID 83702
208-472-8846
208-947-5910 fax

Attorney for Petitioner, Thomas E. Lanham

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of GORDON THOMAS LANHAM, Deceased.	Case No. CV 2013-886 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW the Petitioner, Thomas E. Lanham, by and through his attorney, Douglas E. Fleenor, and submits his Memorandum in Support of Motion For Summary Judgment.

Petitioner seeks summary judgment declaring that property of the decedent passed intestate to the decedent's heirs for the reason that the Last Will and Testament of the decedent fails to dispose of all of decedent's property.

FACTS

The personal representative filed a purported Last Will and Testament of the above named decedent dated January 19, 2011.

Decedent's Last Will and Testament fails to make any dispositive provisions or give direction regarding the residue of his estate.

In paragraph four on page two, the Will states, "I want [Judd] to be able to distribute my property and my personal effects in any way that he sees fit and I will try to put all the wording

about the personal effects." Then again in the last paragraph, the Will reiterates, "I want [Judd} to be able to distribute my property and my personal effects as stated in my Last Will and Testament."

Page 3 of the Will contains the only possible devise, stating "...I gotta $3,000 sheep head that Judd can hang up in his cabin if he wants to."

The remainder of the Will discusses the ownership of certain property located at his residence.

STANDARD OF REVIEW

Summary judgment is appropriate with the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Idaho Rules of Civil Procedure 56(c). Failure of a party to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party bears the burden of proof entitles the moving party to summary judgment as a matter of law. The Idaho Supreme Court has thoroughly addressed the standards governing motions for summary judgment.

When considering a motion for summary judgment, the Court is generally required to liberally construe the record in the light most favorable to the party opposing the motions, drawing all reasonable inferences and conclusions in that party's favor. *Construction Management Systems, Inc. v. Assurance Co. of America,* 135 Idaho 680, 682, 23 P.3d 142, 144 (2001). However, Rule 56(3) requires the non-moving party to go beyond pleadings through affidavit, depositions, etc., to demonstrate that there are genuine issue of material facts, *Doe v. Durischi,* 110 Idaho 466, 716 P.2d 1238 (1986). If the non-moving party fails to do so, then the moving party is entitled to summary

judgment as a matter of law. *Id.* at 46, 716 P.2d at 1241; *see also Sparks v. St. Lukes Reg. Medical Ctr. Ltd.*, 115 Idaho 505, 768 P.2d 768 (1988).

ARGUMENT

Idaho has adopted of the Uniform Probate Code, which allows decedents to pass their property upon death through a validly executed Will.

A will should be interpreted, if possible, in such manner as to prevent intestacy when it evinces an intention to dispose of the entire estate. *In re Corwin's Estate*, 86 Idaho 1, 6, 383 P.2d 339, 341 (1963).

However, a devisee must be identified so that the courts can be certain that the testator's intents and purposes are being carried out. *Yribar v. Fitzpatrick*, 91 Idaho 105, 108, 416 P.2d 164, 167 (1966), quoting 2A Bogert, Trusts and Trustees, pg. 18, § 363.

In order to avoid intestacy, either partial or complete, the court is not permitted to place on the will any construction not expressed in it, and which is based on supposition as to the intention of the testator in the disposition of his estate. *In re Corwin's Estate*, 86 Idaho 1, 5, 383 P.2d 339, 341 (1963); *In re Hoytema's Estate,* 180 Cal. 430, 181 P. 645; *In re Beldon's Estate,* 11 Cal.2d 108, 77 P.2d 1052; 95 C.J.S. Wills § 615c.

Idaho statutes authorize a person to devise or bequeath his property, but it does not permit him to delegate to another the power to make such disposition for him. *Hedin v. Westdala Lutheran Church*, 59 Idaho 241, 250, 81 P.2d 741, 745 (1938). Such testamentary efforts have been likened unto powers of attorney to make wills, which the law does not permit. *Id.*

Each of the above cases held that a devise fails when a devisee is not designated with sufficient legal certainty. Examples of failed devises included a gift to any charitable organization chosen by a spouse (*Hedin*), devising the residue to any worthy charity selected by

the executor (*Yribar*), and a failure to dispose of half the estate (*Corwin*). Without a defined devisee, the court cannot ascertain or enforce a decedent's intent.

Idaho Statutes also state that any part of the estate of a decedent not effectively disposed of by his will passes to his heirs. I.C. §15-2-101. In addition, if any devise fails for any reason, it becomes part of the residue. I.C. § 15-2-606.

When a devise fails and the will lacks a residuary clause, the residue passes through intestate succession. *In re Corwin's Estate*, 86 Idaho 1, 5, 383 P.2d 339, 341 (1963).

In this case, even if the Will is valid, the decedent clearly failed to name devisees for his property. Therefore, as a matter of law, decedent's entire estate, with the possible exception of one specific devise, passes to his heirs by intestate succession pursuant to Chapter 2, Title 15 of the Idaho Code. Therefore, Petitioner is entitled to summary judgment on this issue.

CONCLUSION

Based on the foregoing, summary judgment should be granted in favor of Petitioner, finding the property of decedent passes to his heirs by intestate succession.

DATED this 23 day of April, 2014.

Douglas E. Fleenor
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 23rd day of April 2014, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Nancy Callahan
101 Canal Street
Emmett, ID 83617

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X Fax 208-365-1646
__ By Hand

William F. Lee
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Attorneys for Personal Representative

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	)	CASE NO. CV2013-886
	)	
	)	MEMORANDUM IN SUPPORT
GORDON THOMAS LANHAM,	)	OF CROSS MOTION FOR
	)	SUMMARY JUDGMENT AND
	)	MOTION TO DISMISS
Deceased.	)	
	)	

This memorandum is respectfully submitted to the Court in support of the Personal Representative's CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THOMAS EVERETT LANHAM'S MOTION FOR SUMMARY JUDGMENT.

Facts

Gordon Thomas Lanham executed a Last Will and Testament on January 19, 2011 naming his cousin, Judd Lanham executor giving him Power of Attorney over all of his personal and real property. The Last

Will and Testament of Gordon Thomas Lanham specifically provided for his sons Thomas Lanham and Keith Lanham to each receive a dollar and a bed made by their grandfather. The children of Keith Lanham were also specifically disinherited. The Last Will and Testament was transcribed from a recording made by the testator over a period of time.

On or about November 19, 2013 the testator executed a Transfer on Death Deed naming Petitioner's son, Joe Lanham, beneficiary, subject to payment of a mortgage to his former girlfriend and his brother Rex Lanham Jr.'s ex-wife, Linda Louise Andrews Lanham(aka) Linda Louise Andrews, . Gordon Thomas Lanham died on December 5, 2013. The original Will was filed with the Court on December 20, 2013 and Judd Lanham was informally appointed personal representative.

On January 8, 2014, Thomas Everett Lanham, a son, filed pro se an "Application to Attest Personal Representative" in the probate case with a claim that the will was not valid and that the personal representative was not qualified. On January 13, 2014, Keith Lanham, by and through his attorney William F. Lee filed a Petition to Remove Personal Representative with claims contesting the validity of the will and removal of the personal representative. The matters were set for hearing on January 21, 2014.

On or about January 15, 2014, the personal representative attempted to satisfy the mortgage to Linda Louise Andrews Lanham in

the amount of $54,625.00 from funds left to the personal representative in a POD account. He was verbally instructed by the decedent prior to his death that Joe Lanham would take the ranch free and clear of any encumbrances. Linda Andrews Lanham refused to accept payment of the mortgage.

On January 21, 2014, Thomas Everett Lanham, pro se, and Keith Lanham with his attorney, William F. Lee, were present in Court in the probate case. Judd Lanham was present with counsel. Also present were the two witnesses to the decedent's Will, Rebecca Clift, notary, Cathy Gillihan, sister of the decedent, and other family members. This Court advised the parties that two matters were before the Court; the issue of removal of the personal representative and the validity of the Will. The Court advised the parties that it was not inclined to remove the personal representative and that the matters concerning the construction of the will were continued for a half day trial on April 2, 2014.

On March 5, 2014 the Personal Representative and Joe Lanham filed a Quiet Title action in Gem County Case No. 2014-185 due to Linda Andrews' refusal to accept satisfaction of the mortgage.

On March 24, 2014 Attorney Fleenor entered an appearance in this case on behalf of Thomas Everett Lanham in the probate case and in the quiet title action on behalf of Linda Louise Andrews Lanham. In the

probate case he filed another Petition for Order Removing Personal Representative, Construing Will and Determining Heirs and a Petition of Order Restraining Personal Representative on behalf of Thomas Everett Lanham.

On March 28, 2014 the personal representative, Judd Lanham, filed his affidavit concerning the audio recording of the decedent which was the basis for the Will in contest and because the recording included additional instruction to the personal representative for distribution of his personal property.

On March 28, 2014, William F. Lee, on behalf of Keith Lanham, withdrew his Petition to Remove Personal Representative and Keith's claim contesting the validity of the will.

On April 2, 2014, Thomas Everett Lanham or his attorney failed to appear for the Court trial to construe or determine the validity of the Will, a trial that was pending since January 21, 2014.

On April 3, 2014, Thomas E. Lanham appeared with his counsel, Douglas Fleenor, for hearing on their Petition for Order Removing Personal Representative, Construing Will and Determining Heirs and a Petition of Order Restraining Personal Representative. The Court having reviewed the record and arguments of counsel denied the Petition for Order Removing Personal Representative and further denied the Petition for Order Restraining Personal Representative. The Court awarded the

estate attorney's fees.

On April 9, 2014 Attorney Fleenor filed an Answer and Counterclaim in the quiet title action alleging the deed transferring the ranch to Joe Lanham was void and the ranch should be included in the estate of Gordon Thomas Lanham. Linda Louis Andrews further claimed that the decedent failed to make any principle payments on the December 17, 2002 mortgage entitling her to $137,369.46. Paragraph 6 of the Counterclaim alleges that:

"On August 19, 2004, Gordon Thomas Lanham coerced Linda Lanham into signing a "Mortgage Payment", by threatening to expose and distribute personal, private and revealing photographs of Linda Lanham. The purported amount of the interest payment was $23,400.00."

Paragraphs 8 and 9 further allege:

"That on December 11, 2006, Gordon Thomas Lanham fraudulently caused Linda Lanham to enter into an accord and satisfaction agreement by promising her payment of cash in the amount to $50,000. The accord and satisfaction consisted of Linda Lanham signing a Satisfaction of Mortgage for the December 17, 2002 Mortgage, in exchange for Gordon Thomas Lanham paying Linda Lanham $50,000 in cash and executing a new Promissory Note and Mortgage in the amount of $50,000 bearing interest at the rate of 3% annum. Upon obtaining Linda Lanham's signatures, Gordon Thomas Lanham left the premises without paying Linda Lanham any of the promised amounts."

On April 21, 2014 the personal representative and Joe Lanham filed a reply to Linda Andrew's counterclaim alleging any claims of fraud made by Linda Andrews is barred by the statute of limitations and the only amount due to Linda Andrews is $54,625.00.

On about April 21, 2014, an estate check in the amount of

$54,625.00 was sent to Mr. Fleenor and Linda Louise Andrews Lanham.

On April 23, 2014, Attorney Fleenor filed a Motion for Summary Judgment in Gem County Case No.2014-187 on behalf of Linda Louise Andrews Lanham on the issue that the Deed to Joe Lanham is void and claims that the ranch should be included in the decedent's estate. On that same day Attorney Fleenor filed a Motion for Summary Judgment in this probate case on behalf of Thomas Everett Lanham on the issue that the Will fails to make any dispositive provisions or give direction regarding the residue of his father's estate and should pass intestate to decedent's heirs.

ARGUMENT

The Last Will and Testament of Gordon Thomas Lanham clearly and unambiguously and for independent reason, specifically bequeathed that his sons, Thomas Everett Lanham and Keith Colby Lanham, each receive one dollar and a bed that there grandfather made for them each as children be returned to them, with the intent that his sons take nothing from his estate. The will also specifically states that the children of Keith Colby Lanham would receive nothing from his estate.

On the first page of the will Gordon Thomas Lanham states that:

"This is a new day. It's the 29th of November. Thanksgiving is over and I just wanted to add to this program that my son, Thomas Everett Lanham, 48 years old, has already been given all that he needs to have and that I am going to leave $1 (sic) more dollar against whatever is

legal to him and then he is going to be on his own."

On Page 2 paragraph 1 the Will states:

"It's a new day and it's snowing. It's 1st December 2010. It's the first snow out back. I am not really looking forward to it,....but anyway, I want to go on about my son, Keith Colby Lanham and his wife, Amy Lanham, that I am going to try to write it down or leave it in this recording that... what I leave them is going to be $1 because in my estate I don't want him to be able to sell and profit off his alcoholism or drugs....

Track 7 and 8 of the audio recording previously submitted allows one to hear this decision he made to disinherit his sons in the decedent's own words.

Track 8 of the audio recording made by the decedent (the entry dated March 19, 2011) on the CD previously submitted to the Court, clearly and unambiguously instructed that the lots at Big Creek property were to be distributed as follows:

"My plans are to leave that 27 acres on the east side of that Big Creek Property to Jamie Gillihan, my sister's only son, and I want to plan for leaving the 20 acres on the west side to my grandson Joseph Lanham and my other grandson Thomas Robert John Lanham and he is only eighteen and Joe is 21 so I don't know how that will work on a deed etc. However that works, but anyway, I'm working on what I am going to do with this house and 34 acres because of the $50,000 mortgage that Lizzie has on it, I'm thinking that Jamie can pay her mortgage for his 27" acres ..."

The Court should take judicial notice of the quiet title action concerning the decedent's real property, Gem County Case No. CV2014-187. In that case the issue is payment of the "$50,000 mortgage that Lizzie has on it", her counterclaim states that she is entitled to

$137,369.49, her claim the deed intended to gift the ranch to Joe Lanham is void, and claiming that the ranch should be included in this estate case, presumably as part of the residual estate. Then in this case, Thomas Everett is challenging the validity of the will to claim an intestate portion of the residual estate.

Trial courts must determine the admissibility of evidence as a "threshold question" to be answered before addressing the merits of motions for summary judgment. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778,784, 839 P.2d 1192, 1198 (1992), *Ryan v Beisner*, 123 Idaho at 45, 844 P.2d at 27 (Ct.App. 1992), Gem State Ins. Co. v Hutchinson, 145 Idaho 10, 175 P.2d.172(2007), *Montgomery v Montgomery*, 147 Idaho 1 at 6 (Idaho 2009).

When considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. Petricevich v Salmon River Canal,Co., 92 Idaho 865-,869, 452 P.2d 362,366 (1969) I.R.C.P. 56(e).

In addressing the evidentiary issues raised concerning the statements attributed to Gordon Thomas Lanham on the CD recording concerning the distribution of his estate, and the Affidavits of Catherine Lanham Gillihan, Judd Lanham and Keith Lanham inform the court of the decedent's reasons and intent to completely disinherit

remaining property after his specific bequests would be personal property items to be distributed in-kind, if possible.

The intended beneficiaries of this estate are the sons of Thomas Everett Lanham, namely Joseph "Joe" Lanham and Robert "Robby" Lanham.

Conclusion

Based upon the foregoing argument and the evidence submitted herewith, the Court should dismiss Thomas Everett Lanham's claim, find that Gordon Thomas Lanham fully disposed of his estate in his will and his audio recordings and the personal property remaining in the decedent's estate should be distributed by the personal representative at his discretion for the reasons set forth herein and as intended by Gordon Thomas Lanham. Further, that the Court should order that Thomas Everett Lanham reimburse the estate the attorney's fees incurred herein.

Dated this 2nd day of May 2014.

Nancy L. Callahan,
Attorneys for Personal Representative

Douglas E. Fleenor ISBN 7989
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Attorney for Petitioner, Thomas E. Lanham

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of GORDON THOMAS LANHAM, Deceased.	Case No. CV 2013-886 MOTION FOR RECONSIDERATION

COMES NOW, the Petitioner, Thomas E. Lanham, by and through his attorney of record, Douglas E. Fleenor, and moves this Court to reconsider its ruling on his Motion for Summary Judgment.

The deceased, Gordon Thomas Lanham, left a Will naming his cousin Judd Max Lanham as Personal Representative, and stating that his two sons, Thomas and Keith were each to receive one dollar and a bed. However, the Will fails to dispose of all of decedent's property. Thus, any property not disposed of by the Will, passes through intestate succession according to Idaho's probate statutes.

DISPOSITIVE PROVISIONS

Paragraph 1 of the Will is simple exordium clause, where the testator identifies himself.

In Paragraph 2, the testator states that he has children and grandchildren, and states that he is going to make Judd Max his executor and give him Power of attorney over his property.

In Paragraph 3, the testator names his two sons, identifies deeds and some personal

EXHIBIT 4

property.

In Paragraph 4, the testator states that Judd Max is his executor and gives him Power of Attorney, "now and even after I am dead." Testator states that he wants Judd to be able to distribute property "any way that he sees fit." Testator also states he has property in Big Creek Idaho.

In Paragraph 5, Testator states he is leaving one dollar to his son, Tom.

In Paragraph 6, which begins page two of the Will, the Testator leaves one dollar to his other son, Keith and Keith's heirs.

In Paragraph 7, the Testator discusses property that belonged to Linda Lanham (or her son, Todd), and property that belonged to the Testator. The Testator states that, "I haven't decided where to disperse of it lately."

In Paragraph 8, beginning on the bottom of page two and continuing on page three, the Testator discusses property that belonged to his sister, Kathy (and her family), and states that Kathy can disperse them with Judd's help. The Testator also discusses his personal property, including books and an antique cabinet, and states that Kathy and Judd can "sort thru some of that stuff however they want." Testator also identifies an antique table and chairs, and antique rocker that belonged to "Lizzie," and an antique radio. Testator then states he has guns, and that a bed belongs to Keith and another bed belongs to Tom. Testator identifies a sand painting that belongs to "Lizzie" and a "$3,000 sheep head that Judd can hang up in his cabin." Testator then states that there is property in his safe that Judd can "disperse of how ever he wants."

In Paragraph 9, the Testator discusses the 47 acres in Big Creek Idaho and states that he was to give "½ to one person and ½ to another." Testator then states that he has picture, furniture and household good, and owes a mortgage to Linda Andrews. Testator identifies checks, cash,

coins, and guns in a safe.

In Paragraph 10, on page four, the Testator states that he received a receipt for money owed on a $50,000 mortgage, and states that the guns could be sold to pay part of the mortgage off.

In Paragraph 11, the Testator again names Judd Max Lanham as his executor and gives him Power of Attorney. Testator states again that he want Judd to be able to distribute his property as stated in his Will.

In summary, the Testator names Judd Max Lanham as his executor (paras 2, 4, and 11) and states that he wants Judd to have power of attorney (paras, 2, 4, and 11) and for Judd to distribute his property as he sees fit (paras 4, 8) or as stated in the Will (para 11).

Testator then disposes of one dollar to each of his two sons, Tom and Keith (paras 5 and 6).

Testator identifies personal property belonging to other people: Linda (para 7), Kathy, Lizzie, Keith, & Tom (para 8). This identification of ownership could be interpreted as dispositions to these people.

Testator also allows Judd to hang a sheep head in his cabin (para 8), which is likely disposition of the sheep head to Judd.

Testator also states that his guns "can be sold" to pay of a $50,000 mortgage (para 10), which is likely a precatory statement, rather than a command.

Besides the dollar to each son, the personal property belonging to other persons, and the sheep head, Testator failed to dispose of any other property in his Will. Although Testator identifies some of his property, he does not state how to dispose of it (paras 3, 7, 8, and 9). Further, Testator identifies property and states he does not know how he wants to dispose of it (paras 7 & 9).

Besides Judd's authority, Testator also allows Kathy to decide where certain of his

personal property will go, including plates, china, coffee grinding machine, and tables (para 8).

Finally, this Court may interpret the last two sentences of paragraph 8 as giving the content of the safe Judd. However, Testator later directs the guns in the safe to be sold to pay the mortgage (para 10).

At best, the Will only disposes of the aforementioned personal property. By its terms, the Will does not dispose of any of Testator's real property, banking accounts, or accounts receivable,. According to the Inventory filed by the Personal Representative, these assets have a combined value of more than $300,000. Since the Testator did not dispose of all his property via his Will, "particularly in the absence of a residuary clause, then the omitted property must descend according to the laws of succession. I.C. §§ 14-102 and 14-103; Page on Wills, Vol. 2, § 927; 95 C.J.S. Wills § 615 c.; *In re Peabody's Estate,* 21 Cal.App.2d 690, 70 P.2d 249." *In re Corwin's Estate*, 86 Idaho 1, 5, 383 P.2d 339, 341 (1963). The issue in Corwin's Estate was nearly identical to this case. The decedent had disposed of part of his property through his will, but failed to dispose of all of his property. The Idaho Supreme Court ruled that property not disposed of through the will passed through the laws of succession. *Id.* Since the Testator in our case has not disposed of all of his property through his Will, this Court should determine which property remains to pass to Testator's heirs through intestate succession.

PAROLE EVIDENCE

Respondents argue, without citing any known law, that this Court should consider parole evidence when determining the intent of the Testator. However, as cited by the Petitioner during oral arguments, Idaho Law does not allow for parole evidence to be considered when determining a testator's intent. The Idaho Supreme court has stated:

> Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator

> may have intended, although though [sic] not expressed.' In re Hoytema's Estate, supra. See also *In re Tarrant's Estate,* 38 Cal.2d 42, 237 P.2d 505; *In re Searl's Estate,* 29 Wash.2d 230, 186 P.2d 913, 173 A.L.R. 1247; 2 Schouler on Wills, Executors and Administrators, (6th ed.), § 862, p. 980. Courts cannot speculate as to what was in the mind of the testator, what he intended to do, or what he intended to declare in his will, but our task herein is to determine what was meant by what the testatrix did declare in her will by the words she actually used therein. Presumptions and auxiliary rules applicable to probate matters are all subordinate to the cardinal rule just enunciated.' *In re Watson's Estate,* 32 Cal.App.2d 594, 90 P.2d 349. See also *In re Maloney's Estate,* 27 Cal.App.2d 532, 80 P.2d 998; *In re Klewer's Estate,* 124 Cal.App.2d 219, 268 P.2d 544, 41 A.L.R.2d 941; *Blatt v. Blatt,* 79 Colo. 57, 243 P. 1099, 57 A.L.R. 221; *Chicago Daily News Fresh Air Fund v. Kerner,* 305 Ill.App. 237, 27 N.E.2d 310.

In re Corwin's Estate, 86 Idaho 1, 6, 383 P.2d 339, 342 (1963).

Again, Corwin's estate is very similar to our case. In Corwin, testimony was presented as to the testator's intent in distributing his property which did not pass via his will. The Court ruled that parole testimony of testator's intent was not allowed, only the words actually used by the testator in his will could be used in determining his intent. *Id.* Likewise, any parole evidence offered by Respondents should not be considered by this Court. Only the actual words in the Will, which conform to the formalities required when making a will, should be considered when determining Testator's intent.

POWER OF ATTORNEY

Since the Will does not dispose of the bulk of Testator's property, this Court may be tempted to recognize Testator's statements that Judd or Kathy be able to dispose of his assets as they saw fit. Respondent's did not argue or cite any law which would allow such a provision in either their brief or in oral arguments. On the contrary, Idaho law specifically prohibits a Testator from disposing of his assets in this fashion. Idaho statutes authorize a person to devise or bequeath his property, but it does not permit him to delegate to another the power to make such

disposition for him. *Hedin v. Westdala Lutheran Church*, 59 Idaho 241, 250, 81 P.2d 741, 745 (1938). *Yribar v. Fitzpatrick,* 91 Idaho 105, 108, 416 P.2d 164, 167 (1966). In *Hedin* and *Yriba*, the testators directed their executors to give assets to worthy charities. In *Hedin*, the executor was decedent's spouse, who would certainly know his intentions. However, the Court in both cases ruled such dispositions did not distribute assets according the intent of the testator, but only as to the intent of other persons, and therefore were disallowed, *Id.* Our case is obviously comparable. The Testator states that Judd or Kathy can pick how to distribute his property, not how he would distribute his property. As such, no court could ever enforce whether Testator's intent was followed. And as ruled by the Idaho Supreme Court in *Hedin* and *Yriba*, this type of distribution is not allowed.

Petitioner respectfully requests this Court reconsider its opinion that the Will disposes of all of Testator's property, and that parole evidence can be used to ascertain the Testator's intent in disposing of his property.

DATED this 20th day of June, 2014.

Douglas E. Pleenor
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 20 day of June 2014, I caused a true and correct copy of the foregoing to be forwarded to the following person(s):

Nancy Callahan
101 Canal Street
Emmett, ID 83617

__ U.S. Mail
__ Fax 208-365-1646
__ By Hand

Douglas E. Pleenor

FILED
10:15 A.M. P.M.
JUN 25 2014
SHELLY TILTON, CLERK
Laura Dodson DEPUTY

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Attorneys for Personal Representative

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	)	CASE NO. CV2013-886
	)	
	)	**FINDINGS OF FACT AND**
GORDON THOMAS LANHAM,	)	**CONCLUSIONS OF LAW**
	)	**ON MOTION AND CROSS-**
	)	**MOTION FOR SUMMARY**
Deceased.	)	**JUDGMENT**
	)	

THIS MATTER came before the Court June 20, 2014 on a Motion for Summary judgment filed by Claimant-Petitioner Thomas Everett Lanham and on a Cross-Motion for Summary Judgment filed by the Personal Representative, Judd Lanham. The Court considered the filings, affidavits and Memoranda submitted before the hearing, and considered oral arguments of counsel made at the hearing.

FINDINGS OF FACT

1. Decedent Gordon Thomas Lanham passed away December 5th, 2013, after long-declining health problems. In the time leading up to his death, decedent met with friends and family and his attorney and discussed his various kinds of assets and his intent for transferring them upon his death. Some of those people who participated in those discussions signed affidavits that were included in the record.

2. Decedent periodically dictated his thoughts into an audio recorder. That audio was transcribed and typed into the form of a will. Decedent signed the will before witnesses. Decedent's and the witnesses' signatures were notarized and that will was submitted for probate.

3. Decedent made additional recordings after he executed the will. The audio recordings made by decedent were part of the record before the Court as an exhibit to the Affidavit of Judd Lanham, the Personal Representative. The record also included affidavits from Keith Colby Lanham and Cathy Lanham Gillihan, submitted by the Personal Representative.

4. The Court finds no reason to doubt the validity of the will. From the affidavits and especially the audio recordings, it is clear that decedent Gordon Thomas Lanham possessed undiminished mental capacities at the time of he executed the will. He demonstrated a thorough grasp of the extent and nature of his assets. He also demonstrated a good grasp of his potential heirs, and his relationships with them and sound reasons for

treating each as he did. There is no evidence suggesting that anyone exercised undue influence or coercion over decedent. In fact, in spite of decedent's failing health and physical maladies, it appears he was a strong willed and independent thinker at the time he executed the will.[1]

5. Claimant Thomas Everett Lanham advanced several claims, but he failed to support his claims and arguments with one iota of credible, admissible evidence. Based upon the language of the will itself, the affidavits, the audio recordings and the entire record, the Court finds in favor of the Personal Representative on every factual dispute.

CONCLUSIONS OF LAW

1. The will of decedent Gordon Thomas Lanham is legal, valid, and binding.

2. Decedent's intent is sufficiently clear from the language of the will, particularly as bolstered and explained by contemporary audio recordings and the affidavits submitted, to allow administration and, if necessary, judicial enforcement. As to the claimant, Thomas Everett Lanham, decedent's intent is very clearly that claimant take by the will only one dollar ($1.00) and a bed and there is no lawful reason to frustrate decedent's intent.

---

1. The Court notes that a court trial had been scheduled for early April on the issue of the will's validity but that neither claimant, Thomas Everett Lanham, Jr., nor his attorney, Mr. Douglas Fleenor appeared at the time and date scheduled. The Personal Representative's request for costs and attorney fees is pending.

3. There are no issues of material fact remaining to be determined by the Court and the Personal Representative is entitled to judgment as a matter of law and the Court therefore **GRANTS** the Personal Representative's Cross-Motion for Summary Judgment.

ATTORNEY FESS AND COSTS

The issue of an award of costs and attorneys fees will be taken up at a future time and date.

SO ORDERED this 24th day of June, 2014.

Tyler D. Smith
Hon. Tyler D. Smith

CLERK'S CERTIFICATE OF SERVICE

The undersigned hereby certifies services of the foregoing FINDINGS AND CONCLUSIONS upon the following in the manner indicated.

[XX] Deposit in the U.S. Mail postage prepaid, addressed to:

Douglas Fleenor
Attorney For Claimant,
Thomas Everett Lanham
702 West Idaho Street, Suite 1100
Boise, Idaho 83702

[XX] Deposit in her Gem County Courthouse Mail basket:

Nancy Callahan
Attorney for Personal Representative,
Judd Lanham
Law Offices of Nancy L. Callahan.
101 Canal St.
Emmett, Idaho 83617

Service accomplished and this Certificate signed on this 25th day of June, 2014.

SHELLY TILTON

By Laura Dodson
Deputy Court Clerk

Nancy L. Callahan
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Attorneys for Personal Representative

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	)	CASE NO. CV2013-886
	)	
	)	**JUDGMENT**
GORDON THOMAS LANHAM,	)	
	)	
	)	
Deceased.	)	
	)	

THIS MATTER came before the Court June 20, 2014 on a Motion for Summary judgment filed by Claimant-Petitioner Thomas Everett Lanham and on a Cross-Motion for Summary Judgment filed by the Personal Representative, Judd Lanham. The Court considered the filings, affidavits and Memoranda submitted before the hearing, and considered oral arguments of counsel made at the hearing. The Court having entered written FINDINGS OF FACT AND CONCLUSIONS OF LAW, and having

announced in open Court the granting of the Personal Representative's Cross-Motion for Summary Judgment, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Claimant Thomas Everett Gordon take nothing by his Motion for Summary Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Personal Representative's Cross-Motion for Summary Judgment is granted and the Personal Representative may continue to administer the estate in accord with the Decedent's intent and according to law.

IT IS FURTHER ORDERED that consideration of an award of costs and fees is reserved for decision at a future time and date.

SO ORDERED this 24th day of June, 2014.

Tyler D. Smith
Hon. Tyler D. Smith

CLERK'S CERTIFICATE OF SERVICE

The undersigned hereby certifies services of the foregoing FINDINGS AND CONCLUSIONS upon the following in the manner indicated.

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Emmett, Idaho 83617

Service accomplished and this Certificate signed on this 25th day of June, 2014.

SHELLY TILTON

By Laura Dodson
Deputy Court Clerk

Douglas E. Fleenor ISBN 7989
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Attorney for Petitioner, Thomas E. Lanham

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of GORDON THOMAS LANHAM, Deceased.	Case No. CV 2013-886 NOTICE OF APPEAL

TO: THE ABOVE NAMED PLAINTIFF AND HIS ATTORNEY OF RECORD NOTICE IS HEREBY GIVEN THAT:

Petitioner, Thomas E. Lanham, appeals the Decision and Order of the Magistrate Court in this matter as follows:

1. Petitioner appeals from the Order of the Magistrate Court in and for the Third Judicial District of the State of Idaho in and for the County of Gem.

2. Petitioner makes this appeal to the District Court for the Third Judicial District.

3. Petitioner appeals the Magistrate's Order in this matter dated June 25, 2014 and entitled Findings of Fact, Conclusions of Law, and Judgment.

4. This appeal is taken upon matters of law.

5. The hearings in this matter were recorded. The tape recordings of the hearings are in the possession of the Clerk of the Court of Gem County.

6. Issues Appellant asserts on appeal will be stated in a Statement of Issues on Appeal which will be filed by Defendant pursuant to I.R.C.P. 83(f)(6), but which will include:

a. The Will of the Decedent is clear and plain. The intent of the Decedent should not be bolstered and explained by parole evidence

b. A plain reading of the Will establishes that the Decedent did not dispose of the residue of his estate.

c. Other issues as may be determined during the course of this appeal.

This appeal is taken pursuant to Rule 83, Idaho Rules of Civil Procedure.

DATED this 13th day of August, 2014.

Douglas E. Fleenor
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 13th day of June 2014, I caused a true and correct copy of the foregoing to be forwarded to the following person(s):

Nancy Callahan
101 Canal Street
Emmett, ID 83617

__ U.S. Mail
X Fax 208-365-1646
__ By Hand

Douglas E. Fleenor

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the matter of the estate of: Gordon Thomas Lanham, Thomas E. Lanham, Appellant, vs. Judd Lanham, personal representative for the estate of Gordon Thomas Lanham, Respondent.	Case No. CV-2013-886 MEMORANDUM RE: APPEAL OF ATTORNEY FEE AWARD

This matter is before the court on appeal from an order of the magistrate below awarding attorney fees in a probate case. The petitioner below and appellant on appeal, Thomas Lanham, is represented by Patrick J. Geile of Foley Freeman, Meridian. The personal representative of the estate and respondent on appeal, Judd Lanham, is represented by Nancy Callahan, Emmett. The matter has been fully briefed, no oral argument has been requested, and the time for requesting argument under the case scheduling order has now expired. The case is deemed submitted on the briefs without argument.

For the reasons stated below, the order of the magistrate is vacated, and the matter is remanded for further proceedings consistent with this opinion.

Facts and Background Proceedings

Gordon Thomas Lanham passed away on December 5, 2013. Judd Lanham (hereafter Judd), a cousin of the decedent, filed a petition for informal probate of will and appointment of personal representative, together with what was purported to be the decedent's last will, with the magistrate court on December 20, 2013. In due course, a statement of informal probate of will and an order designating Judd as the personal representative of the estate were issued.

On January 8, 2014, Thomas E. Lanham (hereafter Thomas), a son of the decedent, filed a *pro se* pleading contending the will was invalid and Judd was unqualified to serve as personal representative. On January 13, 2014, Keith Lanham (hereafter Keith), a son of the decedent, filed a petition through counsel also contending the will was invalid and seeking to remove Judd as personal representative. A hearing on the issues raised in both pleadings was set for January 21, 2014.

On January 21, 2014, a hearing was held. Thomas appeared *pro se* and Keith and Judd appeared with their respective counsel. Several family members and the witnesses to Gordon's will were also present. The magistrate judge noted there were two issues presently before the court: (1) the issue of removal of Judd as personal representative, and (2) the issue of the validity of the will. The court declined to remove Judd as personal representative at that time. The judge set the matter for a bench trial on April 2, 2014. The record indicates that a written notice of trial was prepared by the clerk at the time, with copies handed to everyone present at the hearing. A notice of service reflecting this service is in the file.

Thomas retained counsel, who appeared in the case for the first time on March 24, 2014, by filing a petition to temporarily restrain Judd's activity as personal representative, together with a new petition to remove Judd, determine the validity of the will, and determine Gordon's lawful heirs. These petitions were noticed for hearing April 3, 2014, the day after the bench trial was scheduled.

On March 28, 2014, Judd filed an affidavit averring that he had made available to each of the parties in the case a compilation of audio recordings of conversations Gordon and Judd had prior to Gordon's death regarding final distribution of Gordon's estate. Included in the audio recordings was a recording of the decedent stating how he wanted his property distributed. Apparently according to Judd's affidavit, this portion of the tape was transcribed and placed in will format, then signed by the decedent before witnesses, resulting in the transcription he had filed along with his petition for informal probate in December 2013.

On March 31, 2014, the attorney for Keith filed a notice of withdrawal of Keith's objection to the will and to Judd's appointment as personal representative.

On April 2, 2014, Judd and his counsel appeared for the bench trial, along with several witnesses. Thomas and his counsel failed to appear. The magistrate judge noted Thomas had set a hearing for the following day, and continued the matter to the next day. No other orders were entered.

On April 3, 2014 a hearing was held. Judd and Thomas, with counsel, appeared. The parties argued their respective positions on Thomas's petitions, and the magistrate judge, after reviewing the arguments and the record, ruled from the bench that he was denying the petitions filed by Thomas. No orders were entered on this ruling.

Thomas filed a motion for summary judgment on April 23, 2014, again contending the will was invalid and the residue of the estate should pass to Gordon's heirs under the laws of intestacy. The motion was not supported by affidavit, exhibit, or any other evidence, other than evidence previously entered. The estate filed a response, along with a counter motion for summary judgment, both supported by affidavits from Judd, Keith, and a sister of the decedent, as well as the previously submitted audio recordings.

On June 10, 2014, a hearing was held. The magistrate judge heard argument on the summary judgment motions, noted Thomas had put on no evidence in support of his position, and announced from the bench that he intended to grant the estate's motion for summary judgment and dismiss the motions filed by Thomas. Thomas filed a motion for reconsideration on June 20, 2014, apparently from the magistrate's oral rulings, as no written orders had been entered. The magistrate entered a written decision and order on summary judgment on June 25, 2014, granting the summary judgment of the personal representative, denying the motions filed by Thomas, and dismissing his petitions. This court later concluded that this order mooted the motion for reconsideration and constituted the final appealable order on the matter. The effect of these rulings was to continue the probate of the will under the administration of Judd.

On July 9, the estate filed a motion for attorney fees, requesting fees and costs pursuant to I.C. §§ 12-120, 12-121 and 12-123(2)(a), and I.R.C.P. 11 and 54(e), but not including I.C. § 15-8-208. Thomas filed an opposition on July 31, contending he had not brought claims "frivolously, unreasonably or without foundation," and arguing the requested fees were excessive.

On August 13, 2014, Thomas filed a notice of appeal to this court from the final order issued June 10, 2014. The appeal was filed more than 42 days after entry of the order appealed

from. This court dismissed the appeal on February 10, 2015, for lack of jurisdiction on the ground it had been untimely filed. This court notes than an appeal of this ruling has been filed with the Supreme Court.

The magistrate below addressed the estate's attorney fee motions in a memorandum decision on February 19, 2015. An attorney fee determination, the magistrate judge explained, would require resolution of the questions of: (1) which party had "prevailed," for purposes of the relevant statutory and rule provisions, and (2) whether the non-prevailing party "acted frivolously and without basis in fact or law."

With respect to the prevailing party question, the magistrate judge noted Thomas had failed to appear for the April 2, 2014, bench trial and could not point to "good cause or excusable neglect," had lost on his removal and restraint petitions, and had finally lost on all his claims on summary judgment. As a result, the magistrate judge concluded, the estate was clearly the prevailing party in the proceedings.

Turning to the frivolousness question, the magistrate ruled that Thomas's failure to appear for the trial on April second, his duplication of arguments already made and ruled upon, and his repeated "failure to present any evidence supporting his claims or in opposition of the motion made by the estate," compelled a conclusion that the claims against the estate "were frivolous and without foundation" and attorney fees were warranted. After considering the estate's itemization and the relevant Rule 54 factors, the magistrate judge awarded the estate $9,000 in fees.

On March 23, 2015, Thomas appealed this court's order dismissing the appeal to the appellate court. On the same day, he appealed the magistrate's award of attorney fees to this court.

On appeal here, Thomas contends the magistrate judge abused his discretion in awarding the estate $9,000 in attorney fees, by relying improperly on a statutory provision, I.C. § 15-8-208, not cited by the estate in its initial request, and by finding the requisite frivolous conduct. Further, Thomas maintains, the magistrate judge erred as a matter of law by issuing a decision on attorney fees within forty-two days of this court's dismissal of the prior appeal—a window in which, he theorizes, the proceeding should have been automatically stayed.

The estate responds by arguing the magistrate judge appropriately relied upon several applicable statutory provisions in making the award, acted within his discretion in finding the claims frivolous, and had the authority to issue an attorney fee decision even while the underlying disposition was subject to appeal. The estate requests attorney fees on appeal under I.R.C.P. 54, I.C. § 12-121 et seq., I.R.C.P. 11, I.A.R. 11.2, and I.C. § 15-8-208.

Scope and Standard of Review

The court reviews a magistrate's attorney fee award for abuse of discretion. *Thomas v. Madsen*, 142 Idaho 635, 639, 132 P.3d 392, 396 (2006). An award is said to have been within the magistrate's discretion under I.C. § 12–121 if the magistrate was "left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003).

Analysis

A. Applicability of Idaho Code § 15-8-208. The estate correctly points out that our appellate courts have "held in a variety of contexts that a correct ruling or order, based upon an incorrect theory, will nonetheless be upheld on appeal under the proper theory." *Fournier v. Fournier*, 125 Idaho 789, 791, 874 P.2d 600, 602 (Ct. App. 1994). Provided, as the *Fournier* court explained, "a statutory or contractual justification for an award of fees must be advanced

below by the party seeking such an award." *Id.* At a minimum, the *Fournier* court noted, due process requires that any theory selected on appeal as the "correct theory" upon which an attorney fee award may be based must have been "advanced at the trial level by the party seeking fees." *Id.* In this case, the arguments and references in the court below were all made with regard to an award of attorney fees for cause, based upon the argument that the proceedings were frivolous and without foundation. There was no reference to the basis of fees under the probate code, I.C. § 15-8-208; it was not mentioned in the pleadings, nor in argument.

B. Bases alleged for imposition of attorney fees. Idaho Code § 12-121 provides that "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties," subject to the condition that the provision "shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees." Rule 54, I.R.C.P., limits the application of I.C. § 12-121, directing that under this section of the code fees "may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." Idaho Code § 12-123 addresses an overlapping application, providing that "at any time prior to the commencement of the trial in a civil action or within twenty-one days after the entry of judgment in a civil action, the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct." Frivolous conduct, under that provision, is defined as "conduct of a party to a civil action or of his counsel of record" that "obviously serves merely to harass or maliciously injure another party to" the action, or "is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." I.C. § 12-123(b).

Interpreting those provisions in the past, our Idaho Supreme Court has explained the "entire course" of litigation "must be taken into account" in making an attorney fee determination, and "if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Phillips v. Blazier-Henry*, 154 Idaho 724, 731, 302 P.3d 349, 356 (2013). Recently, the Supreme Court has expressed concern that "a single, triable issue of fact may excuse a party from the aggregate of misconduct that necessitates or dominates the conduct of the lawsuit." *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 632, 329 P.3d 1072, 1080 (2014).

The *Maslen* court backed away from a strict application of the rule and recognized that an award of attorney fees under I.C. § 12-121 may still be appropriate if the court, in considering the entire course of litigation, is left with the conviction that the management of the case as a whole was frivolous or without foundation, notwithstanding the existence of an isolated legitimate issue. The Supreme Court in *Maslen* ruled that in such an instance, the court should apportion an attorney fee award, separating out and awarding attorney fees for those portions of the case found to be frivolous or without foundation, but not awarding fees for the portions of the case found to rest upon legitimate issues.

An award of attorney fees under I.C. § 12-121 is discretionary, but the discretion is not unfettered. The trial court is obligated to make specific findings of fact upon the elements of the case deemed to be frivolous or without foundation in order to support the award of fees. The problem with the instant case lies here; the court below advanced the conclusions that the circumstances were frivolous and without foundation, but without reference to specific facts to

support the conclusions. This might be accepted if the record was clear and the facts supporting the conclusions obvious. That is not the case here.

Here, the magistrate judge noted the combination of: (1) the failure to appear at the April 2, 2014, bench trial without explanation, (2) the failure to present any evidence supporting his claims, and (3) the failure to present any evidence resisting the estate's claims, all indicated that Thomas's claims against the estate were frivolous and without foundation.

The first item cannot stand. The failure to appear at a scheduled hearing, without more, is not sufficient to prove frivolous conduct, or that the proponent's case is without foundation. It is not an uncommon occurrence for a lawyer to miss a scheduled hearing through simple oversight or mistake. The matter did not get calendared, or the lawyer forgot to look, or the lawyer just forgot. None of these are excusable, and frequently the circumstances will put the lawyer in a significant predicament with regard to whatever issue was involved in the overlooked hearing. But, in the absence of evidence of repeated happenings or of a deliberate course of conduct, the circumstance of an isolated event of missing one hearing is not sufficient, standing alone, to support a conclusion that the case was frivolous nor is it evidence that the case that would have been advanced was without foundation.

In the instant case, the magistrate referred several times to the missed hearing, but without connecting it to any course of conduct or deliberate indifference or other showing that the circumstance was not an isolated instance of simple oversight. The magistrate's conclusion that the incident is evidence of frivolous conduct or that the case was without foundation is not supported. His connection of the occurrence to the findings of an entitlement for attorney fees under I.C. § 12-121 is error. Given that he stated several times that he was relying upon this circumstance in his final conclusion, the error is prejudicial and necessitates a remand.

In ruling on the sufficiency of Thomas's case, the magistrate appears to combine the second and third items. The magistrate discusses Thomas's motion for summary judgment and his defense of the motion filed by Judd together. In ruling on these issues, he held, "Although Thomas Lanham, Jr. made several claims and allegations, he failed to support those claims with *any* admissible evidence necessary to sustain his burden of proof." The problem here is there is no "burden of proof' in a summary judgment. The summary judgment motion rises or falls upon a showing, or lack thereof, based upon "the pleadings, depositions and admissions on file, together with the affidavits, if any," that there is no genuine issue as to any material fact. I.R.C.P. 56(c).

In a summary judgment proceeding, the term "burden of proof" only has meaning with reference to the existence, or the lack thereof, of a dispute over an issue of fact, and to the point that if there is any question over the issue, the party with the burden of proof must come forward with a showing that there are no disputes in the facts to be presented at trial. If an affidavit is submitted, it must be based on first-hand knowledge and contain admissible evidence. If the burden of proof is relevant to a summary judgment, it is as part of the ruling either that the party with the burden of proof has demonstrated that there are no facts in dispute to be proved at trial, or it is part of the ruling that the defending party has demonstrated that the facts claimed by the party with the burden of proof may not be found as claimed, thereby creating a dispute to be resolved at trial, and preventing a summary judgment.

It is not necessary under this construct that the defending party put up "admissible evidence" of anything; while a defending party may not rely upon mere denials, he may demonstrate that the evidence relied upon by the party with the burden of proof is not admissible. The contentions of the party with the burden of proof may not be legally sufficient, or

inadmissible as unfounded conclusions, as assuming facts not proved, as un-excepted hearsay, or for a variety of legal deficits preventing their admission at the summary judgment stage and making them matters for the trier of fact to resolve at trial. He may show this because of a legal insufficiency, because of inherent or judicially cognizable credibility problems, or because of foundational issues pertaining to admissibility. Or he may be able to point to specific evidence contained in the affidavits and other materials already in the record or as submitted by the opponent, and demonstrate that this evidence supplied elsewhere is sufficient to contravene the main evidence and raise issue of fact. The point here is that it does not have to be done by counter affidavit. Rule 56(e) has been construed to mean that when a counter-affidavit is submitted, it must be of evidentiary quality, based on first-hand knowledge and advancing admissible facts.

It is true that a defending party may not create an issue of fact by merely denying an averment of fact offered by the adverse party, but must specifically declare the counter-fact. But if the fact advanced is, itself, inadmissible because it is conclusory, or inherently problematic, or contains within it a legal hurdle requiring further foundation, or if the defending party suggests the existence of other evidence already in the record that demonstrates a foundational deficit or recognized objection that is not answered, that would suffice as a defense to having summary judgment entered against the party, even in the absence of a separate affidavit or counter-affidavit. Counsel may rely upon the affidavits and materials supplied by the opposing party.

The point is that on summary judgement it is not who presented the evidence or the issue, it is what is the state of the record after all such is considered; is there or is there not a dispute as to any material fact necessitating a trial?

In this case, the magistrate merely noted that "Thomas Lanham, Jr. filed no response to the estate's motion, as required by I.R.C.P. (56)(e)." Rule 56(e) says responsive showing may be by affidavit *or as otherwise provided.* This subpart of the rule does not absolutely require an affidavit—elsewhere in the rule it says the entire file may be considered in determining the existence/non-existence or disputed/non-disputed facts. However, here the magistrate seems to read this rule as saying there must be a counteraffidavit, or else.

Appellant argues that he demonstrated the existence of facts in dispute through other means. Neither the magistrate nor the appellant specify what this means. This court notes very broadly that the appellant, a son of the decedent, would be cut off almost entirely once the purported will is admitted to probate—the bequest in the will to Thomas was for $1.00 only. The will was prepared from a transcript of an audio recording—it is not clear whether an attorney was involved. The will was witnessed, but the capacity of the witnesses is not clear. If there was no will, Thomas would be entitled a share of the estate under the laws of intestacy. Further, as a son of the decedent, Thomas would be entitled to preference over the cousin as personal representative. None of this appears by affidavit, but all appears either by law with reference to the laws of intestacy, or by reference to the allegations in the petition for informal probate submitted by Judd. Until the summary judgment, there was no adjudication nor were there any specific findings by the magistrate on any of these items.

The statement of informal probate was not an adjudication. No definitive rulings were made at the January 21, 2014 hearing. It would seem that Thomas, as a questioning heir, is entitled to an adjudication that the will is the will, and that the cousin is entitled to letters of administration over any of the statutorily preferred heirs. From the record, it appears that Judd provided some information that would have been crucial to any determination in the form of

copies of the audio recordings to Keith and Thomas and their lawyers just before the April hearings. Keith decided to withdraw his objection; Thomas did not.

There is nothing in the record for these motions as to what these audio recordings were from the standpoint of their origination, reliability, or purpose. There is nothing to indicate what the foundation was in terms of how they were made, who made them, how they were maintained, and as to the accuracy of any of the contents. It appears these recordings were at least part of the foundation for the will, for the contention that the decedent was of sound mind and not acting under duress, for the decedent's decision in cutting off the sons, and for his decision to appoint the cousin as the personal representative.

There are some representations as to some of this, but no findings or conclusions from the court on any of it. Someone—it is not clear who—caused a portion of the audio recording to be typed up into a format of a will, and obtained the decedent's signature. It is not clear from this simple explanation that the decedent knew it was a will or intended it so. The burden of proof upon all of this, and particularly upon the admission of these tapes, would be upon Judd, not Thomas, at both the summary judgment stage and at trial.

All of this may actually have been submitted to the court below, but there are no findings by the magistrate on any of it, either in the ruling on summary judgment or in the ruling on attorney fees. Thomas may not have had any specific facts to offer to refute the implications of the materials offered by Judd, but he might have thought it sufficient to raise the issue and then cross examine the proponents on most of it. One would certainly think the custodian of the aural recordings would be subject to examination on the foundation—for if the foundation for these aural recordings was found lacking in any material respect, the entire case might have crumbled.

If there is substance to any of these legal deficiencies, Thomas would not be required to advance any counter evidence to sustain his defense of the summary judgment filed by Judd. The actual burden of proof is on Judd, and if it can be demonstrated that the evidence submitted by the proponent is lacking, or leaves any material issue for the trier of fact at trial, summary judgment should not be available. Since Judd would have the burden of proof upon the issue of the will, if there was a basis to find the evidence Judd was advancing presented an open question in any material aspect that might be found insufficient at trial to sustain his burden of proof, that would be a sound argument to present in defense of a summary judgment.

Thomas might be wrong in so relying. The magistrate apparently concluded the foundational evidence was sufficient. But all that can be gleaned from the magistrate's written findings is that Thomas was wrong, and just being wrong does not mean the position taken was frivolous or without foundation. *See, e.g., Auto. Club Ins. Co. v. Jackson,* 124 Idaho 874, 879, 865 P.2d 965, 970 (1993) ("An action is not deemed to have been brought frivolously simply because it ultimately fails."); *Lieurance-Ross v. Ross,* 142 Idaho 536, 542, 129 P.3d 1285, 1291 (Ct. App. 2006) (emphasizing that "failure to present a persuasive custody case did not render" pursuit of the case "frivolous and unreasonable."). Given the open questions that come to mind because of the unusual circumstances surrounding the manner in which the will was drafted, perhaps raising an issue as to the competence and possibility of duress of the decedent, perhaps as to questions as to the legal sufficiency of the will, given further how it was prepared and witnessed, the hearsay nature of the central evidence, and the foundational issues over the aural recordings, I do not believe it can be concluded that resting on an expectation that the foundation for some essential part of some of this might have been found lacking, can be said to be frivolous or without foundation, without specific findings to resolve these unanswered questions.

This is not to conclude that the magistrate was in error; this is only to conclude the magistrate's findings are insufficient to support his conclusion. *See, e.g., McGrew*, 139 Idaho at 562 ("Although an award of attorney fees under the statute is discretionary, the award must be supported by findings, and those findings, in turn, must be supported by the record."). The court below fastens on the failure to appear at the April 2 hearing and the failure to affirmatively advance evidence by affidavit. Standing alone or taken together, these conclusions are insufficient to demonstrate frivolousness or lack of foundation. There may well be additional details in the record and other indicia from which further findings can be drawn. But on the record before this court, the bare conclusions cannot be sustained. *See Severson v. Hermann*, 116 Idaho 497, 499, 777 P.2d 269, 271 (1989) ("[O]n review, we are left with nothing but a bare conclusion lacking the requisite underpinning . . . ."). Therefore, the matter will be remanded for reconsideration by the magistrate consistent with this opinion, and for the entry of properly detailed and specific findings of fact, whichever way the magistrate finally concludes, to support the conclusions reached.

C. Ruling on attorney fees with appeal pending. There is no merit to the argument that the magistrate lacked authority to rule on the attorney fee issue once the appeal to the district court had been filed. The appellate rules clearly provide that the trial court retains jurisdiction to act on matters pertaining to costs and attorney fees after the filing of a notice of appeal. I.A.R. 13; I.R.C.P. 83.

D. Attorney fees on appeal. There is no prevailing party yet, and therefore no basis for considering attorney fees at this juncture.

Conclusion

For the reasons stated, the ruling of the court below awarding attorney fees to the estate and against Thomas E. Lanham is vacated. The matter is remanded to the magistrate below to reconsider the issue of attorney fees in light of the directions contained herein, and to prepare appropriately detailed findings of fact supporting any conclusions reached. No attorney fees on this appeal.

Dated 24 day of November, 2015.

Sr. Judge D. Duff McKee

CERTIFICATE OF SERVICE

The undersigned certifies that on 25 November, 2015, s/he served a true and conformed copy of the original of the foregoing MEMORANDUM RE: APPEAL OF ATTORNEY FEE AWARD upon the following individuals in the manner described:

_ Upon Patrick J. Geile, Matthew G. Bennett, Foley Freman, PLLC, PO Box 10, Meridian, ID 83680;

_ and upon Nancy L. Callahan by placing a copy in each said counsel's box at the Clerk's Office.

when s/he deposited the same into the US Mail, sufficient postage affixed.

SHELLY TILTON, Clerk of the Court

By: _____

Deputy Clerk

SUMMARY OF DISC RECEIVED FROM
KEITH LANHAM ON M ARCH 22, 2016

This disc is dictation by G. T. Lanham. The below entries are not chronological but are in the order as contained on the disc. The entries are paraphrased versions of Mr. Lanham's dictation.

February 1, 2011: Beautiful day. In the hospital with dehydration. Will be giving some items to Judd.

NOTE: WILL IS DATED FEBRUARY 19, 2011.

March 3, 2011: Lists vehicles, trailers, equipment, horse, tools, tool boxes.

March 9, 2011: Keith does not call back. Leave Keith one dollar. More personal property listed for Judd to take care of.

March 19, 2011: 27 acres (east) of Big Creek: to Jamie Gillahan
20 acres (west) of Big Creek: to Joe and Thomas (grandsons)

34 acres and 86 acres (w/ water) to ?

May 20, 2011: four inches of snow

no date: Will be including some new information about my will.

September 27, 2011: No reference to property

NOW BACK TO 2010

December 12, 2010: para. 8 of will

December 19, 2010 para. 9 of will

January 7, ~~2010~~ 2011: para. 10 of will

November 16, 2010: para 1 of will

November 18, 2010: para 2 and 3 of will

November 19, 2010: para. 4 of will

November 29, 2010: para 5 of will

December 1, 2010: para. 6 of will

EXHIBIT 9

December 9, 2010: para 7 of will

NOTE: The transcriber of Mr. Lanham's dictation (Rebecca Clift?) obviously listened to the disc in its entirety and then transcribed it chronologically by the date of each entry. The transcription was on January 19, 2011, prior to Mr. Lanham completing his dictation.

Paragraph 11 of the will, naming Judd the executor is not contained in the dictation.

FILED
9:12 A.M. P.M.
APR 02 2014
SHELLY TILTON, CLERK
Laura Dodson DEPUTY

Nancy L. Callahan
Idaho State Bar #4884
Rolf M. Kehne
Idaho State Bar #2180
LAW OFFICES OF NANCY L. CALLAHAN
101 Canal Street
Emmett, Idaho 83617
Telephone: (208) 365-1200
Facsimile: (208) 365-1646

Attorneys for Personal Representative

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	CASE NO. CV2013-0886
GORDON THOMAS LANHAM, Deceased	**INVENTORY**

The undersigned, as Personal Representative of the estate of the above named decedent, states and represents as follows:

1. The schedule attached hereto constitutes a full and complete inventory of the property owned by the decedent as far as the same has come to the possession or knowledge of the undersigned;

2. The values set forth in such schedules are the fair market values of the decedent's property as of December 5, 2013, the date of the decedent's death, as determined by the undersigned.

DATED this 2nd day of April 2014.

Judd M. Lanham
JUDD M. LANHAM
Personal Representative

CERTIFICATE OF MAILING

THE UNDERSIGNED, states that on the 2nd day of April 2014, the undersigned caused delivery in the manner indicated to the following persons at the addresses shown below:

✓ Court Basket

William F. Lee
Attorney for Keith Colby Lanham
3421 Butte Road
Emmett, Idaho 83617

Douglas E. Fleenor
Attorney for Thomas Everett Lanham
Facsimile: (208) 947-5910

Kathy Gillihan
10041 DeWitt
Boise, Idaho 83704

Douglas E. Fleenor
Attorney for Linda Louise Andrews Lanham
Facsimile: (208) 947-5910

Judd Max Lanham
1504 N. McKinney
Boise, Idaho 83704

Nancy L. Callahan
Attorney for Personal Representative

Inventory of Property
Gordon Thomas Lanham, Deceased
As of December 5, 2014

ASSETS

Real Property

Ranch and Land at 3555 Butte Rd. Emmett, ID in Gem County Parcel #RP00418700	$170,691 *
Land at 3557 Butte Rd., Emmett, ID Gem County Parcel #RP00418817 2012 Assessed Value	3,983 *
47+ acres on Big Creek in Valley County; 2012 Assessed Value (undeveloped forest land) (Market value assumed to be considerably higher)	1,620

Bank Accounts

Home Federal Bank	8,559 **
Idaho Central Credit Union	144,549 **

Accounts Receivable

Undistributed proceeds of Hazel Lanham estate	To Be Determined

Personal Property

Household Goods, Farm Tools and Equipment	8,500
Guns (preliminary unappraised valuation)	3,500
Cash and Coins	12,200
Total	**$353,602**

LIABILITIES

Encumbrances and Debts

Mortgage held by Linda Louise Andrews Lanham	(50,000)
Medical Bills (amounts pending insurance claims filed)	(21,318)
Miscellaneous	(7,036)
Total	**($ 78,354)**

TOTAL NET VALUE **$275,248**

* Payable on Death Transfer of Ownership Deed
**Payable on Death Account

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 43105

IN THE MATTER OF THE ESTATE OF: GORDON THOMAS LANHAM, Deceased.	)	
JUDD LANHAM,	)	2016 Opinion No. 13A
Personal Representative-Respondent-Respondent on Appeal,	)	Filed: February 25, 2016
	)	Stephen W. Kenyon, Clerk
v.	)	AMENDED OPINION
	)	THE COURT'S PRIOR OPINION
THOMAS E. LANHAM,	)	DATED FEBRUARY 24, 2016,
	)	IS HEREBY AMENDED
Respondent-Appellant-Appellant on Appeal.	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Gem County. Hon. D. Duff McKee, District Judge; Hon. Tyler D. Smith, Magistrate.

Intermediate appellate decision dismissing appeal, affirmed.

Foley Freeman, PLLC; Patrick J. Geile and Matthew G. Bennett, Meridian, for respondent-appellant-appellant on appeal. Matthew G. Bennett argued.

Law Offices of Nancy L. Callahan; Nancy L. Callahan and Rolf M. Kehne, Emmett, for personal representative-respondent-respondent on appeal. Rolf M. Kehne argued.

HUSKEY, Judge

Thomas E. Lanham (Appellant) appeals from the district court's order dismissing the appeal filed in this case, arguing that his appeal to the district court was timely. For the reasons set forth below, we affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

After Gordon Thomas Lanham's (Testator) death, Judd Max Lanham (Respondent) filed an application for informal probate and was appointed personal representative. Subsequently, Appellant filed a petition for order restraining the Respondent. After a hearing, the magistrate denied Appellant's motion.

Appellant then filed a motion for summary judgment. Respondent filed a cross-motion for summary judgment and motion to dismiss. At the hearing on June 10, 2014, the magistrate granted summary judgment in favor of the Respondent. On June 20, 2014, Appellant filed a motion for reconsideration, but the motion neither included a notice of hearing nor indicated whether Appellant desired oral argument; both requirements under Idaho Rule of Civil Procedure 7(b).[1] On June 25, 2014, the magistrate filed both an order granting the Respondent's cross-motion for summary judgment and a judgment. In the judgment, the magistrate did not acknowledge the motion for reconsideration. Appellant did not pursue the motion for reconsideration after the final judgment was filed.

On August 13, 2014, Appellant appealed to the district court. Respondent filed a motion to dismiss, arguing that Appellant's appeal was untimely filed. The district court held that the notice of appeal was filed outside the forty-two-day period and that the motion for reconsideration did not toll the time for appeal because it was filed before the magistrate entered the judgment. Appellant timely appeals.

II.

STANDARD OF REVIEW

Whether an appeal to the district court was timely filed is a question of law. *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 147 Idaho 56, 58, 205 P.3d 1192, 1194 (2009). Over questions of law, we exercise free review. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992); *Cole v. Kunzler*, 115 Idaho 552, 555, 768 P.2d 815, 818 (Ct. App. 1989).

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[1] Unless a motion may be heard ex parte, I.R.C.P. 7(b)(3)(A) requires a written motion and a notice of hearing to be filed with the court. I.R.C.P. 7(b)(1) requires a party to indicate on the face of the motion whether the party desires to present oral argument.

III.

ANALYSIS

Appellant argues the magistrate's judgment was not a valid final judgment. Appellant also argues that his motion for reconsideration should be treated like a motion to alter or amend judgment and that his motion tolls the period for appeal.

A. The Magistrate's Judgment was a Valid Final Judgment

Appellant argues the magistrate's judgment was not a valid judgment because it, *inter alia*, contains a recital of the pleadings, in contravention of I.R.C.P. 54(a). Appellant cites *Wickel v. Chamberlain*, 159 Idaho 532, 363 P.3d 854 (2015), in support of his position.

In *Wickel*, the appellant filed a complaint against the respondent for medical malpractice. The Respondent filed a motion for summary judgment, which the district court granted on July 25, 2013. The district court entered a purported final judgment on July 30, 2013. The Appellant filed a motion for reconsideration on August 12, 2013, which the district court denied. Appellant timely appealed. On October 28, 2013, the Supreme Court remanded the matter to the district court because the July 2013 order was not a final judgment as defined by I.R.C.P. 54(a). On October 30, 2013, the Appellant filed a second motion for reconsideration. The district court entered a proper final judgment on October 31, 2013. On December 18, 2013, the district court determined it did not have jurisdiction to consider the second motion for reconsideration because it was filed more than fourteen days after the entry of the July 2013 judgment. The appellant again appealed to the Supreme Court. The Supreme Court noted the July 2013 judgment was not a valid final judgment but, instead, was an interlocutory order. The second motion for reconsideration was timely because it was filed before or within 14 days of the entry of the actual final judgment entered in October 2013. The Supreme Court remanded the case to the district court on December 23, 2015.

Of note, on February 12, 2015, the Supreme Court entered an order entitled In Re: Finality of Judgments Entered Prior to April 15, 2015 (Standing Order). In pertinent part, the order stated that "any judgment, decree or order entered before April 15, 2015, that was intended to be final but which did not comply with Idaho Rule of Civil Procedure 54(a) . . . shall be treated as a final judgment."

Wickel neither overrules nor contradicts the Standing Order. The doctrine of the law of the case provides that upon:

> an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.

Swanson v. Swanson, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000). In *Wickel*, the Supreme Court determined that the initial judgment was not a final judgment almost two years before it issued the Standing Order. *Wickel*, 159 Idaho 537, 363 P.3d at 859. Therefore, under the law of the case, as of October 2013, when the second motion for reconsideration was filed, the July 2013 order was not a valid final judgment. Even though the opinion on the second *Wickel* appeal was issued after the Standing Order, the Supreme Court was obligated to follow the law of the case established in the previous appeal. To allow the parties to relitigate the finality of the initial purported final judgment would transgress the purpose of the doctrine of the law of the case. Therefore, we hold that *Wickel* is not controlling precedent in this case and this Court will defer to the Standing Order as the controlling authority.

Although the final judgment issued in this case did not comply with I.R.C.P. 54(a), it became a valid final judgment by virtue of the Standing Order.

B. The Magistrate Presumptively Denied Appellant's Motion by Entering the Final Judgment

Appellant argues that his motion can be treated as either a motion for reconsideration under I.R.C.P. 11(a)(2)(B) or a motion to alter or amend judgment under I.R.C.P. 59(e). Appellant further argues that his motion, under either rule, tolled the period for appeal. Respondent argues Appellant's motion was a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B) and cannot toll the period of appeal because it was not timely filed. We hold that although Appellant's motion was a timely filed motion for reconsideration under I.R.C.P. 11(a)(2)(B), it was presumptively denied when the magistrate entered the final judgment. Because the motion for reconsideration was presumptively denied, it did not toll the time for appeal.

1. Appellant's motion was a motion for reconsideration under I.R.C.P. 11(a)(2)(B)

We begin by determining whether Appellant's motion is actually a motion for reconsideration under I.R.C.P. 11(a)(2)(B) or a motion to alter or amend judgment under I.R.C.P 59(e). A motion for reconsideration allows a party to move a court to reconsider an interlocutory order. I.R.C.P. 11(a)(2)(B). An interlocutory order is an order that is temporary in

nature or does not completely adjudicate the parties' dispute. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 107, 294 P.32 1111, 1119 (2013). When an order granting summary judgment is filed before a final judgment, the order granting summary judgment is an interlocutory order. *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 911, 332 P.3d 815, 823 (2014).

Here, Appellant moved the court to reconsider its ruling on Respondent's cross-motion for summary judgment, not the final judgment. Because Appellant filed the motion prior to entry of the final judgment and was only challenging the order granting summary judgment, an interlocutory order, Appellant's motion is a motion for reconsideration under I.R.C.P. 11(a)(2)(B), rather than a motion to alter or amend judgment under I.R.C.P. 59(e).

2. Appellant's motion for reconsideration was timely filed

Having determined that Appellant's motion was a motion for reconsideration under I.R.C.P. 11(a)(2)(B), we now determine whether Appellant's motion was timely filed. A motion for reconsideration of any interlocutory order of the trial court may be made at any time before the entry of final judgment, but not later than fourteen days after the entry of the final judgment. I.R.C.P. 11(a)(2)(B). When judgment has been pronounced in open court, requiring a litigant to wait to seek reconsideration until the court clerk has file-stamped the written order would be hyper-technical and violate the spirit of the rules of civil procedure. *See Willis v. Larsen*, 110 Idaho 818, 821, 718 P.2d 1256, 1259 (1986). Therefore, Appellant's motion was timely filed, even though it was filed prior to entry of the written order.

3. Appellant's motion for reconsideration was presumptively denied by entry of the final judgment

A final judgment is "an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document that on its face states the relief granted or denied." *T.J.T., Inc. v. Mori*, 148 Idaho 825, 826, 230 P.3d 435, 436 (2010). The purpose of a rule requiring that every judgment be set forth on a separate document is to eliminate confusion about when the clock for an appeal begins to run. *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 619, 226 P.3d 1263, 1266 (2010). A final judgment that does not dispose of outstanding issues in a case does not fulfill its purpose. Therefore, where a trial court fails to rule on a motion for reconsideration filed prior to the entry of a final judgment, we presume the district court denied the motion when it entered a final judgment. *See State v. Wolfe*, 158 Idaho 55, 61, 343 P.3d 497, 503 (2015).

In *Wolfe*, the appellant was convicted of first degree murder in 1982. In 2004, he filed an Idaho Criminal Rule 35 motion to correct an illegal sentence. *Id.* at 58, 343 P.3d at 500. The motion was denied as untimely; the appellant filed a timely motion for reconsideration. *Id.* While the motion for reconsideration was pending, the appellant filed a petition for post-conviction relief. *Id.* Thereafter, the district court ordered that the motion for reconsideration and the petition for post-conviction relief be decided in one civil case. *Id.* at 61, 343 P.3d at 503. The district court subsequently issued its memorandum decision and order advising the parties that the appellant's claims would be dismissed as untimely but did not separately or explicitly rule on the motion for reconsideration. *Id.* at 59, 343 P.3d at 501. The district court then entered its order dismissing the appellant's civil case. *Id.* Four years later, the appellant moved the district court for a hearing on his seven-year-old motion for reconsideration. *Id.* The district court denied the appellant's motion for a hearing; a timely appeal followed. *Id.*

The Supreme Court held the district court did not err when it denied the appellant's motion for a hearing on the motion for reconsideration. *Id.* at 61, 343 P.3d at 503. The Court presumed, under the doctrine of the presumption of regularity and validity of judgments, that the district court considered the appellant's motion for reconsideration when it issued its memorandum decision and order. *Id.* The Court further noted, "[W]e have held that where a district court fails to rule on a motion, we presume the district court denied the motion." *Id.* Because the district court did not rule on the appellant's motion for reconsideration, the Supreme Court presumed the district court denied the motion. *Id.* at 62, 343 P.3d at 504. The Court noted that the presumption became a conclusion because the subsequent order dismissed the entire civil case. *Id.* The Court then held, because the order dismissed the entire case and the appellant failed to file a notice of appeal within forty-two days, the district court did not err in denying the motion for a hearing. *Id.*

As in *Wolfe*, Appellant filed a motion for reconsideration that was neither explicitly ruled on nor mentioned in the final judgment. However, as in *Wolfe*, we presume the court denied the motion when it failed to rule on it. The presumption became a conclusion when the final judgment was entered. Additionally, presumptively denying outstanding motions by entering final judgment ensures that a final judgment actually ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties, while simultaneously avoiding confusion about when the time for an appeal begins to run.

As noted above, Appellant's motion for reconsideration failed to comply with several sections of I.R.C.P. 7. The failure to comply with I.R.C.P. 7(b)(3)(A) and I.R.C.P. 7(b)(1) was further exacerbated by Appellant's failure to pursue his motion for reconsideration at any time prior to the filing of the notice of appeal or acknowledge his motion for reconsideration in his opening appellate brief to the district court.[2] If Appellant was interested in pursuing the motion for reconsideration, it was incumbent upon Appellant to bring the motion to the attention of the court. *See Wolfe*, 158 Idaho at 62 n.3, 343 P.3d at 504 n.3. Because Appellant waited forty-nine days after the entry of judgment to file his appeal, the appeal is untimely. I.R.C.P. 83(e).

Moreover, fairness and equity do not allow Appellant to destroy the finality of a judgment by failing to pursue the motion in this case and then claim that failure tolled the time for appeal. The rules of civil procedure shall be liberally construed to secure the just, speedy, and inexpensive determination of every action and proceeding. I.R.C.P. 1(a). But to allow a motion that did not comply with I.R.C.P. 7, and which Appellant did not pursue, to toll the period for appeal does not advance those goals.[3] Instead, it allows a party to attempt to indefinitely toll the period of appeals and can create confusion about when the time for an appeal begins to run.

Accordingly, we hold that an outstanding motion for reconsideration is presumptively denied when a trial court enters a final judgment and thus, does not toll the time for filing an appeal.

C. Attorney Fees on Appeal

Appellant seeks an award of costs and attorney fees under Idaho Code §§ 15-8-208 and 12-121. In addition to those statutes, Respondent seeks costs and attorney fees under I.C. § 12-123, I.R.C.P. 11, and Idaho Appellate Rule 11.2.

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[2] Even if we did not presume the magistrate denied Appellant's motion for reconsideration, Appellant abandoned that motion by not pursuing it at any point between the entry of the final judgment and the filing of the notice of appeal. Appellant had the burden to pursue the motion for reconsideration in the event the district court failed to rule on it. Because he failed to pursue the motion, Appellant abandoned the motion. *See Wolfe*, 158 Idaho at 62 n.3, 343 P.3d at 504 n.3; *see also Worthington v. Thomas*, 134 Idaho 433, 437, 4 P.3d 545, 549 (2000).

[3] In addition to the civil rules mentioned above, Appellant also failed to state that his motion for reconsideration was based on I.R.C.P. 11(a)(2)(B). I.R.C.P. 7(b)(1) (a motion shall state with particularity the ground therefor, including the number of the applicable civil rule).

On appeal, Appellant did not act frivolously. Therefore, neither party is entitled to fees under I.C. §§ 12-121 and 12-123, I.R.C.P. 11, or I.A.R. 11.2. Under I.C. § 15-8-208, an appellate court may, in its discretion, award costs or attorney fees to any party. We hold that neither party is entitled to costs or attorney fees on appeal.

IV.

CONCLUSION

Based on the foregoing, the district court's intermediate appellate decision dismissing appeal is affirmed.

Chief Judge MELANSON and Judge GUTIERREZ **CONCUR**.

WILLIAM F. LEE
Attorney at Law
629 E. Main Street
Emmett, ID 83617
ISBN 1509
(208) 365-5367

Attorney for Petitioner Keith C. Lanham

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

IN THE MATTER OF THE ESTATE OF GORDON THOMAS LANHAM Deceased.	CASE NO. CV 2013-886 NOTICE OF WITHDRAWAL OF PETITION FOR REMOVAL OF PERSONAL REPRESENTATIVE AND FOR DECLARATION OF INTESTACY AND OTHER RELIEF

PLEASE TAKE NOTICE that Petitioner Keith Lanham hereby withdraws his Petition for Removal of Personal Representative and for Declaration of Intestacy and Other Relief filed in this matter on the ground and for the reason that said Petitioner no longer wishes to pursue said Petition.

Dated this 30th day of March 2014.

WILLIAM F. LEE
Attorney for Petitioner Keith Lanham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of March 2014, served a true and correct copy of this Notice to Nancy Callahan, attorney for said Estate and Judd Lanham, by leaving a copy is said counsel's basket at the Gem County Clerk's office and to Douglas Fleenor attorney for Thomas Lanham by facsimile transmission to said counsel's facsimile of record being: 947-5910.

WILLIAM F. LEE

Richard L. Stubbs, ISB No. 3239
Samantha L. Lundberg, ISB No. 9992
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and KEITH C. LANHAM, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 ANSWER AND DEMAND FOR JURY TRIAL

COMES NOW the above-entitled Defendant, by and through his counsel of record, Carey Perkins LLP, and hereby answers the Plaintiffs' Complaint as follows:

First Defense

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

Second Defense

I.

Defendant denies each and every allegation of the Plaintiffs' Complaint not herein expressly and specifically admitted.

II.

Admit that Defendant is, and at all relevant times was, an attorney licensed to practice law in the State of Idaho.

Admit that Defendant had an attorney-client relationship with Plaintiff Thomas Lanham.

Third Defense

Lack of privity between Plaintiff Keith Lanham and Defendant.

Fourth Defense

Plaintiffs' claims are barred by the doctrines of waiver and/or estoppel.

Fifth Defense

Plaintiffs' damages, if any, were proximately caused by the negligence, omissions, actions or comparative fault of other third persons or entities for which this answering Defendant is not legally responsible and that responsibility should be compared by Idaho law.

Sixth Defense

Plaintiffs failed to mitigate their damages, if any.

Seventh Defense

Plaintiffs' claims are barred in whole or in part by the fact that their injuries and damages, if any, were proximately caused, in whole or in part, by superseding and/or

intervening acts or omissions of Plaintiffs and/or persons or entities other than the Defendant, and/or by superseding and/or intervening forces other than those controlled by Defendant.

Eighth Defense

Plaintiffs are not the real parties in interest as to some or all of their claims.

Ninth Defense

Plaintiffs' claims are barred by the doctrine of prevention.

PRAYER

WHEREFORE, Defendant prays that Plaintiffs take nothing by way of their Complaint, that their claims against Defendant be dismissed with prejudice, that Defendant be awarded his attorney fees and costs incurred in this action pursuant to all applicable law and for such other and further relief as this Court deems just and reasonable.

DEMAND FOR JURY TRIAL

Defendant demands a trial by jury of twelve (12) as to all issues.

DATED this 23rd day of June, 2016.

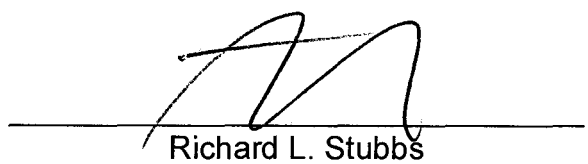
CAREY PERKINS LLP

By_____
Richard L. Stubbs, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June, 2016, I served a true and correct copy of the foregoing ANSWER AND DEMAND FOR JURY TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen B. Ellis Ellis Law, PLLC 12639 W. Explorer Drive, Suite 140 Boise, Idaho 83713 Telephone (208) 345-7832	[X] [ ] [ ] [ ]	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile (208) 345-9564



Richard L. Stubbs

ALLEN B. ELLIS
ELLIS LAW, PLLC
12639 W. Explorer Drive, Suite 140
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208/345-7832 (Tel)
208/345-9564 (Fax)
ISB No. 1626

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, as party plaintiff in the stead of Keith C. Lanham Plaintiffs, v. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-2016-8252 MOTION FOR PARTIAL SUMMARY JUDGMENT

Come now plaintiffs, through their attorney of record, and move the Court for an order of partial summary judgment on the grounds that there is no genuine issue as to any material fact and that plaintiffs are entitled to prevail on the following issues as a matter of law:

(1) Proximate causation: That had the underlying notice of appeal In the Matter of the Estate of Gordon T. Lanham (Gem County Case No. CV 2013-0886) been timely filed, plaintiffs Thomas Lanham and Keith Lanham would have been adjudicated the intestate heirs to the decedent's real property; and

(2) Defendant owed a duty of care to Keith Lanham: Notwithstanding the absence of a conventional attorney/client relationship between defendant and plaintiff Keith Lanham, under the circumstances defendant Fleenor owed plaintiff Keith, as an intestate heir, a duty of care to file a timely appeal.

This motion is based upon the memorandum of law filed herewith, the declaration of Allen B. Ellis, the affidavit of Samantha L. Lundberg, and the pleadings and records in this action.

Dated this 31 day of August, 2016.

Allen B. Ellis
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this ____ day of August, 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Richard L. Stubbs
Carey Perkins, LLP
P.O. Box 519
Boise, Idaho 83701

_____ U.S. Mail, postage prepaid
_____ Hand delivery
_____ Overnight delivery
__X__ Facsimile (345-8660)

Allen B. Ellis

kcatty
NS
9-1-16

NO. _____ FILED 2:30
A.M. _____ P.M.

AUG 31 2016

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, as party plaintiff in the stead of Keith C. Lanham, Plaintiffs, v. DOUGLAS E. FLEENOR, Defendant.	)	Case No. CV-2016-8252

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Honorable Richard D. Greenwood

Attorney for Plaintiffs

ALLEN B. ELLIS
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12639 W. Explorer Drive, Suite 140
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Attorney for Defendant

RICHARD L. STUBBS
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ISB Nos. 3239, 9992

ORIGINAL

TABLE OF CONTENTS

SUMMARY OF PROCEEDINGS

Nature of case and grounds for partial summary judgment: In this action for legal malpractice, the will of the decedent Gordon Lanham disinherited his surviving children, the plaintiffs Thomas and Keith Lanham. In the underlying probate matter, the magistrate erroneously ruled that the will of Gordon Lanham disposed of the entirety of his assets. In reality, the will failed to devise the decedent's real property which should have passed to plaintiffs by intestate succession. Plaintiff Thomas Lanham retained defendant Fleenor to appeal the magistrate decision. Mr Fleenor negligently filed an untimely appeal which was ultimately dismissed and which dismissal was affirmed by the Idaho Court of Appeals.

By plaintiffs' motion, they seek to dispose of two issues:

(1) Proximate causation: In the context of proximate causation, plaintiffs seek a ruling that had the underlying appeal not been dismissed, the plaintiffs would have prevailed. As such they would be accorded the status of intestate heirs to the undevised real property. Based upon the unanimous authority cited below, the Court, not the jury, must opine as to the merits of the appeal.

(2) Duty of care owed to Keith: Plaintiff Keith Lanham did not have an attorney/client relationship with defendant Fleenor. That is, it was Thomas Lanham who retained Mr. Fleenor to pursue the appeal. However, under the criteria set down in *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884 (2004), particularly the foreseeability of harm to Keith in the event of an untimely appeal, defendant Fleenor owed a duty of care to Keith as well as Thomas. Much like a named beneficiary in a will who takes nothing because of a drafting error, Keith, an intestate heir, was damaged by the untimely appeal and has standing to allege professional negligence. See *Lucas v. Hamm, infra*, p. 16.

Standard of review: The Court is familiar with the standard of review respecting motions for summary judgment and it will not be recited here, e.g., *Franklin Bldg. Supply Co. v. Hymas,* 157 Idaho 632, 637, 339 P.3d 357 (2014). Suffice it to say that issues identified above are issue of law, and there are no issues of fact to be disposed of in these motion proceedings.

Exhibits: The referenced exhibits are the exhibits attached to the Lundberg affidavit (alphabetical) and Ellis declaration (numbered) previously filed.

THE FAILURE TO TIMELY APPEAL THE MAGISTRATE DECISION PROXIMATELY RESULTED IN PLAINTIFFS LOSS OF THEIR STATUS AS INTESTATE HEIRS.

Gist of alleged malpractice: The Lanham Will (Exhibit A) which lacked a residuary clause failed to devise two pieces of real property.[1] Notwithstanding, the magistrate erroneously ruled that the Will bequeathed the testator's estate in its entirety. Defendant attorney appealed the magistrate decision but missed the appeal deadline by seven days. As a proximate result, plaintiff Thomas Lanham was prevented from reversing the magistrate decision by which reversal both plaintiffs would have acquired the status of intestate heirs to the decedent's real property.

According to the leading treatise on legal malpractice, attorney errors in post-judgment and appellate matters make up a substantial portion of malpractice suits filed.

> Attorneys frequently have been sued concerning posttrial procedures or appeals. . . . The nature of alleged errors is as varied as the posttrial procedures available to the client. These include failing to make posttrial motions; improperly made posttrial motions; advising against taking an appeal; failing to advise of an appeal; failing to take preliminary steps necessary to appeal, such as moving for a new trial;

[1]As used herein, the meaning of the term "residuary clause", is consistent with the definition in Black's Law Dictionary: "A testamentary clause that disposes of any estate property remaining after the satisfaction of specific bequests and devises". *Id.*, Seventh Edition, p. 1311.

> *failing to file notice of appeal timely;* failing to file required records, transcripts, and factual statements necessary to perfect the appeal; and negligence in presenting the client's intentions.

Legal Malpractice, 2012 Edition (West), Mallen & Smith, Vol. 4, sec. 33:43, pp. 924, 925 (emphasis added), including seven pages of footnotes with citations.

In *Chicoine v. Bignall,* 122 Idaho 482, 835 P.2d 1293 (1992), the client stated a cause of action against his attorney for filing an untimely motion for new trial.

Dismissed appeal and proximate causation: The magistrate's Findings of Fact and Conclusions of Law (prepared by the executor's attorney) are Exhibit 5 to the Ellis declaration. The Court of Appeals recently affirmed the district court's decision, sitting as an appellate court, that defendant Fleenor had failed to timely file an appeal from the magistrate decision. See *In the Matter of the Estate of Gordon Lanham (*Docket No. 43105, 2016 Opinion No. 13A, February 24, 2016). That is, it is undisputed that defendant Fleenor filed an untimely notice of appeal. See Judgment (Exhibit 6) and Notice of Appeal (Exhibit 7). By the failed appeal, plaintiffs lost their claim to being intestate beneficiaries to the real property in the Lanham Estate. See Exhibit 11.

Two major real estate holdings of the decedent are the focus of the herein litigation: (a) a 220 acre ranch in Gem County, and (b) a 47 acre parcel in Valley County ("Big Creek"). The Will does not purport to devise either piece of real estate.

As to Big Creek, the Will does not devise that property but recites "I want to think about that 47 acres in Big Creek" (Exhibit A, p. 3). As to the 220 acre ranch, the Will is silent. This silence is due to the fact that the decedent attempted to deed that property to his grandson thirty days before he died. See Exhibit 1 to Ellis declaration. This so-called deed was never "delivered" in the eyes of the law because the decedent retained all possessory rights to the ranch including the right of sale and

retention of the sale proceeds., i.e., the ranch remained in decedent's estate. *Garrett v. Garrett,* 154 Idaho 788, 791 (2013).

The executor must have recognized that this deed was ineffective to convey the ranch property because the ranch is included on the executor's inventory. See Exhibit 9.

Because the Will did not devise these two acreages *and* given the absence of a residuary clause, these properties should have passed to the plaintiffs by intestate succession, i.e., they are the sole surviving offspring of the widowed decedent. That is, the magistrate committed error in ruling that the Will disposed of the entirety of the decedent's estate. See Exhibits 5 and 6 (Findings of Fact/Conclusion of Law and Judgment). Defendant's untimely appeal allowed the magistrate's error to go unchallenged.

Idaho law of partial intestacy: In the absence of a specific devise of the property as well as the absence of a residuary clause, Idaho case law requires that this real property descend according to intestate succession, i.e., there is a partial intestacy arising from the Lanham Will:

> In other words if the will clearly discloses that the testator did not dispose of all of his property, particularly in the absence of a residuary clause, then the omitted property must descend according to the laws of succession.

In re Corwin's Estate, 86 Idaho 1, 5, 383 P.2d 339 (1963).

Defendant Fleenor acknowledged this point of law in his unsuccessful motion for summary judgment: "When a devise fails and the will lacks a residuary clause, the residue passes through intestate succession. *In re Corwin's Estate* . . ." See Fleenor brief, Exhibit 2, p. 4. The executor's brief is Exhibit 3 and Fleenor's reconsideration brief is Exhibit 4.

Plaintiffs recognize that the Courts "favor testacy rather than intestacy". *In re Corwin's*

Estate, 86 Idaho at 5. Notwithstanding, a Court may not be allowed to speculate as to testamentary intent.

> However, in order to avoid intestacy, either partial or complete, the court is not permitted to place on the will any construction not expressed in it, and which is based upon supposition as to the intention of the testator in the disposition of his estate.

Id., 86 Idaho at 5.

There is not a hint in the Will as to whom the testator intended as beneficiary as to either Big Creek or the ranch property. In fact as to Big Creek, he expressed the desire to "think about" it (Exhibit A, p. 3). A fair inference is that the Will does not reference the ranch because it was decedent's intention, as borne out later, to dispose of it by an attempted inter-vivos transaction. See Exhibit 1.

Plaintiffs' entitlement as intestate heirs is not affected by the testamentary language limiting their bequests to one dollar apiece: A general principle of both American and British jurisprudence is that a testator can only alter the mandate of the intestacy laws by disposing of the property by will. That is, decedent's disinheritance of plaintiffs does not impair their status as intestate heirs to the real property not disposed of by the Will.

> . . . Michigan has held that a testator could not limit or eliminate an heir from receiving that portion of an estate governed by the statute descent and distribution except by disposing of the property by will. *Southgate v. Karp,* 154 Mich. 697, 118 N.W. 600; *In re McKay Estate,* 357 Mich. 447, 98 N.W.2d 604.
>
> In these cases, Michigan followed the general rule in American and British jurisprudence. *Boisseau v. Aldridges,* 5 Leigh 222, 32 Va. 222, 27 Am Dec. 590; *Coffman v. Coffman,* 85 Va. 459, 8 S.E. 672, 2 L.R.A. 848; *Todd v. Gentry,* 109 Ky. 704, 60 S.W. 639; *Pickering v. Stamford,* (1797), 3 Ves. Jun. 492 (30 Eng. Rep. 1121); *Johnson v. Johnson,* 4 Beav. 318 (49 Eng. Rep. 361). See also Page on Wills

(Lifetime ed.), § 939, p. 857; 96 C.J.S. Wills § 1225, p. 1072; 57 Am. Jur § 1170.

In the Estate of Brown, 106 N.W.2d 535, 537 (Mich. 1960).

Plaintiffs concede that the absence of a residuary clause does not, per se, render the Will a nullity: Plaintiffs do asset that failure of the Will to devise the real properties *and* the absence of a residuary clause, require that those properties descend according to the laws of intestate succession, i.e., to plaintiffs as the surviving issue of the decedent. See Idaho Code § 15-2-103.

There is a fatal ambiguity in the Will as to what extent the executor was given "donative" powers: At one point in the Will, the testator recites that the executor may distribute the estate property as he "sees fit". However, thereafter the testator makes specific bequests of personal property to certain persons. As to the Big Creek property, he wants to "think about it". Then, the concluding sentence of the Will constrains the executor to "distribute my property and personal effects as stated in my Last Will and Testament". Exhibit A, p. 5. See below regarding odd circumstances of the Will's creation (pp. 10, 11).

There are several inconsistencies in the above Will provisions. However, it is clear that the executor was not given authority to distribute the Big Creek property. And because of his subsequent attempted conveyance of the ranch property, bequeathing that property was likely not on testator's radar screen at the time the Will was signed.

In order for a power of appointment to be coherent and enforceable, there must be a clear definition of what property is subject to the power. Here, given the mishmash of testamentary intent, i.e., expressed uncertainty (Big Creek), actual devises to named persons, devises as the executor "sees fit", an ineffective inter-vivos transfer, and post-Will "devises" (Exhibit 9), it cannot be determined

from the Will what property is actually subject to the so-called power of appointment. As noted in the California case cited by defendant, the power of appointment, to be effective, must designate specific assets of the decedent. *Estate of Conroy,* 67 Cal.App.3d 734, 738, 135 Cal Rptr 807 (App. 1977).

In the event the power of appointment existed, it clearly did not pertain to property that (a) the testator had not decided about (Big Creek), or (b) property that was not identified in the Will (the ranch property).

The odd circumstances surrounding the Will's origins: The background of the Will's authorship lends credence to the assertion that it suffers from at least partial intestacy. This background also accounts for the various ambiguities noted above. As evinced by the informal syntax of the Will, it was dictated by the testator, transcribed, and signed with the apparent testamentary formalities. After execution, the testator made further devises by dictation which were never incorporated into the Will. See Exhibit 9 to Ellis declaration. This raises the reasonable inference that the testator did not perceive Exhibit A (the Will) to be his last will and testament.

In Judge McKee's written decision on an attorney fee issue, he made the following observations about the Will and the adjudicative process with respect thereto (paraphrased from Judge McKee's Memorandum Decision, Exhibit 8):

> (1) The will was prepared from a transcript of an audio recording; it is not clear whether an attorney was involved;
>
> (2) There is nothing in the record as to the origination, reliability or purpose and accuracy of the audio recordings;
>
> (3) It is not clear who typed the audio into the format of a will and obtained the

decedent's signature and whether the decedent knew it was a will;

(4) The burden of proof on the foregoing would be on the executor, Judd;

(5) One would think that custodian of the audio disc would be subject to examination on foundational issues;

(6) The will was witnessed but the capacity of the witnesses is not clear;

(7) As son of the decedent, plaintiff Thomas would be entitled to preference over the cousin as personal representative;

Exhibit 8, pp. 12 - 15.

These unanswered questions posed by Judge McKee underscore the fragility of the magistrate's decision, rendering its affirmance problematic had there been a timely filed notice of appeal, i.e., there was a sound argument for full intestacy given the slapdash origins and preparation of the Will.

JUDICIAL DECISIONS ARE VIRTUALLY UNANIMOUS THAT AS TO TIME-BARRED APPEALS THE COURT, NOT THE JURY, DETERMINES WHETHER THE UNDERLYING APPEAL WOULD HAVE BEEN SUCCESSFUL.

A key issue in this case is plaintiffs' assertion that a timely appeal would have been successful. In the language of tort law, resolution of this issue determines whether there is "proximate causation". For example, an untimely appeal may constitute negligence, but if the appeal lacked merit there is no completed tort, i.e., no proximate causation. The question presented is whether the merits of the appeal in this case are to be addressed by the jury with the assistance of experts or by the Court as an issue of law.

As in many legal malpractice cases, the Court here is presented with a case-within-a-case.

In the recurring error of a missed statute of limitation, the plaintiff is required to "litigate an action that was never tried" which "is the accepted and traditional means of resolving issues in the underlying proceeding . ." Legal Malpractice, Vol. 4, sec. 37:15, pp. 1510, 1511.

However in the instance of a time-barred appeal, the distinction is that, unlike a barred trial due to the expiration of the limitations period, an appeal presents legal issues, not factual issues, which legal issues cannot be addressed by the traditional device of a case-within-a-case for jury consideration. Thus the choice becomes whether (1) the Court determines what would have been the appeal result, or (2) whether such resolution is reached by the jury with the assistance of expert witnesses.

The overwhelming majority view is that, because an appeal involves issues of law, the Court, not the jury, is tasked with determining the outcome of the appeal. As authors of the leading treatise on legal malpractice note:

> The resolution of a petition or appeal must and can be made by the trial judge as an issue of law, based on review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied to the motion or appeal. This does not usurp the entitlement to a jury because the issue is one of law.

Legal Malpractice, 2012 Edition, Vol 4, sec. 33.43, p. 942.

The above quote is footnoted with multiple case authority from twenty-eight jurisdictions, including California, Oregon, and Washington. As the Michigan Supreme Court held:

> In summary, we hold that the question whether a court or a jury should determine whether the underlying appeal would have been successful is reserved to the court because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the judiciary.

Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 786 (Mich. 1994).

And the Washington Supreme Court:

> In cases involving an attorney's alleged failure to perfect an appeal, however, the burden of proving causation takes on a different light. The cause in fact inquiry becomes whether the frustrated client would have been successful if the attorney had timely filed the appeal. Specifically, the client must show that an appellate court would have (1) granted review, and (2) rendered a judgment more favorable to the client. Not surprisingly, numerous other courts confronted with making this causation determination have not delegated it to the jury. Rather, they have consistently recognized that these latter two determinations are within the exclusive province of the court, not the jury to decide [cases cited].

Daugert v. Pappas, 704 P.2d 600, 603 (Wash. 1985)

UNDER THE CIRCUMSTANCES PRESENTED, DEFENDANT FLEENOR OWED A DUTY OF CARE, NOT ONLY TO HIS CLIENT THOMAS LANAHAM, BUT TO THOMAS' FELLOW INTESTATE BENEFICIARY, KEITH LANHAM, A NON-CLIENT.

Erosion of privity as an absolute condition to tort liability: From the early twentieth century through the present time, the national judiciary has expanded the field of potential tort victims. From manufacturers (*McPherson v. Buick Motor Company,* 111 N.E. 1050 (N.Y. 1916) to public weighers (*Glanzer v. Shepard,* 135 N.E. 275 (N.Y. 1922), liability has been expanded, compensating those persons injured by, but not party to, the original commercial transaction. A similar development in the professional liability context did not occur until the mid-twentieth century, i.e., *Biakanja v. Irving,* 320 P.2d 16, 65 A.L.R. 2d 1358 (Cal. 1958) (notarial malpractice); *Lucas v. Hamm,* 364 P.2d 685 (Cal. 1961) (legal malpractice). The majority rule now is that, under the proper circumstances, an attorney may owe a duty of care to a non-client:

As noted by the leading treatise on legal malpractice:

> The modern trend in the United States is to recognize the existence of a duty beyond the confines of those in privity to the attorney-client contract. Whatever the legal theory, however, there must be a duty of care owed by the attorney to the plaintiff. The issue of duty usually presents a question of law for the court. . . . A duty exists under two principal theories. The first approach is a multi-criteria balancing test, which originated in California. Another approach is the concept of a third-party beneficiary contract.

Legal Malpractice, 2012 Edition (West), Mallen & Smith, Vol I, sec. 7.8, p. 781.

Idaho has adopted the multi-criteria balancing test. See *Harrigfeld v. Hancock,* 140 Idaho 134, 90 P.3d 884 (2004), citing both *Biakanja* and *Lucas v. Hamm.* The test for liability to a non-client focuses on, among other factors, foreseeability of harm to the non-client, proximate causation, and the certainty that a legal injury was inflicted. In *Harrigfeld,* the plaintiff, omitted from the will as a beneficiary, alleged that the drafting attorney's negligence resulted in this omission. The Court rejected this assertion, ruling that the plaintiff failed to meet the *Biakanja/Lucas* criteria: "The attorney has no duty to insure that persons who would normally be the objects of the testator's affection are included as beneficiaries in the testamentary instruments." *Harrigfeld,* 140 Idaho at 138.

Conduct to which the *Harrigfeld* criteria are to be applied: Plaintiff Thomas Lanham ("Thomas") retained defendant Fleenor to contest the attempted probate of the testator's will as pertaining to the entirety of the testator's estate. In the course of this representation, defendant Fleenor was tasked with the assignment of filing a timely notice of appeal to challenge the magistrate's conclusion that the Will disposed of the entire Lanham estate. The successful outcome of this appeal would be the descendance of the ranch and Big Creek to Thomas and Keith Lanham by intestacy. That the challenge was made by his client Thomas, and not Keith, did not obscure the

obvious fact that a finding of intestacy would inure to *both* their respective benefits in equal amounts.

Application of the *Harrigfeld* criteria to defendant's untimely appeal (*Id.*, 140 Idaho at 138):

Criterion	**As applied**
Forseeability of defendant's negligence harming Keith	Keith had exposure equal to Thomas, i.e., untimely appeal would create financial loss for Keith
Degree of certainty that Keith suffered financial injury.	Absolute certainty
Connection between missing appeal deadline and Keith's financial loss.	Undisputed proximate causation
Policy of preventing future harm	Increased sensitivity to non-clients
Moral blame for missed appeal deadline	Marginal (criterion unclear)
Extent of burden to profession by imposing liability for Keith's loss.	Burden of making a timely appeal not enhanced by liability to Keith
Availability of insurance for the risk	Insurance available

The major criteria noted in *Harrigfeld,* i.e., foreseeability, proximate causation, and certainty of loss, clearly point to the conclusion that defendant Fleenor owed a duty of care to Keith Lanham. The lesser criteria of (a) burden on the profession, (b) policy of preventing future harm, and (c) insurance availability also favor acknowledging a duty to Keith, the non-client. The only imponderable is the question of "moral blame". Notably, in *Lucas v. Hamm,* the Court deleted this criterion without explanation. *Id.,* 56 Cal. 2nd at 588, 589, but the *Harrigfeld* decision equated negligence to "moral blame", i.e. "sufficient moral blame attached to the negligent preparation or execution of testamentary instruments to impose liability". *Id.* 140 Idaho at 138.

The *Lucas* parallel: In *Lucas,* the testator directed his attorney to prepare a will which

included gifts to several beneficiaries. Through a drafting error, the gifts were disallowed as constituting an illegal restraint on alienation. Opined Chief Justice Gibson in *Lucas:* " . . [O]ne of the main purposes which the transaction between defendant and testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to the plaintiffs [non-clients] in the event of invalidity of the bequest was clearly foreseeable". *Id.,* 56 Cal 2nd at 589 (bracketed material explanatory).

Likewise here: the damage to Keith Lanham in the event of an untimely appeal was clearly foreseeable, i.e., arising out of his entitlement under the law of intestacy (just as the *Lucas* plaintiffs had entitlement by the testator's bequest). At the time defendant Fleenor faced the challenge of filing a timely appeal, it was foreseeable that failure to do so would deprive Keith, as well as his client Thomas, of their rightful status as intestate heirs. Unlike the plaintiff in *Harrigfeld,* plaintiff Keith Lanham is not imposing upon attorney Fleenor the duty of speculating as to appropriate testamentary beneficiaries.

No conflict of interest: Had Mr. Fleenor actually represented both Thomas and Keith in opposing full testacy, such representation would not constitute a conflict of interest. That is, during the course of such litigation, the interests of the brothers Lanham were co-extensive, i.e., either they would be held to be intestate heirs (sharing equally) or, alternatively, disinherited offspring. Mr. Fleenor would have had no power to manipulate a result which favored one client over the other.

Likewise, had the litigation been fully prosecuted as was attempted with Thomas the sole client, a favorable appeal result would effect Thomas and Keith equally, i.e., intestate heirs sharing equally, notwithstanding Keith's status as a non-client.

CONCLUSION

Proximate causation: From one standpoint, this action is a relatively straight-forward case of professional negligence, i.e., failure to file a timely notice of appeal. However, imbedded in the negligence analysis is the question whether a timely appeal would have reversed the magistrate decision. The law is clear that, for two reasons, a timely appeal would have reversed the magistrate and the real property would have passed to the plaintiffs by intestate succession: (1) the Will did not devise the real property; and (2) there was no residuary clause i.e., "a testamentary clause that disposes of any estate property remaining after the satisfaction of specific bequests and devises". See footnote 1.

By virtually unanimous authority, the Court, not the jury, is to make the determination as to the appellate outcome, had there been a timely appeal. Idaho common law makes it clear that, in the absence of a residuary clause, undevised property must pass according to the law of intestate succession. In short, the magistrate's ruling that the Will devised the entirety of the decedent's estate is in error and would have been vacated on appeal.

Duty owed to plaintiff Keith Lanham: Under the criteria enunciated in *Harrigfeld,* defendant Fleenor owed Keith a duty of care. Like Mr. Fleenor's client Thomas, Keith Lanham was a potential intestate heir, and defendant Fleenor owed him the same duty of care as was owed to Thomas. That is, it was reasonably foreseeable that a missed appeal deadline would impact Thomas and Keith in identical fashion.

DATED This 31 day of August, 2016.

Allen B. Ellis
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 31 day of August, 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Richard L. Stubbs
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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the above-entitled Defendant Douglas Fleenor, by and through his attorney of record, Carey Perkins, LLP, and moves this Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, for entry of summary judgment in favor of said Defendant on the ground that there is no genuine issue as to any material fact and that Defendant Douglas Fleenor is entitled to judgment as a matter of law.

This Motion is supported by the documents and pleadings on file with the Court, the Affidavit of Counsel in support of Motion to Dismiss dated may 6, 2016; and upon Defendant's Memorandum in Support filed contemporaneously herewith.

DATED this 7th day of September, 2016.

CAREY PERKINS LLP

By /s/ Richard L. Stubbs
Richard L. Stubbs, Of the Firm
Attorneys for Defendant

CAREY PERKINS LLP

By /s/ Samantha L. Lundberg
Samantha L. Lundberg, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of September, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I.
INTRODUCTION

This is a legal malpractice action brought by Thomas Lanham and the bankruptcy trustee, standing in the shoes of Keith Lanham, against attorney Douglas Fleenor. Douglas Fleenor represented Thomas Lanham in an action challenging his father Gordon Lanham's will. Plaintiffs allege Douglas Fleenor committed malpractice when he did not file a timely appeal in the prior lawsuit challenging the validity of the will.

This case comes before the Court on Douglas Fleenor's Motion for Summary Judgment. This Memorandum will show that the Magistrate Court's finding the Gordon Lanham's will was valid under Idaho law was based on substantial and competent evidence in the record. As a result, the Appellate Court would not have disturbed the decision on appeal. The Appellate Court also would have affirmed because the Magistrate Court correctly found Gordon Lanham's will to be valid. Additionally, Keith Lanham's claims are barred because Douglas Fleenor did not have an attorney-client relationship with Keith Lanham and did not owe him a duty of care. Keith Lanham also waived his claim when he stated that he believed his father's wishes in his will should be honored. Keith Lanham also is bound by his judicial admission. Accordingly, Douglas Fleenor requests the Court grant his motion for summary judgment.

II.
STATEMENT OF UNDISPUTED FACTS

The following facts are material to the Motion for Summary Judgment and are undisputed.

1. Thomas Lanham retained Attorney Douglas Fleenor to bring an action to invalidate the will of the Lanhams' father, Gordon Lanham. Complaint, Par. I.

2. The will sought to disinherit Thomas and Keith Lanham. Complaint, Par. I.

3. An attorney-client relationship existed between Thomas Lanham and Douglas Fleenor with respect to the action to invalidate the will. Complaint, Par. II.

4. Keith Lanham was not a client of Douglas Fleenor, Complaint, Par. III, and was represented by his own attorney. ***See In the Matter of the Estate of Gordon***

Thomas Lanham, Gem County District Court CV2013-886, Keith Lanham's Petition to Remove Personal Representative dated January 13, 2014, filed by Attorney William F. Lee. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit B.

5. Keith Lanham also provided an affidavit in which he stated, "I believe and accept that my father made the specific gifts to my brother, Thomas Everett, and me as set forth in his Will for his own personal reasons and his wishes should be honored." Affidavit of Keith Lanham dated May 23, 2014, ***In the Matter of the Estate of Gordon Thomas Lanham***, supra. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit C.

6. Gordon Lanham's estate was distributed according to the will, rather than intestate succession. Complaint, Par. VIII.

7. The will that is the subject of the Lanhams' Complaint is the Last Will and Testament of Gordon Lanham ("Lanham Will"). Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

8. The Lanham Will was signed by Gordon Lanham on February 19, 2011. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

9. Two witnesses to Gordon Lanham's signing or acknowledging of the Lanham Will, signed the Lanham Will stating that Gordon Lanham signed or acknowledged the will in their presence, and that he appeared to be of sound mind and under no duress, fraud, or undue influence. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

10. An Idaho Notary Public notarized Gordon Lanham's signature of the

Lanham Will, stating that Gordon Lanham personally appeared before her, acknowledged to her that he signed the Lanham Will. The Notary Public also declared under penalty of perjury that Gordon Lanham appeared to be of sound mind and under no duress, fraud or undue influence. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

11. In the Lanham Will, Gordon Lanham acknowledges specific property he owns and his relationship with his potential heirs. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

12. In the Lanham Will, Gordon Lanham recognized Thomas and Keith Lanham as his sons, and left them each one dollar. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

13. In the Lanham Will, Gordon Lanham stated that Thomas Lanham "has already ben given all he needs to have." Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

14. In the Lanham Will, Gordon Lanham stated that he was not giving Keith Lanham more money than one dollar because he did not want Keith Lanham "to be able to sell and profit off of his alcoholism..." Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

15. The Lanham Will named Judd Lanham as the executor of the Lanham Will and gave Judd Lanham power of attorney over Gordon Lanham's property and personal effects. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

16. The Lanham Will discussed specific furniture and antiques owned by

Lanham family members, and stated that the family members would be left with that property and would be able to disperse of it however they saw fit. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

17. The Lanham Will specifically gave a wooden bed to Keith Lanham and another to Thomas Lanham. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

18. The Lanham Will discussed in detail the guns Gordon Lanham owned, and stated that they could be sold off to pay part of the mortgage. Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A.

19. The Magistrate Court issued Findings of Fact and Conclusions of Law on Motion and Cross-Motion for Summary Judgment on June 25, 2014. Declaration of Allen Ellis dated June 13, 2016, Exhibit 5.

20. The Magistrate Court found: “The Court finds no reason to doubt the validity of the will. From the affidavits and especially the audio recordings, it is clear that decedent Gordon Thomas Lanham possessed undiminished mental capacities at the time of (sic) he executed the will. He demonstrated a thorough grasp of his potential heirs, and his relationships with them and sound reasons for treating each as he did. There is no evidence suggesting that anyone exercised undue influence or coercion over decedent. In fact, in spite of decent’s failing health and physical maladies, it appears he was a strong willed and independent thinker at the time he executed his will.” Declaration of Allen Ellis dated June 13, 2016, Exhibit 5.

21. The Magistrate Court also found: “Claimant Thomas Everett Lanham

advanced several claims, but he failed to support his claims and arguments with one iota of credible, admissible evidence. Based upon the language of the will itself, the affidavits, the audio recordings and the entire record, the court finds in favor of the Personal Representative on every factual dispute." Declaration of Allen Ellis dated June 13, 2016, Exhibit 5.

22. The Magistrate Court then held: "The will of decedent Gordon Thomas Lanham is legal, valid, and binding. Decedent's intent is sufficiently clear from the language of the will, particularly as bolstered and explained by contemporary audio recordings and the affidavits submitted, to allow administration and, if necessary, judicial enforcement. As to the Claimant, Thomas Everett Lanham, decedent's intent is very clearly that claimant take by the will only one dollar ($1.00) and a bed and there is no lawful reason to frustrate decedent's intent. There are no issues of material fact remaining to be determined by the Court and the Personal Representative is entitled to judgment as a matter of law and the Court therefore **GRANTS** the Personal Representative's Cross-Motion for Summary Judgment." Declaration of Allen Ellis dated June 13, 2016, Exhibit 5.

23. Douglas Fleenor filed a Notice of Appeal on August 13, 2014. Complaint, Par. VII.

III.
STANDARD OF REVIEW

Under Rule 56(c) of the Idaho Rules of Civil Procedure, summary judgment is proper if "the pleadings, depositions, and the admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Here, Plaintiffs have moved for partial

summary judgment. Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from granting summary judgment. ***Intermountain Forest Management v. Louisiana Pacific Corp.***, 136 Idaho 233, 31 P.3d 921 (2001).

IV.
SUBSTANTIAL EVIDENCE SUPPORTED THE MAGISTRATE COURT'S FINDINGS OF FACT

The Lanhams' malpractice claim against Douglas Fleenor alleges that he did not timely file an appeal, and if he had timely filed an appeal, the Appellate Court would have found that the Magistrate Judge improperly granted the Personal Representative's Cross-Motion for Summary Judgment.

A court's findings on cross motions for summary judgment will not be disturbed on appeal so long as the record is sufficient to support the findings. ***Riverside Development Co., v. Ritchie***, 103 Idaho 515, 522, 650 P.2d 657, 664 (1982); ***Cougar Bay Co., Inc. v. Bristol***, 100 Idaho 380, 383, 597 P.2d 1070, 1073 (1979) (in reviewing the sufficiency of the record to sustain a trial court's findings of fact and conclusions of law, the Court limits the review to whether there is substantial, competent, although conflicting evidence, in the record to support the findings).

The Magistrate Court based its Findings of Fact and Conclusions of Law on the language of the Lanham Will itself, the affidavits, the audio recordings and the entire record. The Court held there was no reason to doubt the validity of the Lanham Will, stating "from the affidavits and especially the audio recordings, it is clear that decedent Gordon Thomas Lanham possessed undiminished mental capacities at the time of (sic) he

executed the will. He demonstrated a thorough grasp of his potential heirs, and his relationships with them and sound reasons for treating each as he did. There is no evidence suggesting that anyone exercised undue influence or coercion over decedent. In fact, in spite of decedent's failing health and physical maladies, it appears he was a strong willed and independent thinker at the time he executed his will." The Court further stated that Claimant Thomas Everett Lanham advanced several claims, but he failed to support his claims and arguments with one iota of credible, admissible evidence. Based on these findings, the Magistrate Court granted the Personal Representative's Motion for Summary Judgment.

The Magistrate Court's findings concerning the Lanham Will based on substantial and competent evidence in the record. As a result, even if the appeal of the Magistrate Court's decision was timely filed, the Appellate Court's review would have been limited to determining whether the Magistrate Court's findings were supported by evidence in the record. The Lanhams have failed to provide any evidence to demonstrate the Magistrate Court's decision was not based on substantial and competent evidence. Further, while Thomas Lanham previously failed to support his claims with "one iota of credible, admissible evidence," even if there had been conflicting evidence, the Appellate Court would still refrain from disturbing the Magistrate Court's ruling so long as there was evidence in the record to support its findings.

V.
THE MAGISTRATE JUDGE'S CONCLUSION THAT THE LANHAM WILL WAS VALID WAS NOT IN ERROR

The Lanhams' malpractice claim alleges they sustained damages as a result of Gordon Lanham's estate being distributed pursuant to the Lanham Will. The elements

of a legal malpractice claim are : (1) the existence of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the failure to perform that duty; and (4) the failure to perform that duty must be a proximate cause of the injuries suffered by the client. ***Lamb v. Manweiler***, 129 Idaho 269, 923 P.2d 976 (1996); ***Soignier v. Fletcher***, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011) (citing ***Johnson v. Jones***, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982)). However, as the Magistrate Court correctly found, the Lanham Will was valid under Idaho law. Even assuming for the sake of argument Douglas Fleenor failure to perform a duty, the alleged breach of that duty did not cause harm to the Lanhams because the Appellate Court would have sustained the Magistrate Court's correct decision.

i. Gordon Lanham Executed a Valid Will

In 1971 the Idaho Legislature extensively revised Idaho's statutes relating to descent and distribution on death. ***Nebeker v. Piper Aircraft Corp.***, 113 Idaho 609, 747 P.2d 18 (1987). For the most part, the prior statutes were repealed in total and replaced by provisions of the Uniform Probate Code ("UPC"). ***Id.*** The Idaho Legislature specifically stated the two purposes of the adoption of the UPC were to "simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons," and "to discover and make effective the intent of a decedent in distribution of property." Idaho Code §§15-1-102(b)(1) and (2). The provisions of the Uniform Probate Code are to be "liberally construed and applied..." ***In Re Estate of Kunzler***, 108 Idaho 374, 377, 699 P.2d 374, 1391 (1995).

The Legislature defined a will as "a testamentary instrument and includes codicil and any testamentary instrument which merely appoints an executor or revokes or

revises another will." Idaho Code §15-1-201(56). The test of the testamentary character of an instrument "is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest." ***In re Estate of Webber***, 97 Idaho 703, 707, 551 P.2d 1339, 1343 (1976) (***quoting Estate of Hengy***, 53 Idaho, 515, 519, 26 P.2d 178, 179 (1933)) (greeting card did not qualify as holographic will because testator did not write card with testamentary intent).

Any "emancipated minor or any person eighteen (18) or more years of age who is of sound mind may make a will." Idaho Code §15-2-501. The Comment to the Official Text states:

> Part 5 of Article II (Chapter 2) deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. **The basic intent of these sections is to validate the will whenever possible**. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum, holographic wills, written and signed by the testator are authorized, choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment. However, the statute also provides a more formal method of execution with acknowledgment before a public officer.

Comment to Official Text, General Comment to Idaho Code §§15-2-501 to 15-2-513 (emphasis added). The execution of wills is governed by Idaho Code §15-2-502:

> Except as provided for holographic wills, writings within section 15-2-513 of this part, and wills within section 15-2-506 of this part, or except as provided in sections 51-109, 55-712A, or 55-712B, Idaho Code, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two (2) persons each of whom witnessed either the

> signing or the testator's acknowledgment of the signature or the will.

The Comment to the Official Text states:

> The formalities for execution of a witnessed will have been reduced to a minimum. **Execution under this section normally would be accomplished by signature of the testator and of two witnesses**; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at this direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses. There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. **The intent is to validate wills which meet the minimal formalities of the statute**. A will which does not meet these requirements may be valid under Section 2-503 as a holograph.

Comment to Official Text, Idaho Code §15-2-502(emphasis added); ***see In re Estate of McGurrin***, 113 Idaho 341, 743 P.2d 994 (Ct.App. 1987)(discussing legislative history of Idaho Code §15-2-502).

Idaho Code §15-2-603 addresses rules of construction and intention:

> The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this Part apply unless a contrary intention is indicated by the will.

Construing §15-2-603, the Idaho Supreme Court stated, "The language of the will is to be given its ordinary and well understood meaning." ***Allen v. Shea***, 105 Idaho 31, 32, 665 P.2d 1041, 1042 (1983)(affirming magistrate's construction of will). "If the testator's intent can be determined from the face of his will, that intent, unless it is in contravention of some established rule of law or public policy, must be given effect." ***Id.*** at 34, 665 P.2d at 1044. In construing the provisions of a will to ascertain the meaning of a testator, the cardinal rule of construction is to ascertain the testator's intent, and "this intent is to be ascertained from a full view of the everything within the four corners of the instrument." ***Wilkins v. Wilkins***, 137 Idaho 315, 320, 48 P.3d 644, 649 (2002)(affirming magistrate's construction of will).

The Lanham Will satisfies all requirements under Idaho law. The Lanham Will is a testamentary instrument. The Lanham Will is entitled "Last Will and Testament." In the Lanham Will Gordon Lanham referred to giving "executor" Judd Max Lanham "a Power of Attorney for full control now and even after I am dead." Gordon Lanham stated, "I want him to be able to distribute my property and my personal effects as stated in my Last Will and Testament." These statements show Gordon Lanham's intention to create a revocable distribution of his property, to accrue and take effect only on his death, and to pass no present interest.

Compare the Lanham will to the greeting card in ***In re Estate of Webber***, supra. In the greeting card, Arthur Webber addressed the card to Jessie Nail, and wrote on the back of the card, "Aug. 1, 1969 I bid this world goodbye I leave this land to you," and signed his name. Extrinsic evidence was admitted at trial that was conflicting as to Mr. Webber's intent. Mr. Webber's widow and an attorney both testified that while conferring with the attorney on other legal matters, Mr. Webber asked about a will and intestate

succession and after the attorney explained the law of intestate succession to Mr. Webber, Mr. Webber replied to the effect that he did not think that he needed a will. Testimony was adduced that on several occasions Mr. Webber stated that he did not have a will and that he intended that the farm be given to his wife upon his death, apparently under the laws of intestate succession. The trial court resolved the conflicting evidence in favor of Mrs. Webber. The Idaho Supreme Court held that in light of the evidence presented, the finding by the trial court that Arthur Webber did not execute the greeting card alleged to be his will with testamentary intent must be affirmed. ***Id.*** at 707, 551 P.2d at 1343.

In contrast, the Lanham Will is entitled Last Will and Testament. Gordon Lanham discusses at length the fact that he intends to create a distribution of his estate upon his death. The Lanham Will discusses Gordon Lanham's property in detail. Gordon Lanham ends the Lanham Will by stating that he wants Judd Lanham, his executor, to have power of attorney for full control to distribute the property after his death. Unlike the greeting card, Gordon Lanham makes his testamentary intent clear. ***See In re Estate of Webber***, 97 Idaho 703, 551 P.2d 1339 (1976).

The Lanham Will satisfies the requirements of Idaho Code §15-2-502 that it be a writing signed by the testator and that it be signed by at least two other persons each of whom witnessed either the signing or the testator's acknowledgment of the signature of the will. The Lanham Will is in writing. Each witness stated that Gordon Lanham appeared to be of sound mind and under no duress, fraud or undue influence. Gordon Lanham's signature of the Lanham Will is notarized by an Idaho notary public. The notary states that Gordon Lanham acknowledged to her that he executed the Lanham Will. The notary further stated under penalty of perjury that Gordon Lanham appeared to be of

sound mind and under no undue influence.

These elements are sufficient to satisfy the Idaho Probate Code's minimal requirements for a will. The Lanham Will satisfies the "minimal formalities of the statute." Under these circumstances, the Lanham Will must be validated "whenever possible." Gordon Lanham's intention as expressed in the Lanham Will "controls the legal effect of his dispositions." Gordon Lanham's intent, unless it is in contravention of some established rule of law or public policy, must be given effect.

There is no Idaho law or public policy prohibiting a person from choosing not to distribute property to his adult children. "Courts favor testacy rather than intestacy." ***In re Estate of Corwin***, 86 Idaho 1, 5, 383 P.2d 339, 343 (1963)(reversing district court's judgment and ordering that distribution occur as provided for in will). Gordon Lanham was not required to, but listed reasons for not distributing property to Thomas and Keith Lanham. In the case of Thomas Lanham, Gordon Lanham stated in the Lanham Will that he felt Thomas Lanham "has already been given all he needs to have and that I am going to leave $1 more dollar against whatever is legal to him and then he is going to be on his own." Gordon Lanham stated in the Lanham Will that as to Keith Lanham and his spouse, "what I leave them is going to be $1 because in my estate I don't want him to be able to sell and profit off of his alcoholism or drugs ever since his car wreck he has been on pain pills and ever since his son rode in the rodeos and got himself into a domestic violence case and went to prison, now his father is the same way." This was a sound choice by Gordon Lanham that he was legally entitled to make. Gordon Lanham rationally chose not to leave the vast majority of his estate to Thomas or Keith Lanham. Thomas and Keith

Lanham are not pretermitted children. *See*, Idaho Code §15-2-302. The Court could not overturn what Gordon Lanham decided to do in his valid Last Will and Testament.

A. There is no requirement a will contain "dispositive provisions"

The Lanhams allege in their Complaint that the Lanham Will was defective "in several respects," including "failing to set forth dispositive provisions." It is assumed that in making this allegation, the Lanhams intend to allege that the Lanham Will did not contain provisions disposing of Gordon Lanham's property. However, the Lanham Will did in fact dispose of Gordon Lanham's property. Gordon Lanham gave his executor power of attorney and stated that the executor should distribute Gordon Lanham's property and personal effects as stated in the Lanham Will. The Idaho Probate Code permits a testator to do this. Idaho Code §15-2-610 discusses the exercise of a power of appointment by the testator. The Comment to the Official Text of §15-2-610 states in relevant part:

> Under this section and Section 2-603 the intent to exercise the power is effective if it is "indicated by the will." This wording permits a Court to find the manifest intent if the language of the will interpreted in light of all the surrounding circumstances shows that the donee intended an exercise, except, of course, if the donor has conditioned exercise on an express reference to the original creating instrument. **In other words, the modern liberal rule on interpretation of the donee's will would be available**.

(Emphasis added). ***See Conoway v. Fulmer***, 54 So.624, 625 (Ala. 1911)("The will is but the expression of the desire of and direction by the testator as to what shall be done with the property left by him, and if he does not desire to make any disposition save such as the law provides, but does desire to name the one who shall administer upon his effects, he has the right to do so."), cited on other grounds, ***In re Heazle's Estate***, 72 Idaho 307, 240 P.2d 821(1952) (reversing lower court with directions to receive additional evidence as to

testator's competence). Here, Gordon Lanham expressly stated in his will that he intended his executor to make distributions in accordance with his statements in the Lanham Will. Gordon Lanham made it plain that he did not want the vast majority of distributions going to Thomas and Keith Lanham. The Court was required by the modern liberal rule to interpret the will in a way that honored Gordon Lanham's intent.

Additionally, Gordon Lanham made statements in the Lanham Will directing how property should be disposed. The Lanham Will described furniture that was to go to Linda Louise Andrews Lanham. Thomas and Keith Lanham were each given a bed.

B. There is no requirement a will contain a residuary clause

The Lanhams allege that the Lanham Will is invalid because it does not contain a residuary clause. Idaho law does not require a will to have a residuary clause. The Idaho Court of Appeals considered a holographic will in ***In re Estate of Bradley***, 107 Idaho 860, 693 P.2d 1062 (Ct.App. 1984)(deletion of residuary clause did not invalidate will). The testatrix prepared a holographic will. She subsequently made changes to the will be deleting certain provisions, including a residuary clause. The Idaho Court of Appeals held that the deletion of the residuary clause did not demonstrate an intent by the testatrix to cancel specific devises which she had made and which she did not delete. The Court of Appeals noted that Idaho Code §15-2-603 requires that "[t]he intention of a testator as expressed in his will controls the legal effect of his dispositions." The Court therefore was required to determine the validity of the will "'as we find it…giving due effect to all cancellations and additions.'" ***Id.***, 107 Idaho at 862, 693 P.2d at 1064 (quoting, ***In the Matter of the Estate of Fisher***, 47 Idaho 668, 672, 279 P.2d 291, 292 (1929)). In fact, because she deleted certain provisions and left others as she drafted them, her intent was

clear that by deleting the residuary clause, she did not intend to cancel the will in its entirety.

If the deletion of the residuary clause did not invalidate the holographic will in ***In re Estate of Bradley***, then the absence of a residuary clause in the first place does not invalidate the Lanham Will.

C. There is no restriction on bestowing donative powers on the personal representative

As discussed above, Idaho Code §15-2-610 allows a testator to designate the personal representative to have the power to dispose of property under the will. Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust, however for the benefit of the creditors and others interested in the estate. Idaho Code §15-3-711; see also ***Estate of Conroy***, 136 Cal.Rptr. 807, 809 (Cal.Ct.App. 1977)(A "power of appointment" is defined generally as a power or authority conferred by one person by deed or will upon another to appoint the person or persons who are to receive and enjoy an estate or an income therefrom after the testator's death).

Here, Gordon Lanham had the power as testator to empower the personal representative to distribute his estate. The Lanham Will in fact discusses generally how Gordon Lanham wanted property distributed, and the fact that he did not want the bulk of the property distributed to Thomas and Keith Lanham. The fact that Gordon Lanham chose to do this does not invalidate the Lanham Will.

ii. Summary

Although the Lanhams claim that the Lanham Will is defective, in reality the

underlying Court properly decided that the Lanham Will is a "legal, valid and binding" will. In doing so, the Court was favoring testacy over intestacy, validating the will whenever possible. The Lanham Will satisfied "the minimal formalities" of the Idaho Probate Code. Under the circumstances, the Court was constrained to interpret the Lanham Will so as to ascertain and fulfill Gordon Lanham's intent. Gordon Lanham's intent was to not give the bulk of his estate to Thomas and Keith Lanham.

VI.
DOUGLAS FLEENOR IS NOT LIABLE TO KEITH LANHAM BECAUSE MR. FLEENOR DID NOT OWE HIM A DUTY AND BECAUSE KEITH LANHAM WAIVED HIS CLAIM

The Trustee contends that although Keith Lanham did not have an attorney-client relationship with Douglas Fleenor, Douglas Fleenor still owed him a duty. This is contrary to Idaho law. As a general rule, an attorney will be held liable for negligence only to his or her client and not to someone with whom the attorney does not have an attorney-client relationship. ***Taylor v. Riley***, 157 Idaho 323, 336 P.3d 256(2014)(attorney providing opinion letter to stockholder which specifically stated that the stockholder could rely on the opinions in the letter had voluntarily assumed duty to stockholder and was subject to potential liability for legal malpractice). The Idaho Supreme Court has recognized only narrow exceptions to the general rule. In ***Harrigfeld v. Hancock***, 140 Idaho 134, 90 P.3d 884 (2004)(intended beneficiary of will could sue attorney who drafted will for malpractice), the Idaho Supreme Court analyzed whether an attorney drafting a will should potentially be held liable to a beneficiary of the will. In deciding whether to recognize a duty, the Court engaged in a "balance-of-the-harms" test:

> That test involves the consideration of policy and the weighing

> of factors, which include: the foreseeability of the harm to the plaintiff; the degree of certainty that the plaintiff suffered the injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 138, 90 P.3d at 888. Considering those factors, the Court held that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. ***Id.*** at 139, 90 P.3d at 889. The Court found that the harm to the intended beneficiaries was clearly foreseeable. In this setting, the Court found that the connection between the defendant's conduct and the harm is direct. The Court found that there was sufficient moral blame attached to the negligent preparation or execution of testamentary instruments to impose liability. ***Id.*** at 138, 90 P.3d at 888. The Court held that imposing such a duty might prevent future harm by creating an incentive to prepare such instruments carefully because otherwise there would be no liability for the negligent drafting of such instruments. Finally, the Court found that extending the duty to this degree would not unduly increase the burden upon attorneys to use care when drafting testamentary instruments, and insurance is readily available to cover such risk.

The Harringfeld Court noted that its extension of the attorney's duty was "very limited." ***Id***. It did not extend to beneficiaries not named or identified in the testamentary instruments. The extension of an attorney's duty with respect to preparation of testamentary documents "will not subject attorneys to lawsuits by **persons who simply did**

not receive what they believed was their fair share of the testator's estate, or who simply did not receive in the testamentary instruments what they understood the testator and stated or indicated they would receive." ***Id.*** at 139, 90 P.3d at 889 (emphasis added).

In ***Taylor v. Riley, supra***, an attorney representing a corporation wrote an opinion letter to a stockholder. The opinion letter expressly stated that the stockholder could rely upon the opinions stated in the letter. The Idaho Supreme Court held that under the circumstances that the attorney voluntarily undertook to issue the opinion letter and stated that the stockholder could rely on it, the attorney had a duty of care to the stockholder, and was potentially liable for legal malpractice. ***Id***. at 339, 336 P.3d at 272.

Turning to the case at hand, the Idaho Supreme Court has already made it plain that it would not apply the "balance-of-the-harms" test to recognize a duty under these circumstances. Keith Lanham seeks to impose liability upon Douglas Fleenor because Keith Lanham "**simply did not receive what [he] believed was [his] fair share of the testator's estate**." ***Harrigfeld v. Hancock*, *supra*** (emphasis added). In addition, if an attorney representing a beneficiary in an estate dispute owed duties to other persons who were potential beneficiaries, it could create risk of conflicting duties. It would be improper to impose a duty on an attorney representing one heir contesting a will as to another heir where the two heirs have a potential conflict of interest. ***See, Pelham v. Grieseheimer***, 440 N.E.2d 96 (Ill. 1982)(holding that to conclude attorney representing a spouse in a divorce also owed a duty to the children would create conflict of interest situations).

Here, Thomas and Keith Lanham had a conflict of interest. Keith Lanham was represented by separate counsel in the lawsuit. It would be improper to impose a duty on an attorney to a beneficiary in an estate dispute where that beneficiary was represented

by another attorney. Further, Keith Fleenor took a position in the underlying lawsuit that was a direct contravention to Thomas Lanham's position. See Affidavit of Keith Lanham. Keith Lanham's assertion in the affidavit is a waiver of his present claim. ***Fullerton v. Griswold***, 142 Idaho 820, 136 P.3d 291 (2006)(affirming trial court's finding of waiver).

This is not the case in ***Taylor v. Riley*** where another party's attorney made representations to a person and told that person he could rely on those representations. There is no evidence that Douglas Fleenor ever represented Keith Lanham. There is no evidence that Douglas Fleenor provided any communication to Keith Lanham. There is no basis for finding Douglas Fleenor voluntarily assumed a duty.

Accordingly, Douglas Fleenor's motion for summary judgment against Keith Lanham should be granted because Keith Lanham did not have an attorney-client relationship with Douglas Fleenor and it would be improper to impose a duty upon Douglas Fleenor under these circumstances. The claim also should be dismissed because Keith Lanham waived his claim.

VII.
KEITH LANHAM IS BOUND BY HIS JUDICIAL ADMISSIONS

A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within the party's peculiar knowledge, not a matter of law and not an opinion. ***Grain Growers Membership & Investment Trust v. Liquidator for the Universal Life Insurance Co.***, 144 Idaho 751, 759, 171 P.3d 242, 250 (2007). Keith Lanham testified in his affidavit dated March 22, 2014, filed in the lawsuit contesting the Lanham Will:

3. I believe and accept that my father made specific gifts to my brother, Thomas Everett, and me as set forth in his Will for his own personal reasons and his wishes should be honored.

4. The remainder of my father's personal property consists primarily of old farm and ranching equipment and vehicles, household items and sentimental memorabilia. These items of personal property and the lots at Big Creek should be distributed according to his will and his recorded wishes made after he executed his will. Judd Lanham is the appropriate person to manage and distribute my father's estate as he knows what my father wanted to do.

5. A few years ago my father quitclaimed my brother Thomas Everett approximately 100+ acres. This was not intended as a gift. My brother promised to help support my father so he could pay his bills, including the mortgage to Linda Andrews Lanham. My brother abandoned my father after the quitclaim deed was recorded.

6. I reconciled with my father prior to his death. I do know that my father was completely estranged from my brother, Thomas Everett, at the time of his death on December 5, 2013.

Affidavit of Keith Lanham (see Affidavit of Counsel in Support of Motion to Dismiss, Exhibit C). This sworn testimony by Keith Lanham contains the following statements about concrete facts within Keith Lanham's peculiar knowledge:

- Keith Lanham believes and accepts that Gordon Lanham made the specific gifts to Thomas and Keith Lanham as set forth in the Will for his own personal reasons and his wishes should be honored.

- Gordon Lanham's personal property and lots at Big Creek should be distributed according to Gordon Lanham's will and his recorded wishes made after he executed his will.

- Judd Lanham is the appropriate person to manage and distribute Gordon Lanham's estate as Judd Lanham knows what Gordon Lanham wanted him to do.

- Thomas Lanham promised to support Gordon Lanham in exchange for a quitclaim to 100+ acres, and then Thomas Lanham abandoned Gordon Lanham after the quitclaim deed was recorded.

- Gordon Lanham was completely estranged from Thomas Lanham at the time of his death.

Keith Lanham is bound by these judicial admissions. Keith Lanham provided his affidavit testimony expecting the Court to rely on his testimony. The Magistrate Court admitted the Affidavit of Keith Lanham, and relied on his affidavit testimony in rendering its decision that the Lanham Will was valid. Idaho law does not permit Keith Lanham to revoke his testimony. A litigant is not allowed to revoke his testimony that the Court in fact relies upon in rendering its decision. Keith Lanham's testimony is part of the substantial evidence on which the Magistrate Court relied on issuing its decision. Keith Lanham's testimony is completely binding on his claim.

VIII.
CONCLUSION

Even assuming Douglas Fleenor breached a duty, the alleged breach did not cause harm because the Appellate Court would have sustained the Magistrate Court's correct decision. The Magistrate Court's findings were supported by the substantial evidence in the record. An Appellate Court would not have reversed the Magistrate Court's conclusions of law, since they were correct, in that the Lanham Will was valid. Further, Keith Lanham did not have an attorney client relationship with Douglas Fleenor and it would be improper to impose a duty on Douglas Fleenor as to Keith Lanham under the present circumstances. Additionally, Keith Lanham waived his claim. Therefore, for the foregoing reasons, Douglas Fleenor requests the Court grant his motion for summary judgment.

DATED this 7th day of September, 2016.

CAREY PERKINS LLP

By /s/ Richard L. Stubbs
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of September, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

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Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, as party plaintiff in the stead of Keith C. Lanham, Plaintiffs v. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-2016-8252 PLAINTIFFS' ANSWERING BRIEF TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Come now plaintiffs, through their attorney of record, and submit this answering brief to defendant's motion for summary judgment in accordance with Rule 56(c), I.R.C.P.

Preliminary note: Plaintiffs incorporate their Memorandum in Support of Motion for Partial Summary Judgment filed August 31, 2016, as though set forth in full herein. This earlier Memorandum addresses issues of (1) proximate causation, (2) whether the proximate cause issue is within the province the court, rather than a jury; and (3) the duty of care owed Keith, a non-client.

KEITH LANHAM'S WITHDRAWAL OF HIS PETITION FOR A DECLARATION OF INTESTACY DOES NOT CONSTITUTE A WAIVER OF HIS CLAIM AGAINST DEFENDANT FOR LEGAL MALPRACTICE

Defendant erroneously argues that plaintiff Keith has "waived" his right to sue defendant for malpractice: Defendant argues as follows:

> Further, Keith Fleenor (sic) took a position in the underlying lawsuit that was a direct contravention to Thomas Lanham's position. See affidavit of Keith Lanham. It is incredulous that Keith Lanham now contends that Mr. Fleenor owed him a duty where Keith Lanham made a judicial admission in the will contest taking a directly adverse position to Mr. Fleenor's client. . . Keith Lanham's assertion in the affidavit is a waiver of his present claim. . .

Defendant's Brief, p. 17.

Although not entirely clear, defendant apparently is contending that Keith's withdrawal of his petition for intestacy bars this claim for legal malpractice. The precise dynamics of this "waiver" are not identified by defendant, nor is there helpful case authority, i.e., the only citation is to a case dealing with waiver of the right to declare a purchase invoice void. *Fullerton v. Griswold,* 142 Idaho 820 (2006).

At the time of the so-called waiver, it must be shown that the waiving party "intentionally relinquished a known right or advantage", *Id.*, 142 Idaho at 824: As reflected in the 2014 affidavit of Keith Lanham, at the time of the withdrawal of his petition, he believed that his father's real property had either been disposed of by the Will (Big Creek) and that the remainder (the ranch) had been deeded to grandson Joseph. See declaration of Keith Lanham filed herein as corroborated by his 2014 affidavit (Exhibit 3 to Exhibit C to Lundberg affidavit). As testified in his declaration herein, he withdrew his petition for declaration of intestacy because he did not want to incur attorney

fees in attempting to recover personal property of relatively little value. That is, in Keith's eyes, at the time he withdrew his petition, the intestacy claim did not include a claim to the real property.

Defendant erroneously equates Keith's waiver of his claim against the estate as a waiver of his claim against defendant Fleenor. The one has nothing to do with the other.

Even ignoring this error, the petition for withdrawal was made upon the mistaken belief that (1) the Will had devised the Big Creek property, (2) that his father had conveyed the ranch prior to his death, and (3) that all that remained in the Estate was relatively valueless personal property. Accordingly, even if characterized as a waiver, his mistaken perception of things prevented the so-called waiver from being effective because it was not a "relinquishment of a *known* right or advantage". *Id.*

Given the elements of waiver, i.e., relinquishment of a *known* right, genuine issues of material fact are presented which preclude summary adjudication. Rule 56(c), I.R.C.P.; *Brand S Corp. v. King,* 102 Idaho 731, 734, 639 P.2d 429 (1981).

KEITH LANHAM'S SO-CALLED "ADMISSIONS" ARE ERRONEOUS OR IRRELEVANT TO THESE PROCEEDINGS AND INCLUDE CONCLUSIONS OF LAW UNDERTAKEN BY A LAYMAN.

Defendant argues in his brief (pp. 21 - 23) that plaintiff Keith Lanham has made certain "admissions" to which he is "bound". However, defendant fails to explain the relevancy of these admissions to his motion for summary judgment. As set forth below the so-called admissions of fact in Keith's 2014 affidavit (Exhibit 3 to Exhibit C) are either erroneous, irrelevant, or both. Two "admissions" are points of law concerning which Keith, a layman, lacks the competence to articulate:

Alleged admission	**Erroneous**	**Irrelevant**	**Legal conclusion**
(1) Decedent made specific bequests to the plaintiffs which should be honored.		X	
(2) Big Creek property should be devised according to the Will.	X		X
(3) Quitclaim of 100 acres to Thomas was a gift. Then Thomas abandoned decedent		X	X
(4) Decedent was estranged from Thomas; Keith reconciled with decedent.		X	
(5) Judd Lanham is appropriate person to be personal representative.		X	

As can be readily seen, four of the five so-called admissions have no relevance to (1) proximate causation, (2) whether defendant Fleenor owed Keith Lanham a duty of care, or (3) whether Keith waived his claim of malpractice. Defendant's brief fails to point us in the direction of relevancy. The purported admission dealing with the Big Creek property is simply erroneous and constitutes a legal conclusion which is beyond Keith's competence.

CONCLUSION

Prior briefing: As noted above, plaintiffs' summary judgment brief, incorporated herein by reference, deals with issues of proximate cause, proximate cause adjudication, and the duty of care which defendant Fleenor owed Keith Lanham and is responsive to defendant Fleenor's motion for summary judgment.

Waiver: At the time plaintiff Keith withdrew his petition for intestacy, he believed that the real property of the decedent had either been devised by the Will or had been conveyed away during

the decedent's life. That is, there cannot be a waiver in the absence of an intentional relinquishment of a known right. Stated more baldly, withdrawing a petition for intestacy has nothing to do with the herein malpractice claim.

Purported admissions: Defendant's brief fails to identify the relevance of these admissions. As is reflected in the above chart, the admissions are, in the main, irrelevant. The single admission that is not irrelevant, i.e., that Big Creek was devised by the Will, is flat out erroneous and a conclusion of law opined by the layman Keith Lanham.

Dated this 3rd day of October, 2016.

Allen B. Ellis
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3rd day of October, 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Richard L. Stubbs
Carey Perkins, LLP
P.O. Box 519
Boise, Idaho 83701

_____ U.S. Mail, postage prepaid
_____ Hand delivery
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__X__ Facsimile (345-8660)

Allen B. Ellis

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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I.
INTRODUCTION

The first issue raised in the Lanhams' Motion for Partial Summary Judgment is whether Douglas Fleenor's alleged failure to timely file an appeal proximately caused the Lanhams to lose their status as intestate heirs. However, in making this argument the Lanhams apply the wrong standard of review. The correct analysis of an appeal is whether the Magistrate Court based its findings on sufficient facts in the record. *See Camp v. East*

Fork Ditch Co., 137 Idaho 850, 55 P.3d 304 (2002). There is sufficient evidence in the record to support a finding that the Lanham Will was valid under Idaho law. Further, the Idaho Supreme Court has repeatedly upheld juries deciding the issue of proximate cause in legal malpractice cases. *See Marias v. Marano*, 120 Idaho 11, 813 P.2d 350 (1991)(affirming jury's determination that attorney's conduct was not a proximate cause of plaintiff's damages); *Murray v. Farmers Insurance Co.*, 118 Idaho 224, 796 P.2d 101 (1990)(affirming jury determination of proximate cause in attorney malpractice lawsuit). Taking the determination of violation of standard of care of proximate cause away from juries would violate Article I, Section 7 of the Idaho Constitution ("The right of trial by jury shall remain inviolate….").

Additionally, there is a genuine question as to whether Douglas Fleenor's failure to timely file an appeal was a breach of his duty of care based upon Thomas Lanham's hesitation to pursue the appeal. (Affidavit of Douglas Fleenor in Opposition to Plaintiff's Motion for Partial Summary Judgment dated September 30, 2016). After the Magistrate Judge denied Douglas Fleenor and Thomas Lanham's motion for summary judgment in the prior proceeding, Douglas Fleenor informed Thomas Lanham there was a limited time frame to appeal. *Id*. Due to concerns over cost, Thomas Lanham instructed Douglas Fleenor to wait while he decided whether he wanted to pursue an appeal and to only proceed if and when Thomas Lanham gave him approval. *Id*. After the deadline had passed, Thomas Lanham informed Douglas Fleenor he wanted to proceed with the appeal. *Id*. Douglas Fleenor informed Thomas Lanham that the appeal deadline had passed but there may be a chance it would still be accepted due to their motion for reconsideration, and filed the appeal on August 13, 2014.

The second issue the Lanhams raised is whether Keith Lanham, who was not a client of Douglas Fleenor, has a right of action against Douglas Fleenor. It is undisputed that Keith Lanham did not have a contractual attorney-client relationship with Douglas Fleenor. It is additionally undisputed that Keith Lanham took an adversarial position to Thomas Lanham in the prior proceedings. (Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit C). Douglas Fleenor represented and owed a duty of care to Thomas Lanham. Douglas Fleenor cannot be held to have also had a duty to a litigant adverse to his client.

Based on the foregoing reasons, Douglas Fleenor requests the Court deny the Lanhams' Motion for Partial Summary Judgment.

II.
VALIDITY OF THE LANHAM WILL

i. The Magistrate Judge's Ruling Would Not Have Been Overturned on Appeal

If we are evaluating the efficacy of an appeal, findings of fact based on substantial evidence will not be overturned on appeal even in the face of conflicting evidence. *Beckstead v. Price*, 146 Idaho 57, 61, 190 P.3d 876, 880 (2008). So long as the record is sufficient to support the Court's findings, it will not be disturbed on appeal. *Riverside Development Co., v. Ritchie*, 103 Idaho 515, 522, 650 P.2d 657, 664 (1982). In this case, the Magistrate Judge determined that the Lanham Will was valid. This decision was based on affidavits and audio recordings of the Lanham Will, ultimately finding "decedent Gordon Thomas Lanham possessed undiminished mental capacities at the time he executed the will. He demonstrated a thorough grasp of the extent and nature of his assets. He also demonstrated a good grasp of his potential heirs, and his relationships with

them and sound reasons for treating each as he did." (Declaration of Allen Ellis dated June 13, 2016, Exhibit 5). Accordingly, the Magistrate Judge's decision was supported by substantial evidence and would not have been overturned on appeal. The Lanham's reference to Judge McKee's findings and observations concerning the Lanham Will are not persuasive in the current matter. Judge McKee's statements regarding the Lanham Will were dicta, made while deciding whether to award attorney's fees and should not be utilized by this Court in determining whether the Lanham Will was valid, or whether the Magistrate Judge's determination that the Lanham Will was valid was supported by substantial evidence.

ii. Gordon Lanham Executed a Valid Will

Idaho requires the following "minimal formalities" for a will:

- The testator must be an "emancipated minor or any person eighteen (18) or more years of age who is of sound mind." Idaho Code Section 15-2-501. A testator is of 'sound mind' if he knows, "in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of persons who are to be the objects of his bounty, and his relation toward them." *Wooden v. Martin (In re Conway)*, 152 Idaho 933, 943-44, 277 P.3d 380, 390-91 (2012)(citing *In re Heazle's Estate*, 74 Idaho 72, 76, 257 P.2d 556, 558 (1953));

- The will must be a testamentary instrument, which means that it demonstrates the testator's intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. Idaho Code Section 15-1-201(56); *In re Estate of Webber*, 97 Idaho 703, 707, 551 P.2d 1339, 1343 (1976);

- The will must be "signed by the testator or in the testator's name by some other person in the testator's

> presence and by his direction, and shall be signed by at least two (2) persons each of whom witnessed either the signing or the testator's acknowledgment of the signature of the will." Idaho Code Section 15-2-502.

The Lanham Will meets these requirements. Gordon Lanham was above the age of eighteen and of sound mind when he executed the Lanham Will. He acknowledged his property, his heirs, and his relation to them. He appointed Judd Lanham as his Executor, and granted him Power of Attorney, to have full control to distribute his property after his death. The Lanham Will is in writing, signed by the testator, in the presence of two witnesses, each of whom witnessed both the signing and the testator's acknowledgment of the signature of the will. Each witness stated Gordon Lanham appeared to be of sound mind and under no duress, fraud or undue influence. A notary further stated under penalty of perjury that Gordon Lanham appeared to be of sound mind and under no undue influence. The Lanham Will complies with the minimal formalities set forth under Idaho law.

iii. Thomas and Keith Lanham Seek to Circumvent Gordon Lanham's Testamentary Intent by Declaring Part of the Property Should Pass Intestate

If the Court determines that the Lanham Will is valid, but also finds there are ambiguities concerning the proper distribution of property, before requiring property to pass intestate, it is the goal of the Court to determine the testator's intent from within the four corners of the will. *Wilkins v. Wilkins* (*In Re Estate of Wilkins*), 137 Idaho 315, 319, 48 P.2d 644, 648 (2002). Here, there is no question as to what Gordon Lanham intended. Gordon Lanham intended that specific items of property be distributed as stated and then gave Judd Lanham discretion to distribute the remaining property. Nonetheless, the Lanhams

continue to argue that the Lanham Will is defective and so the property should pass intestate, particularly regarding two pieces of real property.

Relying on *In re Corwin's Estate*, the Lanhams contend "in the absence of a specific devise of the property as well as the absence of a residuary clause, Idaho case law requires that this real property descend according to intestate succession." (Memorandum in Support of Partial Summary Judgment pg. 7.) This argument fails to consider the fact Gordon Lanham granted Judd Lanham power of appointment in lieu of creating a residuary clause. In *In re Corwin's Estate*, the testator left one half of her estate to her granddaughter, but provided that in the event the granddaughter predeceased her, her brother was to receive an undivided interest in the estate. *In re Corwin's Estate*, 86 Idaho 1, 383 P.2d 339 (1963). The granddaughter was still living at the time the testator died. Accordingly, the court found the testator had failed to dispose of the other half of the estate. *Id.* at 5. The court held the undevised half of her property must pass through intestate succession because there was no residuary clause. *Id.* at 6. Because the will in *In re Corwin* did not include a power of appointment, it is clearly distinguishable from the case at hand.

While arguing there are no dispositive provisions regarding the Big Creek and Ranch properties, the Lanhams assert that "the failure of the Will to devise the real properties and the absence of a residuary clause, require that those properties descend according to the laws of intestate succession." (Memorandum in Support of Partial Summary Judgment, pg. 9). This argument does not recognize that a residuary clause cannot co-exist with a power of appointment. A power of appointment cannot be created if there is "a general residuary clause in a will, or a will making general disposition of all of

the testator's property." Idaho Code Section 15-2-610. The reason being that a power of appointment authorizes "a power or authority given to a person to dispose of property, or an interest therein, which is vested in a person other than the donee of the power." *Estate of Conroy*, 67 Cal. App. 3d 734, 738, 136 Cal. Rptr. 807 (1977).

The Lanhams contend that if a power of appointment existed in the Lanham Will, it doesn't pertain to property that Gordon Lanham had not decided about, or property not identified in the will. In asserting this argument, the Lanhams cite to *Estate of Conroy*, stating that a power of appointment must "designate specific assets of the decedent" to be effective. (Memorandum in Support of Partial Summary Judgment, pg. 10). However there is no discussion of such a requirement in that case. Gordon Lanham chose to grant Judd Lanham Power of Attorney over ***all*** personal and real property stating "I want him to be able to distribute my property and my personal effects in any way that he sees fit and I will try and put all the wording about the personal effects." (Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit A) (emphasis added).

Additionally, the Lanhams argue that the Lanham Will's disinheritance of Thomas and Keith Lanham does not impact their status as intestate heirs. This ignores the presumption that if a provision in a will can be construed in more than one way, intestacy should be avoided, "especially where the will evinces an intention on the part of the testator to dispose of his or her entire estate, or where intestacy will result in persons sharing in the estate whom the testator expressly cut off in the will." *Estate of Kuttler*, 185 Cal. App. 2d 189, 202, 8 Cal. Rptr. 160,167 (1960) (the court found "where an intention to disinherit an heir is expressed clearly and manifestly in a will, so as to leave no reason for doubt, a construction of the will which would leave the testator intestate as to any portion of the

property will not be adopted to defeat the intention and thus allow the heir to have some share in the estate."); *In Re Corwin's Estate*, supra, 86 Idaho at 5, 383 P.2d at 343 ("Courts favor testacy over intestacy"). The Lanhams were each left $1 dollar and a bed built by their grandfather. It would entirely frustrate the intent of Gordon Lanham to allow the Lanhams to profit through the laws of intestacy.

Finally, the Lanhams allege that because there were additional devises by dictation, Gordon Lanham did not intend the Lanham Will to be his last will and testament. (Declaration of Allen Ellis dated June 13, 2016, Exhibit 9). To create a valid will it must only comply with the minimal formalities set forth in the Idaho Probate Code. Once a will is created, the testator may revoke or amend the will, but only through formal processes. Idaho Code Section 15-2-507. Those formalities were not followed in this case. As a result, any additional dictation is not legitimate and does not impact the validity of the Lanham Will. The Lanhams are attempting to circumvent the intent of the Lanham Will to recover a majority of the estate that the Gordon Lanham sought to disinherit them from. Such an attempt does not comport with Idaho law.

III.
DOUGLAS FLEENOR DID NOT BREACH HIS DUTY OF CARE

The Lanhams' allege that Douglas Fleenor breached his duty of care by failing to file the appeal within the 42-day time period. However, this argument does not take into account Douglas Fleenor's numerous attempts to discuss the appeal deadline with Thomas Lanham, and Thomas Lanham's reluctance to file the appeal. On June 10, 2014, Douglas Fleenor and Thomas Lanham discussed the limited time to file an appeal after the Magistrate Judge's decision in favor of the personal representative and against

Thomas Lanham. (Affidavit of Douglas Fleenor in Opposition to Plaintiff's Motion for Partial Summary Judgment dated September 30, 2016). Thomas Lanham instructed Douglas Fleenor that he wanted to wait due to concerns over the cost of an appeal. *Id*. Due to Thomas Lanham's concerns, Douglas Fleenor and Thomas Lanham discussed filing a motion for reconsideration as a cheaper alternative to pursuing the appeal, and on June 20, 2014, Douglas Fleenor filed a motion for reconsideration with the Court. *Id*.

On July 9, 2014, the Court denied the motion for reconsideration and Douglas Fleenor called Thomas Lanham and again discussed the deadline for filing an appeal. *Id.* Thomas Lanham instructed Douglas Fleenor to not file an appeal unless and until he decided he wanted to proceed. Douglas Fleenor made several attempts to contact Thomas Lanham over the next few weeks to ask about the appeal and Thomas Lanham failed to respond. On August 13, 2014, Thomas Lanham told Douglas Fleenor to file the appeal. Douglas Fleenor informed Thomas Lanham that the appeal deadline had passed but there may be a chance due to their previous motion to reconsider. *Id*. Douglas Fleenor then filed the appeal on the same day.

Douglas Fleenor has testified that under the circumstances, his filing of the notice of appeal complied with the applicable standard of care. This evidence creates a genuine issue of material fact as to whether Mr. Fleenor's filing of the appeal more than forty two days after the Court's decision violated the standard of care.

IV.
DUTIES OWED TO KEITH LANHAM

It is undisputed that Keith Lanham did not have a contractual attorney-client relationship with Douglas Fleenor. The Lanhams incorrectly apply the

balance-of-the-harms test set forth in *Harrigfeld v. Hancock* and *Lucas v. Hamm*, to argue that Keith, as a beneficiary of the Lanham Will, was owed a duty by Douglas Fleenor. *Harrigfeld v. Hancock*, 140 Idaho 134, 139, 90 P.3d 884, 889 (2004); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685 (Cal. 1961). This argument ignores the precedent concluding the multi-factor balancing test does not apply in adversary situations. *See Bowman v. John Doe Two*, 704 P.2d 140 (Wash. 1985)(attorney representing son did not owe duty to mother); *Rhode v. Adams*, 957 P.2d 1124 (Mont. 1998)(attorney representing mother in custody dispute did not owe duty to father); *Norton v. Hines*, 123 Cal.Rptr. 237 (Cal.Ct.App. 1975)(attorney did not owe duty to former adverse litigant, declining to extend holding of Lucas).

Additionally, both *Harrigfeld* and *Lucas* are strongly distinguishable from the case at bar because in those cases, the attorney drafted the will that led to the dispute. Here, Douglas Fleenor did not draft the will. Douglas Fleenor represented Thomas Lanham in a challenge to the Lanham Will. Thus, unlike the situations in *Harrigfeld* and *Lucas*, Douglas Fleenor's role arose out of litigation. Keith Lanham was an adversary to Thomas Lanham in the will contest. Keith Lanham was represented by his own attorney, and later, Keith Lanham executed an affidavit in which he testified that Thomas Lanham should receive nothing under the Lanham Will. (Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit C). Douglas Fleenor's duties were owed to Thomas Lanham. He cannot also be held to owe duties to a litigant who was adverse to his client. Keith Lanham ignores the statement of the *Harrigfeld* Court that the general rule is that attorneys do not owe duties to non-clients. Keith Lanham further ignores the Supreme Court's statement in *Harrigfeld* that its holding "will not subject attorneys to lawsuits by

person who simply did not receive what they believed was their fair share of the testator's estate, or who simply did not receive in the testamentary instruments what they understood the testator had stated or indicated they would receive." *Harrigfeld*, 140 Idaho at 138, 90 P.3d at 88.

The Lanhams maintain that there was no conflict of interest between Thomas and Keith Lanham. Idaho Rules of Professional Conduct Rule 1.7 provides in relevant part:

> Except as provided in paragraph (b) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

Here, Thomas and Keith Lanham were both seeking to recover property from the Estate of Gordon Lanham. There was an inherit potential conflict of interest between them. In fact, the inherit potential conflict of interest became a real conflict when Keith Lanham testified in an affidavit that Thomas Lanham should not recover. (Affidavit of Counsel in Support of Motion to Dismiss dated May 6, 2016, Exhibit C).

The Court cannot determine that there was no conflict between Thomas and Keith Lanham simply as to the issue of the timeliness of the appeal. If Douglas Fleenor had a conflict that prevented him from representing both Thomas and Keith Lanham at the trial court level, that conflict permeates the entire representation. The adversity between

Thomas and Keith prevents the Court from imposing a duty owed by Douglas Fleenor to Keith Lanham, a non-client.

V.
CONCLUSION

For the foregoing reasons, Douglas Fleenor requests that the Court deny the Lanhams' Motion for Partial Summary Judgment.

DATED this 3rd day of October, 2016.

CAREY PERKINS LLP

By /s/ Richard L. Stubbs
Richard L. Stubbs, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

Allen B. Ellis	[ ]	U.S. Mail, postage prepaid
Ellis Law, PLLC	[ ]	Hand-Delivered
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Boise, Idaho 83713	[ ]	Facsimile (208) 345-9564
Telephone (208) 345-7832	[X]	ICourt/E-Filing

/s/ Richard L. Stubbs
Richard L. Stubbs

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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 DEFENDANT DOUGLAS FLEENOR'S AFFIDAVIT IN OPPOSITION OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF IDAHO)
: ss.
County of _____)

DOUGLAS FLEENOR, having been first duly sworn upon oath, deposes and says:

1. I am the Defendant in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. I am, and at all relevant times have been, an attorney admitted to practice, and in good standing, in the State of Idaho. I have actual knowledge of, and I am familiar with, the standard of care applicable to an attorney practicing in the State of Idaho at the times that I provided legal services to Thomas Lanham. I developed my actual knowledge of, and familiarity with, the standard of care through practicing in the State of Idaho and discussing the practice of law with attorneys and judges in the State of Idaho. The opinions stated herein are stated with reasonable professional certainty.

3. On March 5, 2014, Thomas Lanham retained me to represent him with respect to Gordon Lanham's will. Attached hereto as **Exhibit A**, is my file copy of the retention agreement entered into by Thomas Lanham in retaining me to represent him. This file copy has been maintained by me in the ordinary course of my doing business.

4. On June 10, 2014, the Judge ruled from the bench and granted summary judgment in favor of the personal representative and against Mr. Lanham. After the Judge's decision I discussed the possibility of an appeal with Mr. Lanham and informed him that time was limited if he wanted to pursue an appeal. Mr. Lanham expressed some concern over the possible cost of appeal and told me to wait.

5. On June 17, 2014, due to his concerns about the cost of an appeal, I talked with Mr. Lanham about filing a motion for reconsideration as a cheaper alternative to pursuing an appeal. Mr. Lanham agreed to proceed with a motion for reconsideration. On June 20, 2014, I filed a motion for reconsideration with the court.

6. On July 9, 2014, I informed Mr. Lanham by telephone that the Magistrate Judge had denied the motion for reconsideration. I told Mr. Lanham we only had until the first week of August to appeal. Mr. Lanham instructed me to hold off for now. Mr.

Lanham asked me to estimate how much it would cost to undertake an appeal, and I told him that it would cost approximately $5,000 dollars. Mr. Lanham then told me that he did not want me to file an appeal at that time.

7. I called Mr. Lanham several times over the next weeks asking about the appeal, but he did not get back to me.

8. On August 13, 2014, Mr. Lanham told me to file an appeal. I told him that the time had run out and that it was too late to file a timely appeal, but stated there may be a chance due to the motion for reconsideration. After our conversation I filed the appeal.

9. It is my opinion that I met the standard of care for an attorney practicing in the State of Idaho in not filing an appeal within 42 days of issuance of the Magistrate Court's opinion and order granting the personal representative's motion for summary judgment and denying Thomas Lanham's motion for summary judgment, because Thomas Lanham expressly directed me not to file an appeal unless and until he told me to file an appeal. It is my opinion that at all relevant times the standard of care for an attorney practicing in Idaho requires the attorney to follow the instruction of his client with respect to whether or not to file an appeal, and it is my opinion that I met the standard of care in following Mr. Lanham's instruction to not file an appeal. It is my opinion that at all relevant times the standard of care for an attorney practicing in Idaho requires the attorney to inform the client of the consequences of a late appeal, and it is my opinion that I met the standard of care in informing Mr. Lanham that failing to file an appeal within 42 days of the Court's opinion could foreclose an appeal. It is my opinion that there was a valid argument that the filing of the motion for reconsideration extended the time for taking

of an appeal, and that it was within the standard of care for me to inform Mr. Lanham that the filing of the motion for reconsideration might extend the time for an appeal.

FURTHER your Affiant saith not.

DOUGLAS FLEENOR

SUBSCRIBED AND SWORN to before me this 30 day of September 2016.

(SEAL)

LISA M. WARREN NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Ada County
Commission expires 7-13-2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

Allen B. Ellis	[ ]	U.S. Mail, postage prepaid
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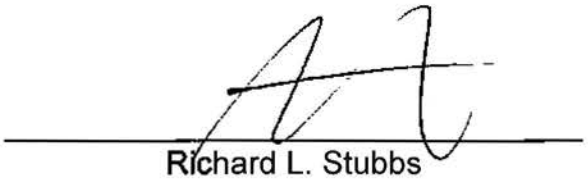

Richard L. Stubbs

EXHIBIT A

ATTORNEY FEE AGREEMENT

Thomas E. Lanham

This will confirm our agreement that you will retain Douglas E. Fleenor in representing your interests in the Gordon Thomas Lanham estate. You have provided your express authorization to institute administrative or legal proceedings as may be deemed necessary.

As compensation for legal services you promise to pay the following:

1. Attorney fees for the services of Douglas E. Fleenor at the rate of $200.00 per hour.

2. All necessary costs associated with this representation, including but not limited to filing fees, discovery costs, deposition costs, witness fees, faxes, photo copies, and the like.

Under our attorney/client relationship, you as the client will be the final decision-maker with regard to substantive decisions regarding the course of this action. Douglas E. Fleenor shall have the right to manage and control the matter.

No matter how likely I believe it is that you will obtain a successful outcome, I cannot guarantee a positive result.

Either of us may end this Agreement. I reserve the right to withdraw if you fail to honor this Agreement, or for any just reason permitted or required under Idaho rules or codes. If I withdraw, I will send you written notice.

You may end this Agreement at any time by sending written notice. If you end the Agreement, you will still owe for expenses incurred and work performed up to the time of notice, and for any expenses or work incurred to withdraw and close your file.

I look forward to working with you in this matter.

Th E Lanham — 3-5-14

Thomas E. Lanham — Dated

ALLEN B. ELLIS
ELLIS LAW, PLLC
12639 W. Explorer Drive, Suite 140
Boise, Idaho 83713
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ISB No. 1626

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

OC

THOMAS E. LANHAM and JANINE P. REYNARD, as party plaintiff in the stead of Keith C. Lanham, Plaintiffs v. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-2016-8252 PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Come now the plaintiffs, through their attorney of record, and submit the herein reply brief in support of their motion for partial summary judgment.

PLAINTIFFS ARE NOT CHALLENGING THE VALIDITY OF THE WILL; RATHER, THEY ASSERT THAT THE TESTATOR'S REAL PROPERTY WAS NOT DEVISED BY THE WILL AND MUST PASS BY INTESTATE SUCCESSION.

The will did not convey a power of appointment to the executor Judd Lanham with respect to the testator's real property:

(1) Real property not subject to any "power": At the time of his death, the testator owned

acreage in Valley County (Big Creek) and a ranch in Gem County. The ranch was not mentioned in the will, and the testator expressly "want[ed] to think about that 47 acres in Big Creek". Also, there is no reference to a "power of appointment" in the will. Absent disposition by the will, these properties pass to the plaintiffs by intestate succession given the absence of a residuary clause. See plaintiffs opening brief.

(2) Indispensable to an enforceable power of appointment is an identification of the property that is subject to the power: The Lanham will fails to identify the property that is subject to the alleged power. The will (Exhibit A to Lundberg affidavit) recites that executor Judd is to distribute the property "as he sees fit" pursuant to "*power of attorney*". However, the "property" is not identified. Thereafter, contradicting this language, the testator seeks to devise certain articles of personal property to named beneficiaries, rather than allowing his executor to do it, i.e., "Kathy can disburse", some books "belong to Lizzy"; "as far as my guns are concerned, I am gonna have to try and decide how that goes"; table and chairs "belong to Lizzy"; "sand painting that belongs to Lizzy". As to the Big Creek real property, "I want to think about that".

As defined in Black's Law Dictionary: "power of appointment. A power conferred on a donee by will or deed to select and nominate one or more recipients of the donor's estate or income" (*Id.*, Seventh Edition, p. 1190). Indispensable to the creation of a coherent power of appointment is identification of the property to which the power is subject. The will in question fails in this regard. The need for property identification is particularly crucial because the Lanham testator specifically devised items of personal property in derogation of so-called power of appointment.

In arguing for the existence of a "power of appointment", defendant erroneously conflates such power with the "power of attorney" referenced in the will: The will recites that executor Judd is the recipient of the testator's "power of attorney over all my personal and real property". There is no reference to a "power of appointment".

Defendant's brief asserts: "He [the testator] appointed Judd Lanham as his executor, and granted him *power of attorney*, to have full control to distribute his property after his death" (p. 5, emphasis added). Under the Uniform Power of Attorney Act such distribution by the executor is a legal impossibility. According to the Act, "a power of attorney terminates when . . . the principal dies" (§ 15-12-110). Hence, the executor had no authority, post death, to convey any property, real or personal.

Defendant may argue that the testator confused "power of attorney" for "power of appointment"and, therefore, the will should be read as conferring a power of appointment. The express language of the will causes this argument to fail. The will recites that the executor's power of attorney is effective immediately, a feature inconsistent with a testamentary power of appointment. According to Black's Law Dictionary, a "power of appointment" is "[a] power conferred on a donee by will or deed . . ." *Id.*, p. 1190, (Seventh Ed.).

By the terms of the will (Exhibit A): (a) "I am giving his (sic) Power of Attorney for full control *now*" (p. 1); and (b) "I am giving him a Power of Attorney for full control *now* and even after I am dead." (pp. 4, 5).

The mere absence of a residuary clause does not transform will provisions into a power of appointment: Defendant argues that the existence of a residuary clause is incompatible with the existence of a power of appointment. Again, as noted above, the will gave the executor a power of

attorney, not a power of appointment. In any event, defendant seems to be asking this Court to conclude that the *absence* of a residuary clause transforms will provisions into powers of appointment.

Idaho Code § 15-2-610, cited by defendant does provide that a residuary clause does not constitute an exercise of a power of appointment unless specific reference is made that the residuary clause includes the property subject to the power. Absent a residuary clause in the Lanham will, the statute is not relevant.

DEFENDANT ERRONEOUSLY ARGUES THAT APPLICATION OF OF THE *HARRIGFELD* CRITERIA DOES NOT COMPEL THE CONCLUSION THAT HE OWED KEITH THE SAME DUTY OF CARE WHICH HE OWED TO PLAINTIFF

Plaintiffs incorporate herein pages 14 through 17 of their opening brief which is an exposition of why the criteria in *Harrigfeld v. Hancock,* 140 Idaho 134 (2004) force the conclusion that defendant attorney owed Keith Lanham a duty of care. Defendant's answering brief fails to establish that such conclusion is incorrect.

At the time defendant filed the notice of appeal, there was no adversary relationship between defendant and Keith: Tom Lanham hired defendant to appeal the magistrate decision holding that the will in question devised the entirety of the Lanham Estate assets. The case authority cited by defendant deal with claims made by a litigant against his adversary's attorney respecting alleged negligence occurring in that litigation.

In the underlying litigation, Keith and the defendant attorney were not adversaries. The failed appeal was against Judd Lanham, the executor of the Lanham Estate who was claiming that the will disposed of the decedent's real property. As reflected in Keith's declaration, he withdrew from the

probate litigation in order to avoid additional attorney fees. He was under the illusion that (1) the will devised the Big Creek property and (2) that the ranch had been conveyed, inter-vivos, by the decedent to his grandson.

Defendant attorney erroneously seeks to distinguish *Harrigfeld* and *Lucas* by the fact that the defendant attorney in those cases drafted the will: There is nothing in the *Harrigfeld/Lucas* criteria which limits attorney conduct which can give rise to non-client liability. In *Lucas,* three named beneficiaries (non-clients) failed to get their inheritance because the bequest was an illegal restraint on alienation. *Lucas* held that these non-clients were owed a duty of care by the drafter, i.e., it was foreseeable that a drafting error would cost them financial loss. *Id.,* 56 Cal.2d at 588, 589. It was equally foreseeable to defendant Fleenor that Keith Lanham, the remaining intestate heir, would suffer the same financial loss as his brother in the event of a late appeal. Whether drafting a will or perfecting an appeal, *Lucas* and the case at bench have a commonality: the risk to the non-clients in the event of negligence as well as their identity were known to the attorney from the outset, unlike *Harrigfeld.*

There was no conflict of interest between Keith and Thomas: As potential intestate beneficiaries, the respective entitlement of Keith and Thomas was fifty/fifty. Whether they won or lost the appeal (had it been timely filed), the impact on them would be identical, i.e., owners as tenants in common to the real property or non-owners.

PROXIMATE CAUSATION IS A LEGAL ISSUE
FOR THE COURT TO RESOLVE.

Because the existence of proximate cause turns on the merits of the time-barred appeal, the overwhelming majority of cases conclude that this issue, i.e., the merits of the appeal, is a legal issue

for the Court. See analysis in plaintiffs' opening brief, pages 11 - 13.

The authorities cited by defendant are not on point. One involves the alleged negligence of an attorney in allowing evidence to be destroyed (*Murray v. Farmers Ins.*, 118 Idaho 224, 796 P.2d 101 (1990)). In the other case, the client sued the attorney for his failure to file a financing statement (*Marias v. Marano,* 120 Idaho 11, 813 P.2d 350 (1990).

Defendant argues that removing from jury consideration "the determination of violation of standard of care of proximate cause" (sic) is in violation of the Idaho Constitution. First, Court determination of proximate causation does not remove from the jury whether there has been a "violation of the standard of care". Secondly, as defense counsel well knows, legal issues are routinely removed from jury consideration, the Idaho Constitution notwithstanding.

DEFENDANT HAS IMPROPERLY INCLUDED IN HIS RULE 56 "ANSWERING BRIEF" AN ARGUMENT NOT ADDRESSED IN EITHER HIS SUMMARY JUDGMENT MOTION OR IN PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

Plaintiffs' motion for summary judgment addresses two issues: (1) proximate causation, i.e., whether the magistrate's ruling which held the real property to be devised by the will was subject to reversal on appeal; and (2) whether defendant attorney owed a duty of care to plaintiff Keith Lanham ("Keith"). Defendant's cross-motion for summary judgment addresses these two issues and a third issue, i.e., whether plaintiff Keith is "bound" by "judicial admissions".

Now, for the first time, in his Rule 56(c) "answering brief" defendant asserts that he was not negligent, conceding that this issue is fact-driven and not amenable to summary disposition. Defendant's point is not clear. The issue of fact presented by defendant's alleged negligence does not impair plaintiffs' motion for *partial* summary judgment on the legal issues of proximate

causation and defendant attorney's duty of care to Keith.

Dated this 10th day of October, 2016.

/s/ Allen B. Ellis
Allen B. Ellis
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 10th day of October, 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 DEFENDANT DOUGLAS FLEENOR'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I.
INTRODUCTION

Plaintiffs' Answering Brief discusses Keith Lanham's claim only. Plaintiffs raise two arguments in their Answering Brief: 1) Keith Lanham's withdrawal of his petition for a declaration of intestacy does not constitute a waiver of his claim against Mr. Fleenor for legal malpractice because he mistakenly believed that Gordon Lanham's real property had already been disposed of; and 2) Keith Lanham's judicial admissions were erroneous

or irrelevant. Note that Plaintiffs did not respond to Mr. Fleenor's assertion that it would be improper to impose a duty on Mr. Fleenor as to Keith Lanham where Keith Lanham was represented by separate counsel in the underlying suit. ***See***, ***Pelham v. Grieseheimer***, 440 N. E. 2d 96 (Ill. 1982) (holding that to conclude attorney representing a spouse in a divorce also owed a duty to children would create conflict of interest situations). The fact that Keith Lanham was represented by a separate attorney creates an inherent conflict that precludes Douglas Fleenor from being liable to Keith Lanham.

II.
KEITH LANHAM'S AFFIDAVIT TESTIMONY WAIVED HIS CLAIM

Plaintiffs portray Douglas Fleenor as arguing that Keith Lanham's withdrawal of his petition for a declaration of intestacy constituted a waiver of his claim. This is not Mr. Fleenor's argument. Instead, Mr. Fleenor argues that Keith Lanham's filing of his affidavit constituted a waiver of his present claim. *See*, Defendant's Memorandum in Support of Motion for Summary Judgment, p. 21 ("Keith Lanham's assertion in the affidavit is a waiver of his present claim.") The waiver occurred in Keith Lanham's testimony:

> I believe and accept that my father made the specific gifts to my brother, Thomas Everett, and me as set forth in his Will for his own personal reasons and his wishes should be honored.

Affidavit of Keith Lanham dated May 23, 2014.

Keith Lanham's affidavit testimony could not be more clear. Keith Lanham testified that he believed and accepted that his father made specific gifts to both Thomas Lanham and to him as set forth in his Will for his own personal reasons and that Gordon Lanham's wishes should be honored. The fact that Keith Lanham may have believed that Gordon Lanham's real property had already been disposed does not make this a less than

knowing waiver, particularly when this is considered in its proper context. Keith Lanham filed a petition for a declaration of intestacy. Then, before he withdrew his petition, Keith Lanham provided an affidavit in which he testified that he believed and accepted that Gordon Lanham made the specific gifts to Thomas and Keith "as set forth in his Will for his own personal reasons and his wishes should be honored." In this testimony, Keith Lanham concedes that Gordon Lanham's Will is valid. Keith Lanham also concedes that Gordon Lanham effectively disinherited Thomas and Keith for Gordon's "own personal reasons and that his wishes should be honored."

Keith Lanham knew he had a right to challenge Gordon Lanham's will. He waived that right when he filed his affidavit. When Keith Lanham filed his affidavit, he knew that he could have continued to contest the will as his brother Thomas was doing. Instead, Keith Lanham chose to renounce his right to contest the will. He is not allowed to "unwaive" that right now.

III.
KEITH LANHAM IS BOUND BY HIS JUDICIAL ADMISSIONS

Plaintiffs assert that Keith Lanham's judicial admissions are limited to the following: 1) Gordon Lanham made specific bequests to Thomas and Keith Lanham that should be honored; 2) the Big Creek property should be devised according to the Will; 3) the quitclaim of 100 acres to Thomas Lanham was a gift, and then Thomas abandoned Gordon Lanham; 4) Gordon Lanham was estranged from Thomas Lanham, and Keith Lanham reconciled with Gordon Lanham; and 5) Judd Lanham was the appropriate person to be personal representative. Plaintiffs do not dispute Douglas Fleenor's statement

of the law concerning judicial admissions. Plaintiffs also do not dispute that Keith Lanham was represented by an attorney other than Mr. Fleenor in the underlying action.

The judicial admissions made by Keith Lanham are not limited to the five described by Plaintiffs. Keith Lanham's affidavit testimony constituted a "deliberate, clear, unequivocal" statement about concrete facts within his knowledge. ***Grain Growers Membership & Investment Trust v. Liquidator for the Universal Life Insurance Co.***, 144 Idaho 751, 759, 171 P.3d 242, 250 (2007). Keith Lanham admitted in court that Gordon Lanham's specific gifts to Thomas and Keith in his Will were made for his own personal reasons. Keith admitted in court that Gordon Lanham's will was valid and that he did not challenge it. Keith admitted in court that Gordon Lanham's wishes should be honored. He then withdrew his petition.

The Magistrate Court relied on this testimony by Keith Lanham in rendering its decision. Keith Lanham is not permitted now to revoke his testimony. The assertions in Keith Lanham's affidavit are completely binding on his claim, and bar it.

IV.
CONCLUSION

Keith Lanham's affidavit testimony constitutes a waiver of his claim. In addition, in filing his affidavit, Keith Lanham made judicial admissions that were relied upon by the Court, and by which he is now bound. Keith Lanham was represented by an attorney other than Douglas Fleenor in the underlying lawsuit. Accordingly, Douglas Fleenor respectfully requests that the Court grant his Motion for Summary Judgment.

DATED this 10th day of October, 2016.

CAREY PERKINS LLP

By/s/Richard L. Stubbs
Richard L. Stubbs, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2016, I electronically filed the foregoing document with the Clerk of the Court using the iCourt/E-Filing system which sent a Notice of Electronic Filing to the iCourt/E-Filing Registered Participants as follows:

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/s/Richard L. Stubbs
Richard L. Stubbs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-2016-8252 MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND AND NATURE OF THE CASE

This is an action for legal malpractice. The Last Will and Testament of Gordon Lanham was admitted to probate in Gem County. His cousin, Judd Lanham, was appointed personal representative. Plaintiffs Thomas and Keith Lanham[1] are Gordon Lanham's children. He left them each one dollar in his will. Plaintiff Thomas Lanham unsuccessfully contested the will as to its validity and as to its inclusion of certain property in the probate estate. The contest of the will was originally joined by plaintiff Keith Lanham. Keith Lanham withdrew his objection prior to the hearing before the probate judge. Plaintiff Thomas Lanham was represented in the probate proceedings by defendant Douglas Fleenor. Plaintiff Keith Lanham was represented by separate counsel. An appeal from the magistrate's decision was held to be untimely, and this lawsuit followed.

[1] Janine Reynard, bankruptcy trustee for Keith Lanham, has been substituted as a party in his place by Order entered August 31, 2016. For the sake of simplicity and consistency, this opinion will continue to refer to Keith Lanham as a party, recognizing that the real party in interest is the bankruptcy trustee.

Plaintiffs moved for partial summary judgment, stating that (1) had the underlying notice of appeal for In the Matter of the Estate of Gordon T. Lanham been timely filed, Plaintiffs Thomas Lanham and Keith Lanham would have been adjudicated the intestate heirs to the decedent's real property; and (2) Defendant owed a duty of care to Keith Lanham. Defendant moved for summary judgment for dismissal of the case because (1) a timely appeal would have been unsuccessful; and (2) in any event defendant owed no duty to plaintiff Keith Lanham.

II. DISCUSSION

i. *The Duty Owed to Keith Lanham*

The Court reiterates its ruling made from the bench: Defendant Douglas Fleenor owed no duty to Plaintiff Keith Lanham. Keith Lanham was represented by separate counsel, and it is undisputed that Defendant did not undertake to represent him. This case does not fall within the exception to the general rule set forth in *Harrigfeld v. Hancock*, 140 Idaho 134, 90 P.3d 884 (2004). Nor did Defendant voluntarily undertake any duty to act on Plaintiff Keith Lanham's behalf as did the defendant in *Taylor v. Riley*, 157 Idaho 323, 336 P.3d 256(2014). The mere fact that Keith Lanham might incidentally benefit from a successful appeal is insufficient to impose such a duty and consequential liability.

ii. *The Outcome of a Timely Appeal*

Both parties suggest that they would be successful had the appeal been timely filed. When viewing this question from the standpoint of Plaintiffs' motion for summary judgment, there is a preliminary question of whether the outcome of a hypothetical appeal is a question of law for the court or a question of fact for a jury. Plaintiff cites a treatise on legal malpractice:

> "The resolution of a petition or appeal must and can be made by the trial judge as an issue of law, based on review of the transcript and record of the underlying

> action, the argument of counsel, and subject to the same rules of review as should have been applied to the motion or appeal. This does not usurp the entitlement to a jury because the issue is one of law."

Legal Malpractice, 2012 Edition, Vol. 4, sec. 33.43, p. 942.

The treatise cites multiple cases from several jurisdictions. For example, the Washington Supreme Court held that for "cases involving an attorney's alleged failure to perfect an appeal," courts have consistently recognized that the determination of the success of the appeal is within the exclusive province of the court and not the jury. *Daugert v. Pappas*, 704 P.2d 600, 603 (Wash. 1985).

At oral argument, Defendant's counsel suggested the outcome of the appeal was a question of fact to be determined by the jury. No similar argument was made in the briefing submitted by the defense and no authority for this proposition was cited at oral argument. The Court is persuaded that the treatise is correct. Whether or not a properly perfected timely appeal would have been successful is a question for the court. The Court is further persuaded that the issue is to be decided "based on review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied to the motion or appeal."

The difficulty here is that, while many of the facts are not in dispute, including those recited above, the Court does not have before it a complete record of the proceedings before the magistrate court in the underlying case, nor any clear understanding of the judgment entered by the probate court in the underlying case. The record does not tell us what "affidavits, the audio recordings and the entire record" is the basis for the probate court to "find in favor of the Personal Representative on every factual dispute." Nor has Plaintiff presented evidence of

exactly which appellate record would be presented in the hypothetical appeal along with the argument for exactly the relief that would be available in a properly perfected appeal. While it is correct that the opinion of the Honorable Duff McKee raises concerns regarding the procedure and decision of the magistrate judge, that is a far cry from a decision on the merits based upon a complete record.

Defendant's motion for summary judgment on this issue suffers the same frailty. Absent a complete record and argument that would be before an appellate court in the hypothetical appeal, this Court is not prepared to say the magistrate ruling was correct. There are a number of interesting issues, including the question of what is required to create a power of appointment, whether the will in this case does so, what evidence is admissible to make that determination and what issues were before the trial court. Ultimately, Plaintiff Thomas Lanham bears the burden of proof and persuasion in this case. However, where Defendant is moving for summary judgment, it is incumbent upon Defendant to present the Court with a complete record upon which a decision can be made.

For the foregoing reasons, Plaintiffs' motion for partial summary judgment is denied. Defendant's motion for summary judgment as to Plaintiff Janine P. Reynard, as party plaintiff in the stead of Keith C. Lanham, is granted and Plaintiff Reynard's complaint will be dismissed. The remainder of Defendant's summary judgment motion is denied.

IT IS SO ORDERED.

Signed: 11/22/2016 11:48 AM

RICHARD D. GREENWOOD
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of November, 2016, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

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Clerk of the District Court
Signed: 11/22/2016 12:05 PM

By _____
Deputy Clerk

CLERK OF THE DISTRICT COURT FOURTH JUDICIAL DISTRICT ADA COUNTY, IDAHO

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Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, as party plaintiff in the stead of Keith C. Lanham, Plaintiffs v. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-2016-8252 STIPULATION ON THE ISSUE TO BE RESOLVED IN SUMMARY JUDGMENT PROCEEDINGS

Come now the parties, through their respective attorneys of record, and stipulate and agree as follows:

WHEREAS, the parties have filed cross-motions for summary judgment on the issue of the legality of the magistrate court's Findings of Fact and Judgment in the underlying probate proceedings, to wit, In the Matter of the Estate of Gordon Thomas Lanham (Gem County Case No. CV-2013-886).

WHEREAS the herein Court has ruled the aforesaid motions for summary judgment cannot be resolved until a record of the underlying proceedings is made a part of this record.

WHEREAS the parties are in the process of assembling the aforesaid record in order to comply with the Court's ruling.

WHEREAS the Court has directed the parties to prepare a stipulation which identifies the issue to be resolved in the pending summary judgment proceedings.

WHEREAS the parties have fully briefed the issue presented, and the matter can be submitted for decision at such time as the underlying record has been filed with the Court, subject to the Court's discretion to require oral argument.

Therefore, based upon the above premises, the parties, through their respective attorneys of record, stipulate and agree to submit the following issues to the Court for resolution without further briefing: Plaintiffs issue: had the underlying notice of appeal for In the Matter of the Estate of Gordon T. Lanham been timely filed, Plaintiffs Thomas Lanham and Keith Lanham would have been adjudicated the intestate heirs to the decedent's real property. Defendant's issue: a timely appeal would have been unsuccessful.

Dated this 10th day of February, 2017.

___/s/ Allen B. Ellis_____
Allen B. Ellis
Attorney for Plaintiffs

Dated this 13th day of February, 2017.

___/s/ Samantha L. Lundberg_____
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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 DEFENDANT'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED ON NEWLY OBTAINED EVIDENCE

COMES NOW Defendant Douglas Fleenor, by and through his counsel of record, and hereby submits this Motion for Leave to File a Supplemental Brief in Support of his Motion for Summary Judgment based on newly obtained evidence, stating the following in support thereof:

1. On August 31, 2016, Plaintiffs filed a Motion for Partial Summary

Judgment, and on September 7, 2016, Defendant filed a Motion for Summary Judgment.

2. The Court issued a Memorandum Decision on November 22, 2016, indicating that the Court could not resolve all the issues presented due to an inadequate record.

3. Following the Court's Decision, the parties assembled additional records to provide the Court with sufficient facts to make a ruling. These records were provided to the Court on or about March 2, 2017.

4. In obtaining a complete record, Defendant discovered evidence the Court and the parties did not incorporate into their briefing prior to the November 22, 2016 decision.

5. The request to submit supplemental briefing will not prejudice Plaintiffs and is timely as the Court has not yet issued a ruling resolving all the issues on the cross-motions for summary judgment

Respectfully submitted,

DATED this 18th day of April, 2017.

CAREY PERKINS LLP

By /s/ Richard L. Stubbs
Richard L. Stubbs, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

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Richard L. Stubbs

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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

Plaintiffs Thomas and Keith Lanham brought a legal malpractice action against Defendant Douglas Fleenor alleging that Defendant Fleenor committed malpractice when he did not file a timely appeal in the prior lawsuit challenging the validity of the will of their father, Gordon Lanham. On August 31, 2016, Plaintiffs filed a Motion for Partial Summary Judgment, and on September 7, 2016, Defendant filed a Motion for

Summary Judgment. On November 22, 2016, the Court issued a Memorandum Decision indicating the Court could not resolve all the issues presented due to an inadequate record. Following the Court's decision, the parties assembled the additional Gem County records to provide the Court with sufficient facts to make a ruling. While obtaining a complete record of the Gem County documents for the Court, Defendant Fleenor uncovered additional information that further demonstrates the Magistrate Court's finding that Gordon Lanham's Will was valid under Idaho law was based on substantial and competent evidence. Accordingly, Defendant Fleenor requests the Court grant his Motion for Summary Judgment.

II.

SUBSTANTIAL EVIDENCE SUPPORTED THE MAGISTRATE COURT'S FINDINGS OF FACT

Plaintiffs allege that Defendant Douglas Fleenor did not timely file an appeal, and that had he filed an appeal, the Appellate Court would have found the Magistrate Judge improperly granted the estate's motion for summary judgment.

A court's findings on cross motions for summary judgment will not be disturbed on appeal so long as the record is sufficient to support the findings. ***Riverside Development Co., v. Ritchie***, 103 Idaho 515, 522, 650 P.2d 657, 664 (1982); ***Cougar Bay Co., Inc. v. Bristol***, 100 Idaho 380, 383, 597 P.2d 1070, 1073 (1979) (in reviewing the sufficiency of the record to sustain a trial court's findings of fact and conclusions of law, the Court limits the review to whether there is substantial, competent, although conflicting evidence, in the record to support the findings).

In the prior proceedings, on April 23, 2014, Douglas Fleenor, on behalf of Thomas Lanham, filed a Motion for Summary Judgment and a Memorandum in Support, alleging that the property of the decedent, Gordon Lanham, should have passed intestate to the decedent's heirs for the reason that the Last Will and Testament of the decedent failed to dispose of all of decedent's property. Affidavit of Richard L. Stubbs in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment, **Exhibit A**. On May 23, 2014, Attorney Nancy Callahan, on behalf of the estate, filed a Cross-Motion for Summary Judgment and Memorandum in Support, alleging the will was valid. *Id*., **Exhibit B.**

As evidence considered in the cross-motions for summary judgment, the Court reviewed the transcription of Gordon Lanham's Will, the audio recording of Gordon Lanham's Will, as well as the affidavits of Catherine Lanham Gillihan, Judd Lanham, and Keith Lanham, which discuss the decedent's intent to completely disinherit Thomas Everett Lanham. The affidavits explicitly state that Thomas Everett Lanham was not to profit from the estate and that Judd Lanham should distribute the remaining property not specifically addressed in Gordon Lanham's Will.

Catherine Lanham Gillihan, the older sibling of Gordon Lanham, testified in an affidavit:

> When Gordon Thomas was unable to be a lineman and had limited work, his son, Thomas Everett agree to pay his father for part of the property. Gordon Thomas quit claimed Thomas E. some 100 + acres. The agreement was contingent on Thomas E. selling his ranch. The sale failed and numerous problems 'snowballed.' Because there was no written contract, Gordon Thomas received no money and Thomas E. listed that property for sale. Because of this transaction and because Thomas E. failed to pay child support or arrange for

> any further education for Joe or Robbie, and because Gordon Thomas with assist from myself contributed to the education of Joe and Robbie, Gordon Thomas felt Thomas E. needed no further distribution from the estate.

Affidavit of Richard L. Stubbs in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment, **Exhibit C.** Ms. Gillihan went on to testify:

> When Gordon Thomas was asked about his will, he told me that when he dictated his estate wishes he had been at odds with his family and that he was now making new distributions. He stated that if it was incomplete, Judd knew his wishes and that he completed trusted him to take care of Keith, Joe, and Robbie. Gordon Thomas told me he didn't put any one else in charge because of the family conflict it would cause. He told me he wanted Joe to be on the land and in his house to care for him. He had a life tenancy for the property, and that the ranch would be Joe's when he died. He wanted Judd to pay off Linda and take care of Keith, Joe, and Robbie, using his discretion, with his remaining property. He left an audio tape of his intentions and directions to Judd.

Id. Ms. Gillihan additionally attested to Gordon Lanham's mental state and stated that "he was coherent and clear as to his intentions and desires." *Id.*

Judd Max Lanham, cousin of Gordon Lanham and the named personal representative, testified in an affidavit that Gordon Lanham:

> [S]aw his elder son, Thomas Everett, as a liar and a thief, having quitclaimed about 115 acres to Thomas Everett on his promise that he would help support Tom. Once the quitclaim deed was recorded, Thomas Everett abandoned Tom. He felt betrayed and saddened by Thomas Everett's words and actions. To say that this situation broke his heart is not an exaggeration. Tom was ashamed of Thomas Everett's behavior toward the many women in his life and his neglect of his children, particularly Joe and Robby.

Affidavit of Richard L. Stubbs in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment, **Exhibit D**. Judd Lanham also testified "Tom

died on December 5, 2013. He left a Last Will and Testament naming me personal representative. I did not want to be personal representative but Tom insisted because he predicted problems from his son Thomas Everett Lanham, whom he was estranged from until the day he died." *Id.*

Additionally, Keith Lanham testified in an affidavit "I believe and accept that my father made the specific gifts to my brother, Thomas Everett, and me as set forth in his Will for his own personal reasons and his wishes should be honored." Affidavit of Richard L. Stubbs in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment, **Exhibit E.**

At the hearing on June 10, 2014, the Court heard arguments on the cross-motions for summary Judgment. Prior to arguments, the Magistrate Judge informed the parties he had taken considerable time to review the record on the motions for summary judgment, and stated that he thought the residuary clause in Gordon Lanham's Will was "explicit and clear that he wanted Judd to dispose of anything that was left that wasn't disposed of." Affidavit of Richard L. Stubbs in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment, **Exhibit F.** Judge Smith then stated he wanted to hear oral arguments for any additional information.

After hearing arguments from both parties, and reviewing the briefing prior to the hearing, Judge Smith held:

> I'm going to grant summary judgment on behalf of the personal representative and I'm going to deny, Mr. Fleenor, your motion for summary judgment. I find based on the will (inaudible) admissible to show the donor's intent. What the deceased wanted is disposed of (inaudible) and through parole evidence, you can determine his intent. <u>The two boys were specifically disinherited. I'm not going to override his</u>

> wishes. You know, I find that even in the light most favorable to the adverse party, that there's not genuine issue of material fact implying we need a trial at this point. The rule's clear the donor's intent was established by the concurrent recordings. Ms. Callahan, you'll prepare the order of summary judgment…on behalf of the personal representative and they have higher courts to take a look at what this court decides but it's real clear to me what Mr. Gordon Thomas Lanham wanted and it's real clear that not only in my mind does he dispose of the property, but also his wishes are contained in the recordings of what his intent was, that that would be admissible and that's the order of the Court.

Id. (emphasis added). On June 25, 2014, the Court issued its Findings of Fact and Conclusions of Law, holding "claimant Thomas Everett Lanham advanced several claims, but he failed to support his claims and arguments with one iota of credible, admissible evidence. Based on the language of the will itself, the affidavits, the audio recordings, and the entire record, the Court finds in favor of the Personal Representative on every factual dispute." Affidavit of Richard L. Stubbs in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment, **Exhibit G**.

The Magistrate Court relied on substantial and competent evidence in the record in rendering its decision that Gordon Lanham's Will was valid pursuant to Idaho law. Accordingly, even if the appeal had been timely filed, the Appellate Court's review would have been limited to whether the Magistrate Court's findings were supported by sufficient evidence in the record. *See* ***Riverside Development Co., v. Ritchie***, 103 Idaho 515, 522, 650 P.2d 657, 664 (1982); *see also* ***Cougar Bay Co., Inc. v. Bristol***, 100 Idaho 380, 383, 597 P.2d 1070, 1073 (1979). In making its decision, the Magistrate Court relied on the language from Gordon Lanham's Will itself, bolstered by the audio recording of Gordon Lanham, and the Affidavits of Catherine Lanham Gillihan, Judd Max Lanham,

and Keith Lanham. This is sufficient evidence to make the determination as to whether Gordon Lanham executed a valid will before his death, and as such, the Magistrate's decision would not have been disturbed on appeal.

III.
CONCLUSION

The Magistrate Court's decision was based on substantial evidence in the record. Accordingly, the decision would not have been reversed on appeal. Even assuming Douglas Fleenor breached a duty, the alleged breach did not cause any harm because the Appellate Court would have sustained the Magistrate Court's decision. For the foregoing reasons, Douglas Fleenor requests to Court grant his motion for summary judgment.

DATED this 4th day of May, 2017.

CAREY PERKINS LLP

By: /s/Samantha L. Lundberg
Samantha L. Lundberg, of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

Allen B. Ellis	[ ]	U.S. Mail, postage prepaid
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/s/ Samantha L. Lundberg
Samantha L. Lundberg

Richard L. Stubbs, ISB No. 3239
Samantha L. Lundberg, ISB No. 9992
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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and JANINE P. REYNARD, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 AFFIDAVIT OF SAMANTHA L. LUNDBERG IN SUPPORT OF DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
: ss.
County of Ada)

SAMANTHA L. LUNDBERG, having been first duly sworn upon oath, deposes and says:

1. I am a member of the law firm of Carey Perkins LLP, attorneys of record for the Defendant Douglas Fleenor in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. The following records produced herewith as **Exhibit "A"** through **"G"**, from the *Matter of the Estate of Gordon Thomas Lanham*, Gem County Case No. CV2013-886 were provided to the Court on or about March 2, 2017, and are being reproduced for the ease of the Court in reviewing the Supplemental Memorandum in Support of Motion for Summary Judgment.

3. Attached as **Exhibit "A"** to this Affidavit is a true and correct copy of Thomas Lanham's Memorandum in Support of Motion for Summary Judgment, dated April 23, 2014.

4. Attached as **Exhibit "B"** to this Affidavit is a true and correct copy of the Personal Representative's Memorandum in Support of Cross Motion for Summary Judgment and Motion to Dismiss, dated May 23, 2014.

5. Attached as **Exhibit "C"** to this Affidavit is a true and correct copy of the Affidavit of Catherine Lanham Gillihan, Exhibit 1 to the Memorandum in Support of Cross Motion for Summary Judgment and Motion to Dismiss, dated May 22, 2014.

6. Attached as **Exhibit "D"** to this Affidavit is a true and correct copy of the Affidavit of Judd Max Lanham, Exhibit 2 to the Memorandum in Support of Cross Motion for Summary Judgment and Motion to Dismiss, dated May 23, 2014.

7. Attached as **Exhibit "E"** to this Affidavit is a true and correct copy of the Affidavit of Keith Lanham, Exhibit 3 to the Memorandum in Support of Cross Motion for Summary Judgment and Motion to Dismiss, dated May 22, 2014.

8. Attached as **Exhibit "F"** to this Affidavit is a true and correct copy of the transcript of the Hearing on the Motions for Summary Judgment, dated June 10, 2014.

9. Attached as **Exhibit "G"** to this Affidavit is a true and correct copy of the Findings of Fact and Conclusions of Law on the Motion and Cross-Motion for Summary Judgment, dated June 25, 2014.

FURTHER your Affiant saith not.

By: _____
Samantha L. Lundberg

SUBSCRIBED AND SWORN to before me this 4 day of May, 2017.

(SEAL)

STEPHANIE WHITE
NOTARY PUBLIC
STATE OF IDAHO

_____
Notary Public for Idaho
Residing at Boise, ID
Commission expires 10/20/20

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

Allen B. Ellis	[ ]	U.S. Mail, postage prepaid
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Attorneys for Plaintiff		aellis@aellislaw.com

Samantha L. Lundberg

Exhibit A

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Attorney & Counselor at Law
702 W. Idaho Street, Suite 1100
Boise, ID 83702
208-472-8846
208-947-5910 fax

Attorney for Petitioner, Thomas E. Lanham

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of GORDON THOMAS LANHAM, Deceased.	Case No. CV 2013-886 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW the Petitioner, Thomas E. Lanham, by and through his attorney, Douglas E. Fleenor, and submits his Memorandum in Support of Motion For Summary Judgment.

Petitioner seeks summary judgment declaring that property of the decedent passed intestate to the decedent's heirs for the reason that the Last Will and Testament of the decedent fails to dispose of all of decedent's property.

FACTS

The personal representative filed a purported Last Will and Testament of the above named decedent dated January 19, 2011.

Decedent's Last Will and Testament fails to make any dispositive provisions or give direction regarding the residue of his estate.

In paragraph four on page two, the Will states, "I want [Judd] to be able to distribute my property and my personal effects in any way that he sees fit and I will try to put all the wording

about the personal effects." Then again in the last paragraph, the Will reiterates, "I want [Judd} to be able to distribute my property and my personal effects as stated in my Last Will and Testament."

Page 3 of the Will contains the only possible devise, stating "...I gotta $3,000 sheep head that Judd can hang up in his cabin if he wants to."

The remainder of the Will discusses the ownership of certain property located at his residence.

STANDARD OF REVIEW

Summary judgment is appropriate with the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Idaho Rules of Civil Procedure 56(c). Failure of a party to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party bears the burden of proof entitles the moving party to summary judgment as a matter of law. The Idaho Supreme Court has thoroughly addressed the standards governing motions for summary judgment.

When considering a motion for summary judgment, the Court is generally required to liberally construe the record in the light most favorable to the party opposing the motions, drawing all reasonable inferences and conclusions in that party's favor. *Construction Management Systems, Inc. v. Assurance Co. of America*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001). However, Rule 56(3) requires the non-moving party to go beyond pleadings through affidavit, depositions, etc., to demonstrate that there are genuine issue of material facts, *Doe v. Durischi,* 110 Idaho 466, 716 P.2d 1238 (1986). If the non-moving party fails to do so, then the moving party is entitled to summary

judgment as a matter of law. *Id.* at 46, 716 P.2d at 1241; *see also Sparks v. St. Lukes Reg. Medical Ctr. Ltd.*, 115 Idaho 505, 768 P.2d 768 (1988).

ARGUMENT

Idaho has adopted of the Uniform Probate Code, which allows decedents to pass their property upon death through a validly executed Will.

A will should be interpreted, if possible, in such manner as to prevent intestacy when it evinces an intention to dispose of the entire estate. *In re Corwin's Estate*, 86 Idaho 1, 6, 383 P.2d 339, 341 (1963).

However, a devisee must be identified so that the courts can be certain that the testator's intents and purposes are being carried out. *Yribar v. Fitzpatrick*, 91 Idaho 105, 108, 416 P.2d 164, 167 (1966), quoting 2A Bogert, Trusts and Trustees, pg. 18, § 363.

In order to avoid intestacy, either partial or complete, the court is not permitted to place on the will any construction not expressed in it, and which is based on supposition as to the intention of the testator in the disposition of his estate. *In re Corwin's Estate*, 86 Idaho 1, 5, 383 P.2d 339, 341 (1963); *In re Hoytema's Estate*, 180 Cal. 430, 181 P. 645; *In re Beldon's Estate*, 11 Cal.2d 108, 77 P.2d 1052; 95 C.J.S. Wills § 615c.

Idaho statutes authorize a person to devise or bequeath his property, but it does not permit him to delegate to another the power to make such disposition for him. *Hedin v. Westdala Lutheran Church*, 59 Idaho 241, 250, 81 P.2d 741, 745 (1938). Such testamentary efforts have been likened unto powers of attorney to make wills, which the law does not permit. *Id.*

Each of the above cases held that a devise fails when a devisee is not designated with sufficient legal certainty. Examples of failed devises included a gift to any charitable organization chosen by a spouse (*Hedin*), devising the residue to any worthy charity selected by

the executor (*Yribar*), and a failure to dispose of half the estate (*Corwin*). Without a defined devisee, the court cannot ascertain or enforce a decedent's intent.

Idaho Statutes also state that any part of the estate of a decedent not effectively disposed of by his will passes to his heirs. I.C. §15-2-101. In addition, if any devise fails for any reason, it becomes part of the residue. I.C. § 15-2-606.

When a devise fails and the will lacks a residuary clause, the residue passes through intestate succession. *In re Corwin's Estate*, 86 Idaho 1, 5, 383 P.2d 339, 341 (1963).

In this case, even if the Will is valid, the decedent clearly failed to name devisees for his property. Therefore, as a matter of law, decedent's entire estate, with the possible exception of one specific devise, passes to his heirs by intestate succession pursuant to Chapter 2, Title 15 of the Idaho Code. Therefore, Petitioner is entitled to summary judgment on this issue.

CONCLUSION

Based on the foregoing, summary judgment should be granted in favor of Petitioner, finding the property of decedent passes to his heirs by intestate succession.

DATED this 23 day of April, 2014.

Douglas E. Eleenor
Attorney for Petitioner

Exhibit B

Nancy L. Callahan
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Rolf M. Kehne
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Attorneys for Personal Representative

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	)	CASE NO. CV2013-886
	)	
	)	MEMORANDUM IN SUPPORT
GORDON THOMAS LANHAM,	)	OF CROSS MOTION FOR
	)	SUMMARY JUDGMENT AND
	)	MOTION TO DISMISS
Deceased.	)	
	)	

This memorandum is respectfully submitted to the Court in support of the Personal Representative's CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THOMAS EVERETT LANHAM'S MOTION FOR SUMMARY JUDGMENT.

Facts

Gordon Thomas Lanham executed a Last Will and Testament on January 19, 2011 naming his cousin, Judd Lanham executor giving him Power of Attorney over all of his personal and real property. The Last

Will and Testament of Gordon Thomas Lanham specifically provided for his sons Thomas Lanham and Keith Lanham to each receive a dollar and a bed made by their grandfather. The children of Keith Lanham were also specifically disinherited. The Last Will and Testament was transcribed from a recording made by the testator over a period of time.

On or about November 19, 2013 the testator executed a Transfer on Death Deed naming Petitioner's son, Joe Lanham, beneficiary, subject to payment of a mortgage to his former girlfriend and his brother Rex Lanham Jr.'s ex-wife, Linda Louise Andrews Lanham(aka) Linda Louise Andrews, . Gordon Thomas Lanham died on December 5, 2013. The original Will was filed with the Court on December 20, 2013 and Judd Lanham was informally appointed personal representative.

On January 8, 2014, Thomas Everett Lanham, a son, filed pro se an "Application to Attest Personal Representative" in the probate case with a claim that the will was not valid and that the personal representative was not qualified. On January 13, 2014, Keith Lanham, by and through his attorney William F. Lee filed a Petition to Remove Personal Representative with claims contesting the validity of the will and removal of the personal representative. The matters were set for hearing on January 21, 2014.

On or about January 15, 2014, the personal representative attempted to satisfy the mortgage to Linda Louise Andrews Lanham in

the amount of $54,625.00 from funds left to the personal representative in a POD account. He was verbally instructed by the decedent prior to his death that Joe Lanham would take the ranch free and clear of any encumbrances. Linda Andrews Lanham refused to accept payment of the mortgage.

On January 21, 2014, Thomas Everett Lanham, pro se, and Keith Lanham with his attorney, William F. Lee, were present in Court in the probate case. Judd Lanham was present with counsel. Also present were the two witnesses to the decedent's Will, Rebecca Clift, notary, Cathy Gillihan, sister of the decedent, and other family members. This Court advised the parties that two matters were before the Court; the issue of removal of the personal representative and the validity of the Will. The Court advised the parties that it was not inclined to remove the personal representative and that the matters concerning the construction of the will were continued for a half day trial on April 2, 2014.

On March 5, 2014 the Personal Representative and Joe Lanham filed a Quiet Title action in Gem County Case No. 2014-185 due to Linda Andrews' refusal to accept satisfaction of the mortgage.

On March 24, 2014 Attorney Fleenor entered an appearance in this case on behalf of Thomas Everett Lanham in the probate case and in the quiet title action on behalf of Linda Louise Andrews Lanham. In the

probate case he filed another Petition for Order Removing Personal Representative, Construing Will and Determining Heirs and a Petition of Order Restraining Personal Representative on behalf of Thomas Everett Lanham.

On March 28, 2014 the personal representative, Judd Lanham, filed his affidavit concerning the audio recording of the decedent which was the basis for the Will in contest and because the recording included additional instruction to the personal representative for distribution of his personal property.

On March 28, 2014, William F. Lee, on behalf of Keith Lanham, withdrew his Petition to Remove Personal Representative and Keith's claim contesting the validity of the will.

On April 2, 2014, Thomas Everett Lanham or his attorney failed to appear for the Court trial to construe or determine the validity of the Will, a trial that was pending since January 21, 2014.

On April 3, 2014, Thomas E. Lanham appeared with his counsel, Douglas Fleenor, for hearing on their Petition for Order Removing Personal Representative, Construing Will and Determining Heirs and a Petition of Order Restraining Personal Representative. The Court having reviewed the record and arguments of counsel denied the Petition for Order Removing Personal Representative and further denied the Petition for Order Restraining Personal Representative. The Court awarded the

estate attorney's fees.

On April 9, 2014 Attorney Fleenor filed an Answer and Counterclaim in the quiet title action alleging the deed transferring the ranch to Joe Lanham was void and the ranch should be included in the estate of Gordon Thomas Lanham. Linda Louis Andrews further claimed that the decedent failed to make any principle payments on the December 17, 2002 mortgage entitling her to $137,369.46. Paragraph 6 of the Counterclaim alleges that:

"On August 19, 2004, Gordon Thomas Lanham coerced Linda Lanham into signing a "Mortgage Payment", by threatening to expose and distribute personal, private and revealing photographs of Linda Lanham. The purported amount of the interest payment was $23,400.00."

Paragraphs 8 and 9 further allege:

"That on December 11, 2006, Gordon Thomas Lanham fraudulently caused Linda Lanham to enter into an accord and satisfaction agreement by promising her payment of cash in the amount to $50,000. The accord and satisfaction consisted of Linda Lanham signing a Satisfaction of Mortgage for the December 17, 2002 Mortgage, in exchange for Gordon Thomas Lanham paying Linda Lanham $50,000 in cash and executing a new Promissory Note and Mortgage in the amount of $50,000 bearing interest at the rate of 3% annum. Upon obtaining Linda Lanham's signatures, Gordon Thomas Lanham left the premises without paying Linda Lanham any of the promised amounts."

On April 21, 2014 the personal representative and Joe Lanham filed a reply to Linda Andrew's counterclaim alleging any claims of fraud made by Linda Andrews is barred by the statute of limitations and the only amount due to Linda Andrews is $54,625.00.

On about April 21, 2014, an estate check in the amount of

$54,625.00 was sent to Mr. Fleenor and Linda Louise Andrews Lanham.

On April 23, 2014, Attorney Fleenor filed a Motion for Summary Judgment in Gem County Case No.2014-187 on behalf of Linda Louise Andrews Lanham on the issue that the Deed to Joe Lanham is void and claims that the ranch should be included in the decedent's estate. On that same day Attorney Fleenor filed a Motion for Summary Judgment in this probate case on behalf of Thomas Everett Lanham on the issue that the Will fails to make any dispositive provisions or give direction regarding the residue of his father's estate and should pass intestate to decedent's heirs.

ARGUMENT

The Last Will and Testament of Gordon Thomas Lanham clearly and unambiguously and for independent reason, specifically bequeathed that his sons, Thomas Everett Lanham and Keith Colby Lanham, each receive one dollar and a bed that there grandfather made for them each as children be returned to them, with the intent that his sons take nothing from his estate. The will also specifically states that the children of Keith Colby Lanham would receive nothing from his estate.

On the first page of the will Gordon Thomas Lanham states that:

"This is a new day. It's the 29th of November. Thanksgiving is over and I just wanted to add to this program that my son, Thomas Everett Lanham, 48 years old, has already been given all that he needs to have and that I am going to leave $1 (sic) more dollar against whatever is

legal to him and then he is going to be on his own."

On Page 2 paragraph 1 the Will states:

"It's a new day and it's snowing. It's 1st December 2010. It's the first snow out back. I am not really looking forward to it,....but anyway, I want to go on about my son, Keith Colby Lanham and his wife, Amy Lanham, that I am going to try to write it down or leave it in this recording that... what I leave them is going to be $1 because in my estate I don't want him to be able to sell and profit off his alcoholism or drugs....

Track 7 and 8 of the audio recording previously submitted allows one to hear this decision he made to disinherit his sons in the decedent's own words.

Track 8 of the audio recording made by the decedent (the entry dated March 19, 2011) on the CD previously submitted to the Court, clearly and unambiguously instructed that the lots at Big Creek property were to be distributed as follows:

"My plans are to leave that 27 acres on the east side of that Big Creek Property to Jamie Gillihan, my sister's only son, and I want to plan for leaving the 20 acres on the west side to my grandson Joseph Lanham and my other grandson Thomas Robert John Lanham and he is only eighteen and Joe is 21 so I don't know how that will work on a deed etc. However that works, but anyway, I'm working on what I am going to do with this house and 34 acres because of the $50,000 mortgage that Lizzie has on it, I'm thinking that Jamie can pay her mortgage for his 27" acres ..."

The Court should take judicial notice of the quiet title action concerning the decedent's real property, Gem County Case No. CV2014-187. In that case the issue is payment of the "$50,000 mortgage that Lizzie has on it", her counterclaim states that she is entitled to

$137,369.49, her claim the deed intended to gift the ranch to Joe Lanham is void, and claiming that the ranch should be included in this estate case, presumably as part of the residual estate. Then in this case, Thomas Everett is challenging the validity of the will to claim an intestate portion of the residual estate.

Trial courts must determine the admissibility of evidence as a "threshold question" to be answered before addressing the merits of motions for summary judgment. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778,784, 839 P.2d 1192, 1198 (1992), *Ryan v Beisner*, 123 Idaho at 45, 844 P.2d at 27 (Ct.App. 1992), Gem State Ins. Co. v Hutchinson, 145 Idaho 10, 175 P.2d.172(2007), *Montgomery v Montgomery*, 147 Idaho 1 at 6 (Idaho 2009).

When considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. Petricevich v Salmon River Canal,Co., 92 Idaho 865-,869, 452 P.2d 362,366 (1969) I.R.C.P. 56(e).

In addressing the evidentiary issues raised concerning the statements attributed to Gordon Thomas Lanham on the CD recording concerning the distribution of his estate, and the Affidavits of Catherine Lanham Gillihan, Judd Lanham and Keith Lanham inform the court of the decedent's reasons and intent to completely disinherit

Thomas Everett Lanham after quitclaiming 115 acres to Thomas Everett on his promise to help financially support his father as set forth in the affidavits submitted herewith are admissible hearsay and will be admitted as evidence at trial as exception to hearsay rule I.R.E. 803(3) which provides:

Rule 803: Hearsay exceptions; availability of declarant immaterial

> (3) The Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design mental feeling, pan, and bodily heath), but not including a statement of memory or belief to prove the fact remembered or believed ***unless*** it relates to the execution, revocation, identification, or terms of declarant's will. (emphasis added)

The Affidavit of Catherine Lanham Gillihan (Exhibit 1) and the Affidavit of Keith Lanham (Exhibit 3), support the decedent's wishes that neither Keith Lanham nor Thomas Everett were to profit from the estate and that Judd Lanham should distribute his remaining personal property.

The Affidavit of Judd Lanham, personal representative, clarifies the terms of the will concerning the statement in the will that "I want Judd to be able to distribute my property and my personal effects in any way that he sees fit and I will try to put all the wording" in that Gordon Thomas Lanham believed at the time of his death that the only

remaining property after his specific bequests would be personal property items to be distributed in-kind, if possible.

The intended beneficiaries of this estate are the sons of Thomas Everett Lanham, namely Joseph "Joe" Lanham and Robert "Robby" Lanham.

Conclusion

Based upon the foregoing argument and the evidence submitted herewith, the Court should dismiss Thomas Everett Lanham's claim, find that Gordon Thomas Lanham fully disposed of his estate in his will and his audio recordings and the personal property remaining in the decedent's estate should be distributed by the personal representative at his discretion for the reasons set forth herein and as intended by Gordon Thomas Lanham. Further, that the Court should order that Thomas Everett Lanham reimburse the estate the attorney's fees incurred herein.

Dated this 2nd day of May 2014.

Nancy L. Callahan,
Attorneys for Personal Representative

Exhibit C

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Idaho State Bar #2180
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Attorneys for Personal Representative

In the Matter of the Estate of:	)	CASE NO. CV2013-0886
	)	
	)	
GORDON THOMAS LANHAM,	)	
	)	AFFIDAVIT OF CATHERINE
	)	LANHAM GILLIHAN
Deceased	)	
	)	

STATE OF IDAHO)
: ss
County of Gem)

Your Affiant, CATHERINE LANHAM GILLIHAN, having personal knowledge of the facts herein and being first duly sworn upon oath, deposes and states as follows:

1. I am a retired nurse and vocational education instructor. I am the oldest sibling to Gordon Thomas Lanham and Judd Lanham is my first cousin. Our fathers operated a power line construction company involving the entire family in the work.

2. Linda Louise Andrews came into the family by marriage to Rex E Lanham, Jr. in October, 1965 and in the mid 80's she divorced receiving

a marital settlement plus a future distribution. She will be receiving another settlement from our mother's trust. Linda continued to live on and off with our mother, Hazel Lanham. She borrowed a lot of money from her that has never been repaid. She had full knowledge of our family finances including Gordon Thomas's and knew that his finances were limited and that he was receiving assistance from his mother after he returned to the Butte. During his illness, Gordon Thomas's sons, nephews, grandsons, and friends were assisting him to maintain his equipment and repairs to his Butte property.

3. Following Linda's divorce, she married Sam Davis and Gordon Thomas had married Joanne Blackwell; both were married to other people during much of their relationship, and did not file any joint tax returns, or have any financial accounts together. Gordon Thomas never introduced her to anyone as his wife. Linda Louise Andrews Lanham has always been known by this family and friends as Rex Jr.'s ex-wife.

4. After her other ventures for her "dream" bed and breakfast were bankrupt, Linda built a room on the side of Gordon Thomas's house, knowing that the house was in structural disrepair and that it would not pass any commercial codes, including the water.

5. At the same time, Linda was trying to build a similar venture on the family's Mexican property, knowing full well that the Mexican government would not accept it. The government took that property

and Linda returned to the border broke. Gordon Thomas borrowed money to go and get her and he stated "that she was yet in another affair" and he ended his relationship with Linda. Gordon Thomas then married his life-long friend, Norma de Cordova. Linda secured the mortgage on the property.

6. Gordon Thomas delayed paying Linda because he had no cash flow. He also felt he deserved consideration for payment of the mortgage because he paid many of Linda's outstanding bills: her divorce from Sam Davis, her eye surgery, care for her terminally ill mother, and numerous other expenditures.

7. When Gordon Thomas was unable to be a lineman and had limited work, his son, Thomas Everett agreed to pay his father for part of the property. Gordon Thomas quit claimed Thomas E. some 100 + acres. The agreement was contingent on Thomas E. selling his ranch. The sale failed and numerous problems "snowballed". Because there was no written contract Gordon Thomas received no money and Thomas E. listed that property for sale. Because of this transaction and because Thomas E. failed to pay child support or arrange for any further education for Joe or Robbie, and because Gordon Thomas with assist from myself contributed to the education of Joe and Robbie, Gordon Thomas felt Thomas E. needed no further distribution from the estate.

8. Gordon Thomas was hospitalized numerous times in the last 14 months of his life. Linda wrote cards, telephoned, and came to the hospital on numerous occasions. She acted like an old friend, not a woman who was coerced or threated by Gordon Thomas in the past. She stated to him that because she still owed him, she would care for him in his home; an offer Gordon Thomas declined. At no time that I am aware of did Linda ask about payment of the mortgage or that she was owed more money. It is only after Gordon Thomas's death is she now claiming she is owed more money.

9. I understand that Linda is now making accusations that Gordon Thomas threatened or coerced her into signing certain documents or he would distribute "personal, private, revealing photographs of Linda Louise Andrews. I have assisted Judd Lanham in going through Gordon Thomas's personal effects and all of his pictures and papers. No compromising materials were found. There were posed pictures like "glamour shots" that Linda had taken by a professional studio and distributed them herself. These photos have been returned to Linda.

10. When Gordon Thomas was asked about his will, he told me that when he dictated his estate wishes he had been at odds with his family and that he was now making new distributions. He stated that if it was incomplete, Judd knew his wishes and that he completely trusted him to take care of Keith, Joe and Robbie. Gordon Thomas told me he didn't

put any one else in charge because of the family conflict it would cause. He told me he wanted Joe to be on the land and in his house to care for him. He had a life tenancy for the property, and that the ranch would be Joe's when he died. He wanted Judd to pay off Linda and take care of Keith, Joe, and Robbie, using his discretion, with his remaining property. He left an audio tape of his intentions and directions to Judd.

11. When Gordon Thomas was undergoing surgery or treatments, he was coherent and clear as to his intentions and desires. He could clearly recall any fact or figure we needed about getting work done around the place or for his finances. He was clearly able to make any and all decisions necessary for his future.

The above is true to the best of my knowledge, Catherine Gillihan

Dated this 22 day of May 2014.

Catherine Lanham Gillihan

Catherine Lanham Gillihan, Affiant.

SUBSCRIBED AND SWORN to before me this 22nd day of May 2014.

NANCY L. CALLAHAN NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Sun Valley, Idaho
My Commission Expires: 12/19/2018

Exhibit D

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Attorneys for Personal Representative

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	CASE NO. CV2013-0886
GORDON THOMAS LANHAM,	AFFIDAVIT OF JUDD LANHAM
Deceased	

STATE OF IDAHO)
: ss
County of Gem)

Your Affiant, JUDD LANHAM, personal representative, having personal knowledge of the facts herein and being first duly sworn upon oath, deposes and states as follows:

1. Gordon Thomas Lanham and I were first cousins. Our fathers were brothers. We grew up together. He was the closest I would ever have to a little brother. We played together as children, ran a little wild

together as adolescents, worked in power line construction with our dads for several years, and spent time with our young families together camping and otherwise socializing. I was with Tom through his marriages and divorces to Colleen, JoAnn and Norma, and his relationship with Defendant Linda Louise Andrews. At the time of his death he was confined to a wheelchair and housebound. I spoke to him each day (sometimes twice a day) until the day before he died.

2. Tom married his first wife, Colleen, while he was still in high school. They had two sons, Thomas Everett Lanham and Keith Colby Lanham. Keith has three sons and Thomas Everett has four children including, Joseph (Joe) Lanham and Robert (Robby) Lanham. Joe and Robby are half-brothers. Tom was estranged from his children. He was disappointed in the behavior of Keith's sons, who rarely came to visit their grandfather and only, in Tom's words, "when they wanted something from him." Prior to his death he was rebuilding his relationship with Keith.

3. He saw his elder son, Thomas Everett, as a liar and a thief, having quitclaimed about 115 acres to Thomas Everett on his promise that he would help support Tom. Once the quitclaim deed was recorded, Thomas Everett abandoned Tom. He felt betrayed and saddened by Thomas Everett's words and actions. To say that this situation broke his heart is not an exaggeration. Tom was ashamed of Thomas Everett's behavior toward the many women in his life and his neglect of his children, particularly Joe and Robby.

4. During the last years of Tom's life, his support network was pretty much reduced to Joe and wife Jessica, Keith and his wife Amy, Robbie, his sister Cathi, a few close friends and me. Tom was especially appreciative of the support of his grandsons Joe and Robby. Tom saw genuine promise in them. He gave great credit to his sister Cathy for the way they had turned out; she had taken a firm hand in helping them with upbringing and schooling. Over the course of our discussions, Tom made it clear to me that he wanted Joe to have his ranch, free and clear of the mortgage to Linda, and he wanted to help Robby. After his experience with Thomas Everett, he wanted to be sure that he could live at the ranch for the rest of his life knowing that Joe and his wife would care for him and upon his death the ranch would be transferred, free and clear to his grandson, Joseph Lanham. A deed entitled Transfer on Death Deed was recorded to memorialize his intent, shortly before he passed away.

5. Tom had a live-in relationship with Linda Louise Andrews Lanham (whose last name is Lanham because she was once married to Tom's older brother Rex Jr.). At one point in their relationship in mid-1990, Tom agreed to let Linda add_onto the ranch house in the hopes of turning the place into a dude ranch or bed and breakfast. Linda used some of her money for the project. To secure her investment, Tom gave Linda a mortgage on his ranch. The bed and breakfast idea failed, which began Tom's long and tumultuous "on-again, off-again" relationship with Linda. As set forth in the documents filed in the quiet title action, Tom and Linda entered into a series of recorded

satisfactions and mortgages and at the time of his death Linda held a mortgage of $50,000.00 with 3% interest, payable on death.

6. Tom died on December 5, 2013. He left a Last Will and Testament naming me personal representative. I did not want to be personal representative but Tom insisted because he predicted problems from his son Thomas Everett Lanham, whom he was estranged from until the day he died.

7. Once I was appointed personal representative and because the mortgage was payable upon Tom's death and accruing 3% interest, and knowing it was Tom's desire that Joe own his ranch free and clear of further involvement with Linda, I attempted to satisfy Linda's mortgage. I issued a check for payment in the amount of $54,625.00 for the principle and approximate interest that had accrued from January 2011 to January 15, 2014. Linda refused to accept this check.

9. As a result of Linda refusing to accept payment I initiated a quiet title action with, and on behalf of Joe Lanham and the estate in Gem County Case No. CV2014-185. In that action, Linda Andrew Lanham is claiming that deed to transfer the ranch to his grandson Joe Lanham is void and the ranch should be included this estate action. She further counterclaims in the quiet title action that due to threats or coercion Tom made in 2004 and 2006, she is owed $137,369.49, instead of $54,625.00.

10. Once issue of payment of Linda's mortgage is settled, Tom still has outstanding debts and medical bills of approximately $28,354.00. The rest of his property, not including the ranch, consists of household goods, farm tools, guns, family memorabilia, an unknown distribution from the Hazel

Lanham trust, and 2 undeveloped forest lots at Big Creek in Valley County with a tax assessed value of $1620.00, although the market value may be much higher.

11. According to track #9 (the entry dated March 19, 2011) of the CD previously submitted to the Court, Tom wanted the Big Creek property to be distributed as follows:

"My plans are to leave that 27 acres on the east side of that Big Creek Property to Jamie Gillihan, my sister's only son, and I want to plan for leaving the 20 acres on the west side to my grandson Joseph Lanham and my other grandson Thomas Robert John Lanham and he is only eighteen and Joe is 21 so I don't know how that will work on a deed etc. However that works, but anyway, I'm working on what I am going to do with this house and 34 acres because of the $50,000 mortgage that Lizzie has on it, I'm thinking that Jamie can pay her mortgage for his 27 acres ..."

12. I believe that this is a specific instruction. Tom wanted me to sell the 27 acres on the east side of the creek to Jamie Gillihan for $50,000 and to gift the remaining 20 acres to his grandsons Joe and Rob Lanham, who has now reached the age of majority. Tom's sister, Cathy Gillihan, owns property at Big Creek and she has personal knowledge of the lay-out of the properties. This distribution is possible, unless the properties need to be listed for sale to pay for medical bill or further litigation in this case and the quiet title action.

13. Much of the personal property listed in the will and by Tom on the CD was sold prior to his death.

14. Tom wanted me to distribute the remaining personal property in kind to his various family members, and in consideration of their actions or

inactions related to challenging his will and estate. I am prepared to make such distributions, unless this property needs to be sold to pay for Tom's medical bills or further litigation in this case and the quiet title action.

15. Tom specifically did not want his sons Keith and Thomas Everett Lanham to profit from his estate and as set forth in his Last Will and Testament and on Tracks 7 and 8 of the CD, in Tom's own word, it is obvious that this was a very painful and difficult decision for him to make.

16. Keith Lanham was able to reconcile with his father before his death and he accepts and honors his father's wishes as set forth in his father's will.

17. Thomas Everett did not have further contact with his father after acquiring 100+ acres by quitclaim deed and they were estranged at the time of Gordon Thomas Lanham's death.

Dated this 23rd day of May 2014.

Judd M. Lanham, Personal Representative

SUBSCRIBED AND SWORN to before me this 23rd day of May 2014.

JERRY KIROUAC NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Kuna - Boise, Idaho
My Commission Expires: 03/2017

AFFIDAVIT OF JUDD LANHAM – PAGE 6

Exhibit E

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Attorneys for Personal Representative

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	CASE NO. CV2013-0886
GORDON THOMAS LANHAM,	AFFIDAVIT OF KEITH LANHAM
Deceased	

STATE OF IDAHO)
: ss
County of Gem)

Your Affiant, KEITH LANHAM, son of Gordon Thomas Lanham, having personal knowledge of the facts herein and being first duly sworn upon oath, deposes and states as follows:

1. My father, Gordon Thomas Lanham, passed away on December 5, 2013. At the time of his death he was wheelchair bound and needed full time assistance so he could continue to live on his ranch. My wife and I live one property away and we were both working full-time. Joe was

working in North Dakota and he was able to help my father financially. His wife, Jessica, helped care for him during the last years of his life. He was building a small house on his property so Joe and his family could be closer to care for him. It was my father's intent to live on his ranch with Joe and his family living with him or on his property.

2. He intended to give the ranch to Joe and he recorded a deed to transfer the ranch to Joe after he died.

3. I believe and accept that my father made the specific gifts to my brother, Thomas Everett, and me as set forth in his Will for his own personal reasons and his wishes should be honored.

4. The remainder of my father's personal property consists primarily of old farm and ranching equipment and vehicles, household items and sentimental memorabilia. These items of personal property and the lots at Big Creek should be distributed according to his will and his recorded wishes made after he executed his will. Judd Lanham is the appropriate person to manage and distribute my father's estate as he knows what my father wanted him to do.

5. A few years ago my father quitclaimed my brother Thomas Everett approximately 100+acres. This was not intended as a gift. My brother promised to help support my father so that he could pay his bills, including the mortgage to Linda Andrews Lanham. My brother abandoned my father after the quitclaim deed was recorded.

7. I reconciled with my father prior to his death. I do know that my father was completely estranged from my brother, Thomas Everett, at the time of his death on December 5, 2013.

Dated this 22nd day of May 2014.

Keith Colby Lanham

SUBSCRIBED AND SWORN to before me this 22nd day of May 2014.

NANCY L. CALLAHAN NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Sandpoint, Idaho
My Commission Expires: 12/14/2018

Exhibit F

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COPY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

STATE OF IDAHO FOR THE COUNTY OF GEM

MAGISTRATE DIVISION

In the Matter of)
)
GORDON THOMAS LANHAM,) Case No. CV2013-886
)
Deceased.)

MOTIONS FOR SUMMARY JUDGMENT

THE HONORABLE TYLER D. SMITH, PRESIDING

STATE OF IDAHO MAGISTRATE

EMMETT, IDAHO

JUNE 10, 2014

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Caldwell, Idaho 83606

Proceedings recorded by electronic sound recording.
Transcript produced by transcription service.

A P P E A R A N C E S:

FOR THE PERSONAL REPRESENTATIVE:	MS. NANCY CALLAHAN Attorney at Law 101 Canal Street Emmett, Idaho 83617
FOR MR. THOMAS EVERETT LANHAM:	MR. DOUGLAS FLEENOR Attorney at Law 702 West Idaho Street, Ste. 1100 Boise, Idaho 83702

I N D E X

(Proceedings begin.)

COURT: Be seated. I have Gordon Lanham. I have pending cross motions for summary judgment and motion to dismiss on behalf of the personal representative. In this particular case, I've spent considerable time this morning going through the record on the motions for summary judgment.

Was there any additional information by way of evidence that either side was going to present? I know there was a hearing in the district court but I'm not sure that it had anything that would be dispositive on my decision in this matter.

MS. CALLAHAN: Judge, I guess I can tell you what I'm aware of that happened in the district court that Ms. Linda Lanham Andrews had (inaudible) against the stay. We did a quiet title action. The defendant failed to plead any defenses in her counterclaim. She'd made some general allegations. She didn't meet the specific elements of fraud that she was attempting to plead. The statute of limitations arose in 2006.

Concerning her raising the issue of a transfer on death deed, the judge -- Judge Southworth left that issue to be determined by the Court as far as interpreting or reformation of the deed that was signed and recorded by Gordon Lanham purporting to obtain a life estate and

transferring the property to Joseph Lanham and I believe that that's what happened in district court.

COURT: Well, and I'll just kind of tell you guys just based on my review, I think that -- I don't think there's -- the real issue I think is -- in my mind having reviewed it is does the residual clause actually dispose of the main property. Because I think the one piece of property, based on what's presented to the Court, likely has to be disposed of by the residual clause because it looks like a life estate and so I don't see -- I'm just telling you that's how I see it as I read it. You guys can argue.

And that's kind of what it comes down to. I've reviewed the residual clause. I think it's explicit and clear that he wanted Judd to dispose of anything that was left that wasn't disposed of but I wanted to hear argument for additional information and, Mr. Fleenor, I'll let you go first.

MR. FLEENOR: Thank you, Your Honor. Our argument's pretty much set forth in our brief and I guess just to recap that is, yeah, even if this will is valid and we've not even got to that point yet but even if it was and even if -- when you're reading the will, the testator said, "I don't want my sons to have anything. I want them to have one dollar each," or whatever he put in the will --

COURT: (Inaudible.)

MR. FLEENOR: Exactly. Outside of that, there's no dispositive provisions -- not even residue but there's no dispositive provisions or residue.

COURT: I thought you quoted it in your brief where he basically says, "I want Judd to be able to distribute my property and personal effects in any way that he sees fit." So frankly, all the wording, you have personal effects and then later says, "And I want him to be able to distribute my property and personal effects as stated in my last will and testament."

MR. FLEENOR: Yes, that's exactly right but there is no -- there is no other language that decides that and that language by itself, Idaho courts have already determined that's not good enough. You can't tell someone else or you can't shift that intent to someone else.

A testator cannot say, "I want my wife to be able to pick the charities she gives it to," or "I want my whoever to pick the organizations where my property goes." Those are the other -- those are the cases that I've cited in here and so it's clear that that's not the testator's intent anymore. That's now Judd's intent or the personal representative's intent. And Idaho law does not allow the testator to give what Idaho courts have called a power of attorney on death is you can't say, "I want him to be able

to distribute my estate as he sees fit." That's not a dispositive provision under Idaho law.

There's been no legal argument that the personal representative has put forth to contrast that because there is none. It's a clear -- I mean the issues in this are very clear is the Court can't say, "Yeah, it's okay for a personal representative to make these determinations by himself." And once that's gone away, once -- once he doesn't make any intent known, then it passes back through the residue of the estate, back in testate provisions which go to his heirs. And even in the case where he says, "I only want my two sons to get nothing or a dollar," it goes back to those two sons because those are his heirs.

The only argument that they've brought up that I can see in their cross motion is that you should look at the testator's intent through these other things that are outside the will. There's these recordings. I know that those have been mentioned a couple of times in court that there's -- the basis for the will was these oral recordings that the testator made and there's other recordings besides what's in the will.

And again, that's clear in that Corwin estate as well where it says the Court cannot speculate as to what the testator intended to declare in his will except as the intent as expressed in the testator's words. What he

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actually used in the will, that's how the Court determines what the testator's intent was.

COURT: Fair enough.

MR. FLEENOR: Okay?

COURT: Ms. Callahan.

MS. CALLAHAN: Judge, I think that this Court at the last hearing where Mr. Fleenor's motions to determine the validity of the will when he missed the court trial to determine that and the Court ordered attorney's fees which haven't been judged on yet that I don't believe that Mr. Thomas Everett Lanham even has standing. He was specifically disinherited by his father. Any residual would go to Joe and Robby. Keith Lanham, his other son, accepts and understands the reasons for his father's wishes in disinheriting him and Tom.

Tom received 115 acres which he subsequently sold for over $240,000. Now he's making a claim here. I don't know if it's out of spite or interest but he's really gotten his share.

I think that what the Court has to determine is the testator's intent and that's what the Court needs to do is to look at the other evidence that is admissible in this case. And I believe that the affidavits that we've submitted and the record in this case shows that he was explicitly clear. He essentially disposed of all of his

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property. He did intend that Joe get the ranch. It says in his will one person will get the ranch. He's done a deed that attempted to transfer that retaining a life estate.

He specifically in I guess you could call it a recorded codicil to his will instructed Judd on how to dispose of the Big Creek property which he says he's going to give to two people. That specific instruction is in there.

As far as what's left after the ranch and the -- or the Big Creek property is a bunch of (inaudible) memorabilia, family items. And, you know, as Judd puts in his affidavit is that he was instructed to do it based on whether or not -- the actions of his sons in this action and he has withdrawn any objection.

So I think any challenge to the will has been decided by the Court when Mr. Fleenor and Mr. Thomas Everett didn't show up for court and I believe that the rest of the property should be distributed as Judd's been directed to do.

COURT: All right. Mr. Fleenor, I'll give you a final word.

MR. FLEENOR: Right. I guess just briefly is the argument that because the two sons were disinherited precludes them from receiving under the estate is just

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misreading of the law.

Under his will, he disinherits them but then under the statutory provisions when there's nothing that go passes under the will, it goes through statutory constructs and that's to those two same sons and that's very similar to the Corwin case again is where in the Corwin case, he gives half to I believe it was a granddaughter at the time and doesn't dispose of the other half. And when he does not dispose of the other half, the whole thing goes to the granddaughter even though he argued I suppose that he only intended half of it to go to the granddaughter.

That's the same type of case here. When the will doesn't say where the property goes, it goes via estate statute and estate statutes are through his heirs and --

COURT: So what property do you think isn't disposed of specifically?

MR. FLEENOR: The only -- the only property I see that is disposed of is the sheep's head. The sheep's head of $3,000, somewhere in there, Judd can hang in his cabin. That's the closest thing that he gives any property to anybody.

He names a bunch of property and he says, "Yeah, Linda or Joe or somebody has property here or I own these guns," but he doesn't say who to give those guns to or the contents of my safe. He doesn't say who to give the

11

contents of the safe. He does say Judd can hang the sheep's head in his cabin if he wants to. That's the closest property or closest dispositive provision that's in there. And that's what I referenced as the piece of property. I'm not referencing the ranch or the bighorn -- Big Creek property because he doesn't say who it goes to.

UNIDENTIFIED SPEAKER: Could I say something to this, Judge?

MR. FLEENOR: No. And the other thing, you've read -- you've read the deed as reserving the life interest which is true but it's more than that. It's a transfer on death deed. Not only does it reserve a life interest but he reserves the current right to buy, sell, pledge, whatever, to do whatever he wants with it. So we're going to argue that later is that's not an effective deed. That should be part of this estate as well to pass to the two boys.

COURT: Ms. Callahan, any other (inaudible)?

MS. CALLAHAN: Judge, I guess my response would be that I think that the decedent's recordings specifically say how the Big Creek property should be disposed of. I believe that the Court, if the issue is raised, to look at the deed, it was -- if you look at the donor's intent, if you look at the affidavits of admissible evidence, everyone intended -- everyone knew, every one of the family accept

for Thomas Everett who also received his -- well, received property essentially under false pretenses but that it was Gordon Thomas' intent that his grandson, Joseph Lanham, Thomas Everett's son, receive the property because Thomas Everett Lanham didn't support his son and they were completely estranged at the time of his death.

And if that issue is brought before the Court, I believe the case law's clear that the Court can look at the donor's intent, parol evidence comes in as to the donor's intent (inaudible) so the only residual property -- well, let me back up just a second.

He says that there is no other dispositive things in the will. The stuff in the safe is given to Judd and he can do with it what he wants. It was given to him. It wasn't as a power of attorney. So Mr. Fleenor's wrong there. I think that the rest of the property is stuff that may have to be sold to pay for attorney's fees and quiet title action and I think that the will's clear that Judd should be able to distribute it the way he sees fit according to the wishes of Gordon Thomas Lanham.

COURT: Mr. Fleenor, you have the last word.

MR. FLEENOR: All right. No, I don't have anything else to add except for I mean she's trying to argue facts that are not in evidence. Clearly, even given his intent at some point, the law is clear. That's why we're asking

for summary judgment. There's no dispositive provisions in this will.

COURT: I'm going to grant summary judgment on behalf of the personal representative and I'm going to deny, Mr. Fleenor, your motion for summary judgment. I find based on the will (inaudible) admissible to show the donor's intent. What the deceased wanted is disposed of (inaudible) and through parole evidence, you can determine his intent.

The two boys were specifically disinherited. I'm not going to override his wishes. You know, I find that even in the light most favorable to the adverse party, that there's no genuine issue of material fact implying we need a trial at this point. The rule's clear the donor's intent was established by the concurrent recordings. Ms. Callahan, you'll prepare the order of summary judgment --

MS. CALLAHAN: I will.

COURT: -- on behalf of the personal representative and they have higher courts to take a look at what this court decides but it's real clear to me what Mr. Gordon Thomas Lanham wanted and it's real clear that not only in my mind does he dispose of the property, but also his wishes are contained in the recordings of what his intent was, that that would be admissible and that's the order of the Court. I'll reserve ruling on the request for

attorney's fees and costs in the motion for summary judgment.

MS. CALLAHAN: Thank you, Judge.

COURT: The Court's in recess.

(Proceedings concluded.)

STATE OF IDAHO)
) SS
COUNTY OF CANYON)

I, TAMARA A. WEBER, State-certified and licensed transcriber, do hereby certify:

That the foregoing transcript is a transcript of a disk made of the proceedings in The Matter of Gordon Thomas Lanham, Gem County Case No. CV2013-886, before the Honorable Tyler D. Smith, Magistrate of the Magistrate Division of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Gem; that the foregoing pages 1 through 14 of this transcript contains as accurate and complete a transcription of said disk as I was able to make.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of October, 2014.

TAMARA A. WEBER, CSR
Idaho CSR License No. 278
Transcriber

Exhibit G

FILED
10:15 A.M. P.M.
JUN 25 2014
SHELLY TILTON, CLERK
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

In the Matter of the Estate of:	)	CASE NO. CV2013-886
	)	
	)	**FINDINGS OF FACT AND**
GORDON THOMAS LANHAM,	)	**CONCLUSIONS OF LAW**
	)	**ON MOTION AND CROSS-**
	)	**MOTION FOR SUMMARY**
Deceased.	)	**JUDGMENT**
	)	

THIS MATTER came before the Court June 20, 2014 on a Motion for Summary judgment filed by Claimant-Petitioner Thomas Everett Lanham and on a Cross-Motion for Summary Judgment filed by the Personal Representative, Judd Lanham. The Court considered the filings, affidavits and Memoranda submitted before the hearing, and considered oral arguments of counsel made at the hearing.

ORIGINAL

FINDINGS OF FACT

1. Decedent Gordon Thomas Lanham passed away December 5th, 2013, after long-declining health problems. In the time leading up to his death, decedent met with friends and family and his attorney and discussed his various kinds of assets and his intent for transferring them upon his death. Some of those people who participated in those discussions signed affidavits that were included in the record.

2. Decedent periodically dictated his thoughts into an audio recorder. That audio was transcribed and typed into the form of a will. Decedent signed the will before witnesses. Decedent's and the witnesses' signatures were notarized and that will was submitted for probate.

3. Decedent made additional recordings after he executed the will. The audio recordings made by decedent were part of the record before the Court as an exhibit to the Affidavit of Judd Lanham, the Personal Representative. The record also included affidavits from Keith Colby Lanham and Cathy Lanham Gillihan, submitted by the Personal Representative.

4. The Court finds no reason to doubt the validity of the will. From the affidavits and especially the audio recordings, it is clear that decedent Gordon Thomas Lanham possessed undiminished mental capacities at the time of he executed the will. He demonstrated a thorough grasp of the extent and nature of his assets. He also demonstrated a good grasp of his potential heirs, and his relationships with them and sound reasons for

treating each as he did. There is no evidence suggesting that anyone exercised undue influence or coercion over decedent. In fact, in spite of decedent's failing health and physical maladies, it appears he was a strong willed and independent thinker at the time he executed the will.[1]

5. Claimant Thomas Everett Lanham advanced several claims, but he failed to support his claims and arguments with one iota of credible, admissible evidence. Based upon the language of the will itself, the affidavits, the audio recordings and the entire record, the Court finds in favor of the Personal Representative on every factual dispute.

CONCLUSIONS OF LAW

1. The will of decedent Gordon Thomas Lanham is legal, valid, and binding.

2. Decedent's intent is sufficiently clear from the language of the will, particularly as bolstered and explained by contemporary audio recordings and the affidavits submitted, to allow administration and, if necessary, judicial enforcement. As to the claimant, Thomas Everett Lanham, decedent's intent is very clearly that claimant take by the will only one dollar ($1.00) and a bed and there is no lawful reason to frustrate decedent's intent.

---

1. The Court notes that a court trial had been scheduled for early April on the issue of the will's validity but that neither claimant, Thomas Everett Lanham, Jr., nor his attorney, Mr. Douglas Fleenor appeared at the time and date scheduled. The Personal Representative's request for costs and attorney fees is pending.

3. There are no issues of material fact remaining to be determined by the Court and the Personal Representative is entitled to judgment as a matter of law and the Court therefore **GRANTS** the Personal Representative's Cross-Motion for Summary Judgment.

ATTORNEY FESS AND COSTS

The issue of an award of costs and attorneys fees will be taken up at a future time and date.

SO ORDERED this 24th day of June, 2014.

Hon. Tyler D. Smith

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Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CVOC-2016-8252

THOMAS E. LANHAM and KEITH C. LANHAM, Plaintiffs, v. DOUGLAS E. FLEENOR, Defendant.	Case No. ~~CV-2016-8252~~ SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

PRELIMINARY NOTE

Plaintiffs concede that the decedent may have intended to disinherit them under the terms of the Will. If so, this intention was frustrated by (1) his failure to make a specific devise of the two real properties and (2) his failure to make a general bequest by the device of a residuary clause. A testator can effectuate disinheritance *only* by a specific bequest or by a general residuary bequest. The decedent here did neither.

Defendant's supplemental brief misapprehends the issue presented as one of testamentary

intent. Testamentary intent is trumped by the failure to devise. The failure of plaintiffs' father to make a bequest of the real property, either specifically or by a residuary clause, required that the real properties pass by intestate succession. As noted in plaintiffs' summary judgment brief, a testator's ability to avoid the laws of intestate succession can only be exercised by disposing of the property by will.[1] No amount of extrinsic evidence respecting testamentary intent can neutralize the laws of intestacy which is a rule followed by American and English jurisprudence. See footnote 1 and *In re Corwin's Estate,* 86 Idaho 1, 5, 383 P.2d 339 (1963). For that matter, even language in the Will which purports to effectuate disinheritance cannot do so where the testator fails to dispose of an item of property and there is no residuary clause. *Id.*

In ruling that the Will disposed of the *entirety* of the Lanham Estate, the magistrate committed an error of law. This decision would have been reversed on appeal had there been a timely appeal. Contrary to defense counsel's reliance on newly "uncovered information", the "information" respecting the testator's intention to disinherit the plaintiffs is simply irrelevant. Although a moot point given its irrelevancy, defendant's assertion that there was "substantial and competent evidence" of the intent to disinherit strikes a discordant note as applied to the underlying Rule 56(c) proceedings.

'See Memorandum in Support of Motion for Partial Summary Judgment, pp. 8, 9. *Southgate v. Karp,* 154 Mich. 697, 118 N.W. 600; *In re McKay Estate,* 357 Mich. 447, 98 N.W.2d 604; *Boisseau v. Aldridges,* 5 Leigh 222, 32 Va. 222, 27 Am Dec. 590; *Coffman v. Coffman,* 85 Va. 459, 8 S.E. 672, 2 L.R.A. 848; *Todd v. Gentry,* 109 Ky. 704, 60 S.W. 639; *Pickering v. Stamford,* (1797), 3 Ves. Jun. 492 (30 Eng. Rep. 1121; *Johnson v. Johnson,* 4 Beay. 318 (49 Eng. Rep. 361; *In the Estate of Brown,* 106 N.W.2d 535, 537 (Mich. 1960).

DEFENDANT'S CITATIONS OF AUTHORITY ARE NOT ON POINT.

The defendant cites *Riverside* (cross motions for summary judgment are, effectively, a stipulation by the parties that there are no genuine issues of material fact) and *Cougar Bay* (court's findings of fact will be accepted on appeal where there is substantial, though conflicting, evidence to support the findings).

The underlying decision by the magistrate was a summary judgment, not findings of fact. *Cougar Bay* is not on point: it deals with findings of fact and conclusions of law, not summary judgment disposition.

Riverside is limited to the scenario where each party bases its position on the same set of facts., i.e., the parties agree that there are "no genuine issues of material fact". *Id.,* 103 Idaho at 519. Absent such agreement, cross motions for summary judgment do not eliminate factual issues. See *Moss v. Mid-American,* 103 Idaho 298, 302, 647 P.2d 754 (1982); *Stafford v. Klosterman,* 134 Idaho 205, 998 P.2d 1118 (2000); *Kempthorne v. Blaine County,* 139 Idaho 348, 349, 79 P.3d 960 (2003).

The cross-motions here do not render the summary judgment bullet-proof on appeal. The personal representative rested on a point of fact (testamentary intent); whereas, Mr. Fleenor, on behalf of the plaintiffs, rested on a point of law (the existence of partial intestacy). More to the point, as noted throughout plaintiffs' briefing, testamentary intent is irrelevant given that the real properties must pass by intestate succession.

THE AFFIDAVIT TESTIMONY PROFFERED BY DEFENDANT IS BOTH INADMISSIBLE AND IRRELEVANT

The first rule in construction of a will is to look to its "four corners" in order to ascertain the

testator's intent. See *In re Steelsmith Estate,* 139 Idaho 216, 218, 76 P.3d 960 (2003); *In re Jane Doe, 1 48* Idaho 432, 435, 224 P.3d 499 (2009); In *re Wilkins Estate,* 137 Idaho 315, 318, 48 P.3d 644 (2002).

Extrinsic evidence as to the testator's intent may be employed where the will contains an ambiguity. There is no ambiguity, and Gordon Lanham's testamentary intent is not relevant given the failure to devise the real properties.

First, as to Tom and Keith, there is no ambiguity: The Will left Tom and Keith a bed and one dollar and nothing else. Even if relevant, absent an ambiguity, extrinsic evidence is inadmissible.

Secondly, defendant seeks to employ the three affidavits as evidence that the testator did not intend for Tom and Keith to receive the subject real property. His intention is not relevant. The problem here is as follows: (a) there was no disposition of the real property; and (b) absent such disposition, the laws of intestacy come into play under the authority cited in plaintiff's earlier brief See footnote 1. The decedent may have intended for his sons to receive only what is referenced in the Will; but that intention is trumped (and rendered irrelevant) by his failure to dispose of the real property, either by a specific devise or by a residuary clause.

CONTRARY TO DEFENDANT'S ASSERTION, THE WILL DID NOT CONTAIN A RESIDUARY CLAUSE

Defendant points out that the magistrate construed the Will as containing a " residual (sic) clause". See Exhibit F, p. 5. For multiple and independent reasons, the will did not contain a residuary clause:

(1) The magistrate refers to the "residual clause" but does not recite language in the Will that constitutes the residuary clause nor does he identify the residuary de'isee. Exhibit F, p. 5. By its very

nature, a residuary clause must "dispose of any estate property". See Black's Law Dictionary (7th Edition), p. 1311.

(2) A residuary clause must contain an identified "residuary devisee". Idaho Code § 15-2-606 and § 15-3-906(a)(1)(C). See, e.g., *In re Hartwig's Estate*, 70 Idaho 77, 81, 211 P.2d 399 (1949).

(3) The power of attorney does not empower Judd Lanham post-death because the power of attorney does not survive the death of the principal. See *Smith v. Treasure Valley Seed Co.* 161 Idaho 107, 383 P.3d 1277, 1279 (2016).

(4) It is not clear that Judd Lanham was given a free hand to dispose of the Estate because the will constrained him to do so only "as stated in my Last Will and Testament." Exhibit A, p. 5. With respect to Big Creek property, the testator recited "I want to think about the 47 acres in Big Creek.", thus eschewing any testamentary disposition.

Dated this 16th day of May, 2017.

_____/s/ Allen B. Ellis_____
Allen B. Ellis
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 16th day of May, 2017, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Richard L. Stubbs	_____ U.S. Mail, postage prepaid
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Attorneys for Defendant

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

THOMAS E. LANHAM and KEITH C. LANHAM, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-08252 DEFENDANT'S REPLY BRIEF IN SUPPORT OF SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I.
INTRODUCTION

Plaintiffs' Supplemental Memorandum in Support of Motion for Partial Summary Judgment concedes that Gordon Lanham intended to leave Thomas and Keith Lanham each a bed, one dollar, and nothing else. However, Plaintiffs assert that Gordon Lanham failed to create a residuary clause, and as a result the two real properties (Big Creek and Gem County) must pass intestate. In making this argument Plaintiffs allege that "Gordon Lanham's testamentary intent is not relevant given his failure to devise the

real properties." However, a plain reading of the will reveals that Gordon Lanham intended to create a residuary clause by attempting to confer a power of appointment on Judd Max Lanham. Further, in the event it is ambiguous as to whether Gordon Lanham intended to create a residuary clause in the will, the Magistrate Judge was permitted to review extrinsic evidence to determine Gordon Lanham's intent.

Ultimately, by utilizing either a plain reading of the will, or reviewing extrinsic evidence, Gordon Lanham's intent was clear: he wanted to disinherit Thomas and Keith Lanham, and grant Judd Lanham the power to distribute any remaining property as he saw fit. The Magistrate Judge correctly found that the will was valid and disposed of Gordon Lanham's entire estate. Plaintiffs' claims would not have been successful on appeal, and Defendant requests the Court grant his motion for summary judgment.

II.
GORDON LANHAM CREATED A RESIDUARY CLAUSE IN HIS LAST WILL AND TESTAMENT

Plaintiffs acknowledge that when construing a will, you must first look within its "four corners" to ascertain the testator's intent. (Plaintiffs' Supplemental Memorandum in Support of Motion for Partial Summary Judgment, pgs. 3-4). It is well established in Idaho that "when interpreting a will, the intention of the testator must be given effect." *Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983).

A general residuary clause is created when the testator passes all property owned at the time of death not otherwise disposed of by the will unless a contrary intention appears in the will. *In re Hartwig's Estate*, 70 Idaho 77, 82, 211 P.2d 399, 402 (1949) (citing 57 am. Jur. 948-949). In reviewing the will to determine whether a residuary clause has been created "the reasonable and natural presumption is that the testator intends to

dispose of his entire estate…Therefore in the construction of doubtful clauses in a will, that interpretation is to be adopted, if possible, which avoids partial intestacy, unless it clearly appears that the testator intended to die intestate as to part of his property." *Id*.

Gordon Lanham's Will repeatedly attempts to dispose of his entire estate through language such as:

- "I want to state in here that the executor of my Will is Judd Max Lanham and I am giving him a Power of Attorney for full control now and even after I am dead. I want him to be able to distribute my personal property and my personal effects in any way that he sees fit and I will try and put all the wording about the personal effects."
- "I want to state in here again that the executor of my Will is Judd Max Lanham and I am giving him a Power of Attorney for full control now and even after I am dead. I want him to be able to distribute my property and my personal effects as stated in my Last Will and Testament."

Despite Gordon Lanham's clear language in the will, Plaintiffs are alleging that because Gordon Lanham did not specifically devise the Big Creek and Gem County properties to anyone by name in the will, that they must pass intestate to Thomas and Keith Lanham. However, this does not comport with Gordon Lanham's intent to disinherit Thomas and Keith Lanham, or his attempt to create a residuary clause by granting Judd Max Lanham the authority to distribute his property and personal effects "in any way that he sees fit." The language in Gordon Lanham's will is sufficient to support a finding that a residuary clause was created and that Gordon Lanham intended to dispose of his entire estate. Further, Plaintiffs' contention that "Gordon Lanham's testamentary intent is not relevant given the failure to devise the real properties" does not comply with Idaho law.

See Allen v. Shea, 105 Idaho 31, 665 P.2d 1041 (1983).

III.
IF GORDON LANHAM DID NOT CREATE A CLEAR RESIDUARY CLAUSE IN HIS LAST WILL AND TESTAMENT, THIS AMBIGUITY MAY BE RESOLVED THROUGH EXTRINSIC EVIDENCE

Next, Plaintiffs have alleged that extrinsic evidence regarding the testator's intent may only be employed where the will contains an ambiguity. (Plaintiffs' Supplemental Memorandum in Support of Motion for Partial Summary Judgment, pgs. 3-4). Whether an ambiguity exists in a document is a question of law, and the factfinder may "resort to extrinsic evidence to resolve the ambiguity and find the intentions of the testator." *Matter of Estate of Berriochoa*, 108 Idaho 474, 475, 700 P.2d 96, 97 (1985). As mentioned previously, Idaho law requires that "the intention of the testator must be given effect." *Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983).

If an ambiguity exists as to Gordon Lanham's intent to create a residuary clause, the Magistrate Court acted within its discretion to review extrinsic evidence, including the three affidavits and the audio recording of Gordon Lanham's will, to determine Gordon Lanham's intent. After reviewing this admissible and relevant evidence, the Court found Gordon Lanham's Will was "explicit and clear that he wanted Judd to dispose of anything left that wasn't disposed of." *See*, Exhibit F. The Magistrate Judge reviewed sufficient evidence in order to make the determination that Gordon Lanham intended to create a residuary clause. As a result, this finding would not have been disturbed on appeal.

IV.
CONCLUSION

Either through a plain reading of the "four corners" of the will, or through

reviewing extrinsic evidence, it is clear that Gordon Lanham intended to dispose of his entire estate by granting Judd Lanham the power to distribute any property not specifically bequeathed in the will. Plaintiffs have admitted that Gordon Lanham intended to disinherit them through the will, and the Court should not allow them to recover now when it is explicitly against the testator's intent. Accordingly, because the Magistrate Court's decision would have been sustained on appeal, and even if Defendant Fleenor had breached a duty Plaintiffs suffered no harm, Defendant respectfully requests the Court grant his motion for summary judgment.

DATED this 22nd day of May, 2017.

CAREY PERKINS LLP

By: /s/ Richard L. Stubbs
Richard L. Stubbs, of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM AND KEITH C. LANHAM, Plaintiffs, vs. DOUGLAS E. FLEENOR, Defendant.	Case No. CV-OC-16-8252 MEMORANDUM AND ORDER RE: RENEWED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND BACKGROUND

This is an action for legal malpractice. The Last Will and Testament of Gordon Lanham was admitted to probate in Gem County. References in this decision to the "decedent" are to Gordon Lanham. His cousin, Judd Lanham, was appointed personal representative. Plaintiffs Thomas and Keith Lanham are Gordon Lanham's children. He left them each one dollar in his will. Plaintiff Thomas Lanham unsuccessfully contested the will as to its validity and as to its inclusion of certain property in the probate estate. The contest of the will was originally joined by plaintiff Keith Lanham. Keith Lanham withdrew his objection prior to the hearing before the probate judge. Plaintiff Thomas Lanham was represented in the probate proceedings by defendant Douglas Fleenor. Plaintiff Keith Lanham was represented by separate counsel. An appeal from the magistrate's decision was held to be untimely, and this lawsuit followed.

This matter is now before the Court for a second time on the renewed motions for summary judgment. In this case, Plaintiffs abandoned any challenge the admission of the will to

probate, but maintain the will did not effectively dispose of real estate owned by Gordon Lanham. In the first decision, this Court dismissed Keith Lanham on grounds that he was not Defendant Fleenor's client and that Defendant Fleenor otherwise owed him no duty. Both parties maintain that had the appeal in the probate matter gone forward on the merits, each would have prevailed. The Court determined that the outcome of any hypothetical appeal was a legal issue to be determined by the Court as an issue of law, but denied the remaining motions of both parties for lack of a complete record. The previous decision noted:

> The record does not tell us what "affidavits, the audio recordings and the entire record" is the basis for the probate court to "find in favor of the Personal Representative on every factual dispute." Nor has Plaintiff presented evidence of exactly which appellate record would be presented in the hypothetical appeal along with the argument for exactly the relief that would be available in a properly perfected appeal.
> …
> Defendant's motion for summary judgment on this issue suffers the same frailty. Absent a complete record and argument that would be before an appellate court in the hypothetical appeal, this Court is not prepared to say the magistrate ruling was correct. There are a number of interesting issues, including the question of what is required to create a power of appointment, whether the will in this case does so, what evidence is admissible to make that determination and what issues were before the trial court.
>
> *Memorandum Decision* entered November 22, 2016, pp. 3-4.

Thereafter the Parties entered a stipulation regarding the issues to be decided on summary judgment that provided in part:

> WHEREAS the parties have fully briefed the issue presented, and the matter can be submitted for decision at such time as the underlying record has been filed with the Court, subject to the Court's discretion to require oral argument.
>
> Therefore, [the parties] stipulate and agree to submit the following issues to the Court for resolution without further briefing: Plaintiffs' issue: had the underlying notice of appeal for In the Matter of the Estate of Gordon T. Lanham been timely filed, Plaintiffs Thomas Lanham and Keith Lanham would have been adjudicated the

> intestate heirs to the decedent's real property. Defendant's issue: a timely appeal would have been unsuccessful.

Later the parties requested and the Court granted a request for additional briefing.

The parties augmented the record with audio disks that contain the recordings from which the decedent's will was transcribed. Notwithstanding that there appear to be other documents in the record in the probate case, the parties are apparently intend to have the Court decide this matter based upon the record currently in this case. The record in this case, in addition to the audio recordings, consists of the Affidavit of Catherine Lanham Gillihan; the Affidavit of Judd Lanham; the Affidavit of Keith Lanham; the Verified Petition for Removal of P. Gordon Lanham as Personal Representative and for Declaration of Intestacy and Other Relief; the Last Will and Testament of Gordon Lanham; various documents attached to the Declaration of Allan Ellis including Findings of Fact and Conclusions of Law apparently entered by Judge Smith; a Judgment apparently entered by Judge Smith; and an Inventory. Other documents in the file, such as the briefs of the parties in the magistrate court, are not germane to the issue before this Court.

The probate judge decided this case on cross motions for summary judgement. In doing so, he entered Findings of Fact and Conclusions of Law. In doing so, he violated the well-established rule that a trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues. *Montgomery v. Montgomery*, 147 Idaho 1, 7, 205 P.3d 650, 656 (2009). However, whether or not an appeal of the magistrate's judgment would have been successful does not rise and fall on this error. So long as the record is clear and there are no unresolved evidentiary rulings by the trial Court in reaching the summary judgment, this Court can review the hypothetical appeal. *Id.* In an appeal from an order granting summary judgment, the appellate standard of review is the same as the standard used by the trial court in passing upon a motion for summary judgment. Summary judgment is appropriate if the

pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact, such that the moving party is entitled to a judgment as a matter of law. *Id. See* I.R.C.P. 56(c). If the evidence reveals no genuine issue as to any material fact, then all that remains is a question of law over which the appellate court exercises free review. *Partout v. Harper*, 145 Idaho 683, 685–86, 183 P.3d 771, 773–74 (2008). Here the question is the construction of the will. The Court is free to disregard the Findings of Fact by the magistrate and review the record as it stood before the magistrate.

For purposes of the issues presented here, the record reveals some uncontroverted facts. The decedent Gordon Thomas Lanham died, leaving two children, Thomas and Keith. At the time of his death he owned three parcels of real property. He left a will. The will is homemade. It is apparently a transcription of recorded statements of the Decedent. The will has no identifiable residuary clause as that term is generally understood. Nor does the will explicitly directly dispose of the real estate. In the will decedent directed, in three places, that his cousin Judd Max Lanham dispose of decedent's property.

II. DISCUSSION

It is important to keep in mind that the validity of the will is not in question. It is the interpretation of its content that is disputed.

> "[I]n construing the provisions of a will to ascertain the meaning of a testator, the cardinal rule of construction is to ascertain the testator's intent; and ... [t]his intent is to be ascertained from a full view of everything within the four corners of the instrument. "

In re Doe, 148 Idaho 432, 435, 224 P.3d 499, 502, (2009) *(*quoting *Wilkins v. Wilkins,* 137 Idaho 315, 319, 48 P.3d 644, 648 (2002). Plaintiffs argue that, while the will may be valid, it fails to dispose of the real property owned by Decedent. Plaintiffs correctly argue the will has no identifiable residuary clause as that term is generally understood. Nor does the will explicitly

directly dispose of the real estate. Defendant argues that the decedent clearly and explicitly wanted to disinherit Plaintiffs:

> Thanksgiving is over and I just wanted to add to this program that my son, Thomas Everett Lanham, 48 years old, has already been given all he needs to have and that I am going to leave $1 more dollar against whatever is legal to him and then he is going to be on his own. *Last will and Testament of Gordon Thomas Lanham,* p. 1.

While the magistrate erred in issuing "Findings of Fact," his ultimate conclusion that there was no genuine issue of fact as to the intent of the descendant to disinherit plaintiffs is correct. It does not follow that Plaintiffs may not inherit anything from their father. This would not be the first time that a person the testator sought to disinherit succeeded in obtaining some of the decedent's property. It is important to distinguish determination of the decedent's intent as to ambiguous provisions in a will from the more general question of whether the decedent wanted to disinherit his children. *See, e.g, McClain v. Hardy*, 184 Or. App. 448, 450, 56 P.3d 501 (2002). *See also, Matter of Estate of Baxter*, 827 P.2d 184 (1992) and case collected therein:

> [A] disinheritance clause, no matter how broadly or strongly phrased, operates only to prevent a claimant from taking under the will itself, or to obviate the claim of pretermission, but does not and cannot operate to prevent heirs at law from taking under statutory rules of inheritance when the decedent has died intestate as to any or all of his property.

Estate of Baxter, 827 P.2d at 186–87.

As stated in an earlier New York case:

> "In order to cut off the right of a distributee to inherit property, there must be a valid and legal bequest or devise to other persons. Mere words of disinheritance are insufficient to effect such purpose."

In re Bayles' Estate, 113 N.Y.S.2d 39, 40 (Sur. Ct. 1952).

Testamentary intent is a question of law to be determined from the will itself if the will is unambiguous. Even though the will does not expressly dispose of the real estate, the inquiry does not end there. A testator may defer to the judgment of another in determining the ultimate disposition of probate property though use of a power of appointment. The Idaho Probate Code recognizes powers of appointment but has precious little else to say about them. I.C. §15-12-102(8) defines a "presently exercisable general power of appointment" but the definition is concerned with what constitutes "presently exercisable" rather than what constitutes a power of appointment. Idaho Code §15-2-610, cited by Defendant, merely explains that a power of appointment is not exercised by the mere existence of a residuary clause in the *holder's* will. The statute does not speak to the creation of a power of appointment.[1]

The parties have not cited and this Court could not find any Idaho cases explaining or instructing what is required to create a power of appointment. However, other courts seem to be in general agreement that there are no special or technical words required for creating a power of appointment. For example, *First Union Nat'l Bank v. Ingold*, 136 N.C. App. 262, 523 S.E.2d 725 (1999) ("[A] power of appointment may be created not only by express words, but also by implication of law and, further, no technical language need be used");[2] *Irwin Union Bank & Tr. Co. v. Long*, 160 Ind. App. 509, 312 N.E.2d 908 (1974) (it is not necessary that the actual words 'power of appointment' be used in order to create such a power); *In re Kuttler's Estate*, 160 Cal. App. 2d 332, 325 P.2d 624 (1958) (no particular form of words is necessary to the creation of a power of appointment); *In re Rowlands' Estate*, 73 Ariz. 337, 241 P.2d 781 (1952) (No special words are needed to create a power of appointment).

[1] "… [T]his Code has therefore generally avoided any provisions relating to powers of appointment." Uniform Law Comments, Idaho Code Ann. §15-2-610 (West).

[2] *But see, Holzbach v. United Virginia Bank,* 216 Va. 482, 219 S.E.2d 868 (1975) (A power of appointment is a unique legal creature. It is created, never by implication or by operation of law, but only by deliberate act.)

From this it is clear that the Court must first determine if the will is ambiguous as to the creation of a power of appointment. If not, the intention of the testator must be given effect. When a court interprets a will, it will not look beyond the four corners of the will in determining the testator's intent. If the language of the document is unambiguous, given its ordinary and well-understood meaning, it will be enforced as written. Whether a document is ambiguous is a question of law over which appellate courts exercise free review. *Beus v. Beus,* 151 Idaho 235, 241, 254 P.3d 1231, 1237 (2011). If the language is ambiguous, interpretation of the will is a question of fact. The factfinder may resort to extrinsic evidence to resolve the ambiguity and find the intentions of the testator. *Matter of Estate of Berriochoa*, 108 Idaho 474, 475, 700 P.2d 96, 97 (Ct. App. 1985).

Here the language of the will is ambiguous if the paragraphs related to creation of the power of appointment are read in isolation, but not when the will is read as a whole. Near the beginning of the will decedent states:

> "I am going to make my friend and cousin Judd Max Lanham executor to my estate and give him Power of Attorney over all my personal and real property."

A few paragraphs later, still on the first page, he recites:

> "…and I want to state in here that the executor of my Will is Judd Max Lanham and I am giving him a Power of Attorney for full control now and even after I am dead. I want him to be able to distribute my property and my personal effects in any way that he sees fit and I will try and put all the wording about the personal effects."

At the very end of the will, he repeats:

> "I want to state in here again that the executor of my Will is Judd Max Lanham and I am giving him a Power of Attorney for full control now and even after I am dead. I want him to be able to distribute my property and my personal effects as stated in my Last Will and Testament."

This language shows the clear intent to create a general power of appointment and give his friend and cousin the power to dispose of the real estate. "A general power of appointment is an extraordinary power, and the law tolerates only limited ambiguity when determining whether such a power exists." *Matter of Estate of Krokowsky*, 182 Ariz. 277, 280, 896 P.2d 247, 250 (1995). In order to grant such an extraordinary power, the law requires that the grantor must (1) intend to create a power, (2) indicate by whom the power is held, and (3) specify the property over which the power is to be exercised. *Id.* All three conditions exist here. Use of the words "power of attorney" are simply a layman's miscues of a legal term of art. Giving Judd Lanham full control "even after I am dead" is sufficient. Gordon Lanham's intent was to create a power of appointment, so that Judd could distribute his assets after death. The will was effective to dispose of the contested real estate through the power of appointment.

III. CONCLUSION

The magistrate erred in resorting to extrinsic evidence and in issuing Findings of Fact and Conclusions of Law in resolving an issue on summary judgement. However, because the ultimate outcome of the case is the same, the error is harmless. Had the appeal in this case been timely filed, it would have been unsuccessful.

Because it appears that in the absence of a successful appeal, Plaintiff suffered no injury caused by the negligence, if any, of Defendant Fleenor, the case will be dismissed. Defendant is directed to submit a form of judgment complying with IRCP 54.

IT IS SO ORDERED.

DATED: Signed: 8/15/2017 11:41 AM

RICHARD D. GREENWOOD
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of August, 2017, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

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CHRISTOPHER D. RICH
Clerk of the District Court

Signed: 8/17/2017 10:43 AM

By _____
Deputy Clerk

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM and KEITH C. LANHAM,

Plaintiffs,

vs.

DOUGLAS E. FLEENOR,

Defendant.

Case No. CV-OC-16-08252

JUDGMENT OF DISMISSAL

JUDGMENT IS ENTERED AS FOLLOWS:

1. This matter is dismissed with prejudice.

DATED this ___ day of August, 2017. Signed: 8/30/2017 12:28 PM

By:_____
Richard D. Greenwood
District Judge

CLERK'S CERTIFICATE OF SERVICE

Signed: 9/6/2017 07:16 PM

I HEREBY CERTIFY that on this ___ day of August, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ICourt/E-Filing system which sent a Notice of Electronic Filing to the ICourt/E-Filing Registered Participants as follows:

Allen B. Ellis Ellis Law, PLLC 2537 W. State Street, Suite 140 Boise, Idaho 83702 Telephone (208) 345-7832 *Attorneys for Plaintiff*	[ ] U.S. Mail, postage prepaid [ ] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-9564 [✓] ICourt/E-Filing aellis@aellislaw.com
Richard L. Stubbs Justin R. Volle PERKINS, MITCHELL, POPE & MCALLISTER LLP 300 North 6th Street Boise, Idaho 83702 Telephone: (208) 345-8600 *Attorneys for Defendants*	[ ] U.S. Mail, postage prepaid [ ] Hand-Delivered [ ] Overnight Mail [ ] Facsimile (208) 345-8660 [✓] ICourt/E-Filing service@perkinsmitchell.com

CLERK OF THE DISTRICT COURT FOURTH JUDICIAL DISTRICT ADA COUNTY, IDAHO

Clerk of the Court

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ISB No. 1626

Attorney for Plaintiff/Appellant, Thomas Lanham

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM Plaintiff/Appellant, v. DOUGLAS E. FLEENOR, Defendant/Respondent.	Case No. CV-OC-2016-8252 NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named plaintiff/appellant, Thomas E. Lanham appeals against the above-named respondent, to the Idaho Supreme Court from the Judgment of Dismissal entered September 6, 2017, by the Honorable Richard D. Greenwood presiding.

2. The appellant has a right to appeal to the Idaho Supreme Court, and the Judgment identified in paragraph (1) above is appealable under and pursuant to Rule 11(a)(1), I.A.R.

3. A preliminary statement of the issue on appeal which the appellant intends to assert

in the appeal is as follows: Whether the claim of appellant Thomas E. Lanham that respondent Fleenor committed professional negligence is subject to dismissal because, absent a meritorious appeal in the underlying action, the dilatory notice of appeal was not a proximate cause of appellant's financial loss.

4. There has been no order entered sealing all or any portion of the record.

5. The appellant does not request a reporter's transcript.

6. The appellant requests those portions of the clerk's record automatically included under Rule 28, Idaho Appellate Rules, as well as the following:

a. Affidavit of Counsel in Support of Motion to Dismiss filed May 6, 2016;

b. Declaration of Allen B. Ellis, including exhibits, filed June 13, 2016;

c. Motion for Partial Summary Judgment filed August 31, 2016;

d. Memorandum in Support of Motion for Partial Summary Judgment filed August 31, 2016;

e. Defendant's Motion for Summary Judgment filed September 7, 2016;

f. Defendant's Memorandum in Support of Motion for Summary Judgment filed September 7, 2016;

g. Plaintiff's Answering Brief to Defendant's Motion for Summary Judgment filed October 3, 2016;

h. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment filed October 3, 2016;

i. Defendant Douglas Fleenor's Affidavit in Opposition of Plaintiff's Motion for Partial Summary Judgment filed October 3, 2016;

j. Plaintiff's Reply Brief in Support of Motion for Partial Summary Judgment filed October 10, 2016;

k. Defendant Douglas Fleenor's Reply Memorandum in Support of Motion for Summary Judgment;

l. Memorandum Decision on Motion for Summary Judgment filed November 22, 2016;

m. Stipulation on the Issue to be Resolved in Summary Judgment Proceedings filed February 13, 2017;

n. Defendant's Motion for Leave to File a Supplemental Brief in Support of Motion for Summary Judgment Based on Newly Obtained Evidence filed April 18, 2017;

o. Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment filed May 4, 2017;

p. Affidavit of Samantha L. Lundberg in Support of Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment;

q. Plaintiffs' Supplemental Memorandum in Support of Motion for Partial Summary Judgment filed May 16, 2017;

r. Defendant's Reply Brief in Support of Supplemental Memorandum in Support of Motion for Summary Judgment filed May 22, 2017; and

s. Memorandum and Order Re: Renewed Motion for Summary Judgment filed August 17, 2017.

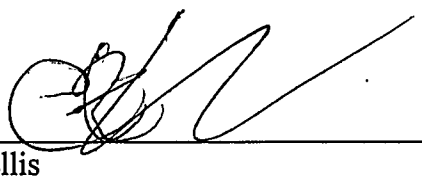
7. I certify:

(a) That the estimated fee for preparation of the clerk's record has been paid.

(b) That the appellate filing fee has been paid.

(c) That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

Dated this 16th day of October, 2017.



Allen B. Ellis
Attorney for plaintiff/appellant Thomas E. Lanham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 16th day of October, 2017, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Richard L. Stubbs
Carey Perkins, LLP
P.O. Box 519
Boise, Idaho 83701

_____ U.S. Mail, postage prepaid
_____ Hand delivery
_____ Overnight delivery
_X_ Facsimile (345-8660)

Allen B. Ellis

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM, Plaintiff-Appellant, and KEITH C. LANHAM, Plaintiff, vs. DOUGLAS E. FLEENOR, Defendant-Respondent.	Supreme Court Case No. 45488 CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Two (2) CDs submitted with the Stipulation on the Issue to be Resolved in Summary Judgment Proceedings, filed February 13, 2017.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 6th day of December, 2017.

COURT 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR ADA COUNTY

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM, Plaintiff-Appellant, and KEITH C. LANHAM, Plaintiff, vs. DOUGLAS E. FLEENOR, Defendant-Respondent.	Supreme Court Case No. 45488 CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

ALLEN B. ELLIS
ATTORNEY FOR APPELLANT
BOISE, IDAHO

RICHARD L. STUBBS
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____
Deputy Clerk

Date of Service: DEC 0 6 2017

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS E. LANHAM, Plaintiff-Appellant, and KEITH C. LANHAM, Plaintiff, vs. DOUGLAS E. FLEENOR, Defendant-Respondent.	Supreme Court Case No. 45488 CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 16th day of October, 2017.

CHRISTOPHER D. RICH
Clerk of the District Court

By
Deputy Clerk