**IN THE SUPREME COURT OF IOWA**

**No. 18-0927**

**Appeal from Johnson County District Court No. TRPR030161**
**The Honorable Mary E. Howes, Judge**

# APPELLANT'S REPLY BRIEF

**IN THE INTEREST OF**

**MAXWELL R. ALBERHASKY,**
**Petitioner-Appellant**

**AND CONCERNING**

**GEORGE RODNEY ALBERHASKY,**
**Respondent-Appellee**

**AND**

**GRAYSON H. ALBERHASKY,**
**Intervenor-Appellee**

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### Background

The existence of assets available to Max and Grayson to pay their college expenses was discovered by Appellant during the litigation of Rod's Motion for Modification filed in Dissolution of Marriage Johnson County Case No. **CDDM012155**, where payment of college expenses for Max and Grayson, was in issue.

Rod was seeking to have the court order Angela to contribute to Max and Grayson's college education (Appellees' Proof Brief, Pg. 17-18) despite his knowledge that both children had substantial UTMA funds and 529 College Savings Plan funds available for their college educations provided by their Grandmother Allie. (Petitioner's Motion Pursuant to IRCP 1.904(2) filed 8-19-11 in CDDM012155, Pg. 1-2, paragraph 4).

The court found that both Max and Grayson had 529 (College Savings Plan) accounts of approximately $65,000 and UGTA funds of approximately $90,000. (App., Pg. 359; Ruling on Petition for Modification filed 8-9-11 in CDDM12155, Pg. 8). The court found that "(t)he 529 accounts should be fully used before either parent has to contribute to post-secondary education." (Id., Pg. 7, paragraph 2). The court ordered "(t)hat the issue of post-secondary school subsidies for

Maxwell Alberhasky be reserved until all of his 529 account in the amount of approximately $65,000 is gone and his UTMA account of approximately $90,000 is gone." (Id. Pg. 10, paragraph 6).

Despite the availability of these funds, all under the control of Rod, Max was leaving for college within a matter of days and Rod was unwilling to pay necessary college expenses for Max causing Angela to bring a contempt proceeding to seek the court's intervention. (Application for Immediate Hearing filed 8-10-11 in CDDM012155).

Following a hearing on August 15, 2011, the court found that Rod had not been forthcoming regarding his finances, understating both his assets and income and that his credibility was "vague" and his testimony was "disingenuous." (App. Pg. 359; Ruling and Order filed 9-8-11 in CDDM012155, Pg. 2, paragraph 2 – Pg. 3, paragraph 1).

The court found that despite Rod having access to or being custodian of approximately $155,000 in 529 and UTMA accounts which were set up to fund Max's education, he had not paid a single dime towards Max's college expenses and refused to reimburse Angela for legitimate expenses she paid on Max's behalf. The court concluded, "that Dr. Alberhasky, out of spite or ill will towards Maxwell and Angela, has more interest in punishing them than providing for Maxwell's

education.” (Id., Pg. 3, paragraph 3).

The court ordered, “. . . that based on the petitioner’s unwillingness to provide for Maxwell’s education, that the funds be managed as trustee and guardian for Maxwell’s education by the respondent, Angela Boeke.” (Id., Pg. 6, paragraph 3).

Rod immediately moved to stay the order. (Petitioner’s Motion Pursuant to IRCP 1.904(2) filed 8-19-11 in CDDM 012155).

Rod continued to act as custodian/trustee of Max’s UTMA funds and 529 Plan until an order was entered by the Court on July 12, 2012. The court found that it would be best that the trustee of the UGMA account for Max and to the extent legally possible the 529 account should be controlled by Rod’s sister (JoEllen). (App. Pg. 81; Order filed 7-12-12 in CDDM012155, Pg. 5, paragraph 2).

However, JoEllen declined to serve as trustee and the court then appointed the US Bank to serve as trustee. (App. Pg. 91; Order of Trustee on UGMA Account filed 9-7-12 in CDDM012155).

Four days after this order was filed, on 9-11-12, Rod transferred Max’s 529 funds to Grayson. (App. Pg.106; Exhibit G, Change of Beneficiary Form and App. Pg. 109; Exhibit H, IAdvisory Statement dated 9-11-12). Max had

finished one year of his undergraduate education and Grayson had not yet graduated from high school.

Max continues to this day to pursue his post-graduate education in a five-year Ph.D. program and to incur expenses in doing so, despite Rod's argument that Max didn't need the funds in his 529 Plan. (Appellants' Proof Brief, Pg. 20, paragraph 1).

Further, Grayson was given an equal amount of money by his Grandmother Allie as Max. (App. Pg. 359; Ruling and Order filed 9-8-11 in CDDM 012155, Pg. 2, paragraph 2), Grayson didn't need Max's 529 Plan funds any more than Rod states Max did not need them. Rod's action was purely intended to punish Max.

## ARGUMENT

### I. Did the Trial Court err in conducting an Evidentiary Hearing on Respondent-Appellees Motion to Dismiss?

It must be remembered that Rod's Motion to Dismiss was filed pre-answer and before any discovery had been conducted. In fact, Rod objected to and resisted Max's effort to seek discovery. (Motion for Protective Order and Respondent's Objections to Petitioner's First Request for Production of Documents filed 4-1-14 in TRPR030161).

Rod's and Grayson's attorneys make no attempt to distinguish why an evidentiary hearing with expert testimony

and exhibits should have been allowed in this case when long-standing Iowa law prohibits such a hearing on a motion to dismiss. See Max's Brief, Argument, Section I and citations.

**II. Did the Trial Court err in failing to apply the proper legal standard for determining a motion to dismiss?**

Rod's and Grayson's attorneys argue that since Max referenced Iowa Trust Code statutes in his Petition, his cause of action must fail because, as they argue, those statutes don't apply. This is a self-serving conclusion and is not supported by Iowa law.

The proper legal standard is, does the petition ". . . contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 354 (Iowa 2009), citing *Rees v. City of Shenandoah*, 682 N.W. 77, 79 (Iowa 2004). "The 'fair notice' requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claims general nature." Id. at 354, citing *Soike v. Evan Matthews & Co*., 302 N.W.2d 841, 842 (Iowa 1981).

In *U.S. Bank*, Id. the Court finds, ". . . the petition as pled gave Barbour fair notice that the bank was seeking a judgment against her for her failure to pay her credit card bill, ***regardless of the theory pled***." Id. at 354 (emphasis

added).

Rod's and Grayson's attorneys argue that since Max cited Iowa Trust Code theories, no other legal theories of recovery can be considered. Appellees' Proof Brief, Pgs. 39-41. This argument fails under *U.S. Bank*, Id.

The authorities cited by Rod's and Grayson's attorneys are clearly distinguishable from this case. In all of the cited cases, the issue of specific theories of recovery arose shortly before or at trial, or sua sponte by the trial court without being pled.

Max has the right to amend his petition and good pleading practice would suggest that the proper time to do so would be after discovery was completed and all of the facts were known.

In *Davis v. Ottumwa YMCA*, 438 N.W.2d 10 (Iowa 1989), cited by Rod's and Grayson's attorneys, (Appellees' Proof Brief, Pgs. 39 and 40), the petitioner, Davis, attempted to amend his petition four months before trial to state a new theory of recovery, not in contemplation of any of the parties at the outset. The trial court denied the motion to amend.

On appeal, the court found that the defendants did not have "fair notice" of the claim from the petition. *Id*. at 13. Yet, the court went on to find that the trial court abused its discretion in denying the motion to amend. Id. at 15. The court stated, ". . . amendments are the rule and denials are

the exception." Id. at 14, citing *Ackerman v. Lauver*, 242 N.W. 279, 284 (Iowa 1976).

In this case, Rod's and Grayson's attorneys, state that Rod is not a "trustee" with respect to Max's UTMA assets and that the Iowa Trust Code does not apply to UTMA accounts. Appellees' Proof Brief, Pgs. 37-40. It should be noted that the trial court repeatedly interchanged the words trustee, custodian and guardian. Certainly Rod and Grayson would not be surprised if Max sought to amend his petition to allege a violation of the standards of conduct for a custodian of a UTMA asset, which is clearly implied in the petition, whether Rod is a trustee or a custodian.

**III. Did Plaintiff-Appellant's Petition state a cause of action under notice pleading standards?**

Rod is clearly on notice of what actions Max complains of and what facts upon which the complaints are based. First, that Rod changed the beneficiary of a 529 College Savings Plan established for him by Allie to Grayson, and secondly, that Rod liquidated Max's interest in an entity known as Alberhasky Family for less than its fair value to the detriment of Max and the resulting benefit of both Rod and Grayson, the remaining owners. And, that these two acts were done in bad faith.

These allegations constitute "fair notice" to Rod and

Grayson of the nature of Max's claim under Iowa law. See Max's Brief, Argument, Section III and citations.

## CONCLUSION

Long-standing Iowa case law holds that an evidentiary hearing is not allowed in considering a motion to dismiss. In this case, the trial court conducted an evidentiary hearing and relied on evidence introduced at the hearing. Max's petition gives Rod and Grayson "fair notice" of his claims and the trial court should have denied the motion to dismiss.

Max respectfully requests the appellate court reverse the decision of the trial court and remand this matter to the district court for further proceedings to allow a determination in this case on its merits.

## CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type volume limitation of Iowa Rs.App.P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

[ x ] this reply brief has been prepared in a monospaced typeface using Courier New in font size 12 and contains 181 lines, excluding the parts of the brief exempted by Iowa R.App.P. 6.903(1)(g)(2).

/s/ Stephen C. Gerard II September 7, 2018

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## Certificate of Service

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the Clerk of the Supreme Court, and Attorneys Stephen B. Jackson, Kerry A. Finley and Justin A. Teitle by EDMS, and by *e-mail* at the addresses shown below this 6th day of September, 2018.

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