IN THE IOWA DISTRICT COURT FOR DUBUQUE COUNTY

IN THE MATTER OF THE RESIDUAL TRUST B UNDER THE LAST WILL AND TESTAMENT OF MARTHA WILLENBORG,
Deceased.

No. TRPR 027914

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IN THE MATTER OF THE ESTATE OF ELMER V. WILLENBORG,
Deceased.

No. ESPR 044243

DECLARATORY RULING

On January 5, 2016 the disputed issues tried in a six-day bench trial were submitted for ruling, upon final party briefing. During the trial conducted November 9 – 10, 11 – 12, and 17 – 18, 2015, appearances were entered by the following:

--Mary Zirul, Joyce Willenborg, Ann Holst, Thomas Willenborg, Sr., and Carl Florian (Beneficiaries), with their attorneys David J. Dutton and Cheryl L. Weber;

--American Trust and Savings Bank's Senior Executive Vice President and Trust Officer Robert Donovan, with counsel Gregory M. Lederer;

--Intervenor Joan L. Recker, with her attorney Douglas M. Henry; and

--John O'Connor of O'Connor & Thomas, P.C., with attorney Robert V.P. Waterman.

Now, in consideration of the lawfully admitted evidence, and in application of relevant Iowa law, the court makes findings of fact, reaches conclusions of law, and issues a declaratory ruling.

FINDINGS OF FACT

Iowa's historic spike in farmland value unites heirs of Elmer V. and Martha Willenborg (Elmer and Martha, respectively) in a quest to reverse a long-standing plan for sale of the family farm under fixed-price conditions. When family patriarch Elmer died January 15, 2012 at age 100, family retrospect over the wisdom of the deal triggered litigation that now posits various factual and legal issues before the court.

I. Litigation Claims

Bank's Petition for Authority to Sell

On August 16, 2012 American Trust and Savings Bank, as trustee of Martha's Residual Trust B filed a Petition for Authority to Sell Real Estate according to terms of the April 1, 2003 Agreement Concerning Real Estate (ACRE). The Bank sought court sanction for transfer of the undivided one-half interest Trust B held in the Willenborg family farm. The Bank's Petition drew an Answer by the current beneficiaries of Martha's Trust B—Mary Zirul (Mary), Joyce Willenborg (Joyce), Ann Holst (Ann), Thomas J. Willenborg, [Sr.] (Tom), and Carl J. Florian (Carl)—who demanded that the farm be conveyed to them, and set out affirmative defenses alleging that the ACRE was unenforceable and that the trustee was estopped from enforcing it.

Beneficiaries' Counterclaim against Bank

Further, the Willenborg trust beneficiaries lodged a September 6, 2012 Counterclaim, later amended, against the trustee Bank, asserting violation of fiduciary duty, negligent misrepresentation, fraudulent misrepresentation, and claims for compensatory and punitive damages. The Bank denies all claims and raises the statute of limitations as an affirmative defense.

Intervention by Recker/Beneficiaries' Counterclaim against Recker

October 5, 2012 Joan L. Recker as the ACRE purchaser from Martha's Trust and Elmer's Estate, filed a Petition of Intervention in the Trust litigation along with her Answer to the Bank's Petition, endorsing a court authorization for sale of the Trust's portion of the farm. Upon approval of intervention, trust beneficiaries responded by incorporating their challenges to the enforceability of the ACRE as well as other affirmative defenses; they also asserted a Counterclaim against the intervenor's interests.

Third Party Legal-Malpractice Claim

On September 20, 2013 the trust beneficiaries amended allegations in their Counterclaim and added a Third Party Claim for legal malpractice against O'Conner & Thomas, P.C. The beneficiaries charged breach of direct and indirect duties in conjunction with the law firm's services in proceeding to draft and implement the ACRE, and otherwise in trust-administration support. The law firm filed its Answer denying all claims, and asserting defenses of a limitations bar, equitable estoppel, unclean hands, and comparative fault.

Petition for Specific Performance

On November 20, 2013 Elmer's Estate became part of the litigation mix,[1] when Joan L. Recker filed a Petition for Specific Performance of the ACRE, to buy the undivided one-half of the farm titled in Elmer's name, as well as the half held by Martha's Trust. In their Answer, the beneficiaries of the estate, as well as those of the trust, denied that enforcement of the ACRE was warranted. Among affirmative defenses, the beneficiaries charged Recker with unclean hands, action on an unconscionable contract, and unjust enrichment.

1 Joan Recker had earlier filed a Petition for Specific Performance in Elmer's Estate, on May 2, 2013. The new Petition filed on November 20, 2013 reasserted the earlier demand made in the estate, and introduced the joint caption for litigation of specific performance that also would involve Martha's Trust.

Consolidation of Cases

On January 21, 2014 an Order for Consolidation and Trial combined claims in both the Trust file, TRPR 027914 and the Estate file, ESPR 044243 for trial preparation and trial.

Motion for Involuntary Dismissal

On November 18, 2015 and under terms of Iowa Rule of Civil Procedure 1.945, O'Connor & Thomas filed a Motion for Involuntary Dismissal. The court deferred ruling for inclusion in this Declaratory Ruling. The Motion was re-urged January 5, 2016 in connection with post-trial briefing.

II. Family Farm Legacy

The farmland sale at the heart of this dispute had its genesis decades ago. Elmer and Martha transitioned out of active farming around 1973, embarking upon a farm-tenant relationship with Donald T. Recker and Joan L. Recker—local farmers of repute. Don Recker and Elmer grew to enjoy a lasting, congenial farm-business relationship.

When Martha died in 1977 the Willenborgs' oldest child, son Tom, assumed an enhanced role in family asset management. Tom became a co-trustee of Martha's testamentary Trust A and Trust B, along with Mary's then-husband, David Maiers who was a local real-estate agent. Upon Mary's divorce, Tom continued as trustee, assuming the station as the sole fiduciary. Elmer liked to think of Tom as taking care of the "brain work" implicated by Martha's two trusts, and the related management of Elmer's individual share of the couple's assets. It made sense to coordinate the overall management of trust assets and Elmer's holdings, and Tom gladly accepted the mantle. He was an accountant by training, self-confident in business matters, and relished the profile of aiding his father and leading the family in that manner. On a personal level, Tom had good rapport with Elmer, respected his father's decision-

making ability, and accepted the unspoken premise that Elmer wielded the moral authority on issues involving the family farm.

The Willenborg association with the Reckers nurtured a mutual respect that eventually led Elmer to settle upon a plan for the succession of farm ownership. That the Reckers intended to ultimately buy the Willenborg land and that Elmer, trustee Tom, and the extended Willenborg family were all content with it, were facts widely known within the respective families.

From 1977 forward, Tom counseled Elmer on business and tax matters, and otherwise facilitated whatever Elmer and Martha's Trusts needed done. He became more autonomous in doing paperwork as the years wore on—partly out of convenience, and partly due to the routine that developed in asset management. Elmer's physical proximity to the land shifted in 1978 when, pursuant to an antenuptial agreement, he married Mary V. Freking, and joined her in the marital home in Remsen, Iowa. When she died January 31, 1997 Elmer elected to continue his residence in Remsen where he had developed relationships with the church and community. At age 86, Elmer was fully aware of legal ramifications attendant to this transition to the status of a single person. Within 60 days, he had hired a Remsen lawyer to draft a new will that acknowledged, among other testamentary directives, the end of his second marriage.

In conjunction with legal work to confirm his testamentary intentions, Elmer also coordinated responsible management of his ongoing personal affairs. While Tom was continuing to assist him, Elmer tapped daughter Mary's knowledgeable approach to business matters and granted her authority to act in his stead under a General Power of Attorney. Separately, Elmer identified Joyce as conscientious about matters of healthcare, and put her in

charge of making those kinds of decisions for him via a Durable Power of Attorney for Health Care.

Even from the remote residence in Remsen, Elmer remained cognizant of what was going on with the tenancy of the family farm near Dyersville. Indeed, when matters of change developed, Tom always consulted his father. So it was in 1998, when Tom was working on renewal of the farm lease, and Don Recker broached the subject of buying the farm, which by that time he and his wife had rented for 25 years. Tom discussed it preliminarily with Don Recker, but it was Elmer who gave the green light, via this handwritten letter to Tom.

> Don & Joan explained to Ann and I their thoughts regarding eventually purchasing the farm. Said he had talked to you about it. This is a copy of what he scribbled on paper.
>
> ---
>
> Don & Joan Recker would like to have the option to purchase the Elmer Willenborg farm for $375,000 (150 A @ 2,500.00 per A.) on March 1, 2004. Recker can tile at Recker expence [*sic*]. Willenborg will not have to reimburse Recker for tiling expence [*sic*] for tile put in fall of '97 (3,000.00) and thereafter. Recker will maintain and repair buildings at Reckers' expence [*sic*] and discretion.
> Recker will pay $18,000.00 Rent in '99
> Recker will pay $20,000.00 rent for crop years 2000 2001 2002 2003
>
> He said you apparently had no objection, and neither do I. As to financing he thought he would prefer leaving the money "in" instead of paying cash. However you and Recker's [*sic*] make it out is satisfactory to me (and Ann)—(I don't expect to be around another 87 years.)
>
> Love –
> Dad

Tom thereupon memorialized the deal, drafting the Option Agreement [for the Purchase of the Willenborg Farm Expiring March 1, 2004] which he, as trustee, Elmer individually, and the Reckers all signed. The Agreement spelled out the following.

> In consideration of the payment by [Reckers] for the tiling improvements made in 1997, 1998 and 1999 to the Willenborg Farm under the FARM LEASE, dated the 9th day of September 1977, as amended, including the EIGHTH and NINTH ADDENDUMs [*sic*] ending December 1, 2003, the parties mutually agree as follows:
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> 1. The Optionor [Elmer and Tom as trustee] obligates itself to enter into a CONTRACT FOR THE PURCHASE AND SALE OF THE WILLENBORG FARM as identified above, with the Optionee [Reckers], upon the exercise by the Optionee [Reckers] of this option.
>
> 2. This option shall commence on December 1, 1998 and expire March 1, 2004.
>
> 3. Optionor [Elmer and Tom as trustee] obligates itself to a $375,000 contract price for the Willenborg Farm.
>
> 4. Whether or not this option is exercised, the Optionor [Elmer and Tom as trustee] shall not be obligated to reimburse the Optionee [Reckers] for the tiling consideration paid by Optionee [Reckers].
>
> 5. The parties may modify this option at any time by agreement.

(Emphasis in original.)

III. Tom's Betrayal

In the course of his work as trustee of Martha's Trusts, Tom served as trustee of her Trust A which came to be the vehicle for management of savings, while Trust B assets consisted chiefly of Martha's half interest in the farm. Tom was not only the oldest child in the family, but was the only surviving boy and a person professionally trained and licensed as a C.P.A., so it seemed natural that Elmer and Martha would vest confidence in him in the 1970s to manage their family money. Tom's sisters shared their parents' deferential stance. Thus, as Tom's fiduciary work spanned decades, he enjoyed unmonitored and seemingly unfettered

discretion to process income and expenses for Martha's Trusts. Tom was duty-bound as trustee to distribute all Trust A income to Elmer, and he was under direction to use discretion in providing Trust B income to his father; Tom also was granted fiduciary authority to invade the principal to assure Elmer's support.

It grew to be a point of irritation for Tom that Elmer, who had always lived frugally, displayed a charitable spirit that moved him to generously support his church and various other causes dear to him. So it was, that despite Martha's clear directive to pay all Trust A income to her widower and supplement that with such other income and principal as he needed, Tom curtailed Elmer's philanthropy by withholding income distributions altogether. Elmer never objected, accustomed as he was to a simple lifestyle—and happy to live with little so as to preserve more for loved ones. Similarly, Elmer's daughters saw nothing amiss in Elmer's support for at least the first 25 years; they were grateful that brother Tom purported to take care of family business, *gratis*.

True to the family's perception that Tom was tuned into money matters, he was. Not only did he portray an expertise in tax planning and business management, but he watched the markets. As early as 1995, Tom alerted his sisters to the rising value of Iowa farmland, sending them a copy of a newspaper article about it.

When, in 1997, Don Recker first brought up the need for tiling on the farm, Tom leveraged the tenants to foot the bill. The funding concept allowed Tom reprieve on having to come up with Willenborg cash for such an improvement. Since the Reckers hoped to eventually own the farm and their rent amount had remained stagnant over the years, they were willing to front the cost of tiling—but they needed to know that they would not be losing the farm. It was in this context that the landlords and tenants framed their December 1, 1998 Option Agreement.

Tom believed at the time that the land price agreed upon, $2,500 per acre, was a good one that actually exceeded the fair-market value at that point and that it would provide a cushion in a what he knew to be a strong land market. By contract, then, that price became a benchmark. Under the 1998 Option Agreement, the Reckers had until March 1, 2004 within which to exercise their option and purchase the farm for the set price.

Unbeknownst to anyone else in the family, as Tom presided over the Willenborg farm and investment accounts, he was fighting for his own financial survival. In the many years Tom had been in the confidential role of trustee for Martha's Trusts and also acted as Elmer's *de facto* financial manager, he had never disclosed to his father or to his trusting siblings that his personal affairs were a mess—leading him to take bankruptcy shelter twice.

The emotional and economic foundation of the Willenborg family was shaken in 2002 when it was discovered that Tom had embezzled around $250,000 from his parents' accounts—drawing out for his own use, a combination of savings he had been in charge of protecting in Martha's Trust A and the income to which Elmer was entitled, along with farm income from Trust B. Tom's transgressions came to light in tandem with controversy over farm management. That year, the Reckers were motivated to exercise at least some portion of their purchase option so that their son Douglas could construct a new home in the area of the Willenborg homestead site. Tom, concerned that the farm sale would trigger otherwise avoidable capital-gains taxes, negotiated a new chapter in the deal with the Reckers: a couple of acres would be transferred for the construction site, the option on the rest of the farm would be extended, and the landlord-tenant roles would continue into the future.

When the specter of sale and demolition of the Willenborgs' childhood home was raised, the three sisters—Mary, Joyce, and Ann—were jolted. In the course of processing the

development psychologically and then logistically to empty the old house of keepsakes, Elmer's daughters began asking questions about farm management, the Reckers' influence on decisions being made, and circumstances of their father's income. An emergency meeting was held April 1, 2002 when the sisters confronted Tom at his California home. They pressed questions about his loyalty to the family vis-à-vis his marriage to Joan Recker's sister. They voiced concern over the farm rent being too low. They disagreed with sale of the homestead. And they raised evidence of self-dealing. During the meeting, Tom admitted that he had, for years, been "borrowing" from accounts entrusted to his care.

As the sisters expressed their dissatisfaction with sale of the homestead site, Tom did not reveal that he had already assembled and circulated paperwork designed to accomplish that as part of a multi-faceted deal. In a round-robin mailing system that Tom conceived and had used before, the paperwork was initially signed by Tom, was then circulated through Elmer, and was then sent on to the Reckers for final signing. Thus, at the time of the April 1st meeting, documentation in the offing included Douglas and Nikki Recker's March 25, 2002 Offer to Buy two acres of the homestead site for $5,000, the Tenth Addendum to the Reckers' farm lease that Tom had drafted for an eight-year extension at a static annual rental of $21,000, and the Option Agreement Extension (expiring December 31, 2011) for a $370,000 purchase of the land surrounding the carved-out building site. Both the lease renewal and the Option Agreement Extension had been pre-dated "April 4, 2002" even though the parties' various signatures were applied on disparate and unidentified actual dates. Tom picked the December 31, 2011 option-expiration date by surmising that his father—who came from a family who lived into their 90s—would not make it past 100, the age Elmer would achieve in November of 2011.

IV. Mary, Joyce, and Ann Step Up

Elmer's daughters saw the situation Tom had created, as a family crisis and they sprung to action. They intended to protect their father's interests, but also their own as contingent beneficiaries of their mother's estate plan, and potential beneficiaries of their father's Will. In the wake of discovering Tom's betrayal, Elmer relied greatly upon his daughters for emotional support, an in navigating his own ensuing affairs-management upheaval. The sisters' goal was to right the ship of family, and to recalibrate their 92-year-old father's legal authority.

Daughter Mary, who held Power of Attorney in case she needed to exercise it, stepped up to lead and she exercised careful attention in sorting out the legal issues and assisting Elmer in advocacy. Even before the sisters traveled to California to confront their brother April 1, 2002, Mary called John O'Connor March 27th to get her bearings on what was going on with the farm and her mother's trusts. It was the attorney who immediately investigated courthouse records and spotted the suspicious activity of Tom's ruse of issuing "commercial paper" to the trusts, and indication that the total was growing with the annual siphon. Attorney O'Connor counseled on questions the sisters should pose to Tom when they met up with him a few days hence.

Mary did an excellent job of coordinating a transparent and timely communication with Joyce and Ann to keep those family members on the same page as difficult revelations unfolded and issues needed to be tackled.

Elmer was astute to the circumstances of the time, accepted his daughters' advice, and took strength in the blanket of support. Mary arranged for her father to present at the law office of John O'Connor for counsel on the situation. She initially advanced a $1,500 retainer, but

she accepted reimbursement once a new trustee was in place; Mary recognized that the representation undertaken dealt with issues properly funded by Martha's Trusts.

Aside from a long-standing reputation in the community, the O'Connor & Thomas law firm was a logical choice for Elmer and his daughters to consult in seeking help with family-trust matters. The firm had assisted the Willenborg family before with the estate plans adopted by Elmer and Martha, and had also provided service in implementing Martha's Trusts at the conclusion of her estate administration.

V. Legal Intervention

John O'Connor accepted the challenge of working with the family members to protect their common interests involved in protecting trust assets and managing the farm asset. Necessarily, the initial consultation addressed the need for timely removal of Tom from positions of control with Elmer's affairs, and getting a successor trustee in place for Martha's Trusts. Attorney O'Connor immediately recognized the significant legal issue in the illegality of Tom's conduct in misappropriating assets entrusted to his fiduciary care. He properly advised Elmer and the engaged daughters about legal options available, including the steps necessary to secure a court-ordered removal of Tom from the trustee posts; and he also identified merits in an alternative, speedy resignation. The attorney vetted issues to be confronted in recovery of stolen funds, including strategies to maximize recovery. Thus, it was with Elmer's interests as the focal point that there came to pass a changing of the guard: Tom's confidential position in his father's life would need to be canceled, Tom would need to resign as trustee of Martha's Trusts, and Tom would need to be excised from access to family assets and management.

Throughout the early work of John O'Connor and others in his law firm, Elmer's plight and needs remained the immediate focus. Elmer's intentions were informed by, and variously communicated through, his daughters who took on an interactive role with one another and were in open communication with O'Connor & Thomas. All three, as well as Elmer, took active interest in what was going on, and consistently all approved of the work being done in what they saw as the family's best interest even as family-member Tom was not part of the team for obvious reasons. In the end, the lawyer would be authorized to negotiate with Tom for a timely resignation and would lay the groundwork for a coordinated restitution plan that served the priorities expressed by Elmer and his supporters.

Upon first learning of Elmer's predicament, John O'Conner was astute to the need for timely trustee replacement. Drawing upon decades of experience in Dubuque-area probate practice, and also familiar with the community resources, he was quick to recognize that the trust department at American Trust and Savings Bank would be a logical successor. None of Elmer's other family members was available locally or had the expertise or interest in being a successor trustee, and there were matters of financial and farm management to tackle that the Bank's trust department could readily address. It was agreed by Elmer and his daughters from an early point, to follow O'Connor's recommendation, and thus that relief was pursued with dispatch.

In devising the process that would be necessary for a lawful transition, John O'Connor identified the interested parties under Martha's Trusts, envisioned legal documentation through which their collective interests could be protected and the purpose of the trusts furthered, and exercised drafting skills to accomplish an efficient and cost-effective result. Thereupon, the Willenborg family—beneficiary Elmer together with majority of the contingent beneficiaries

Mary, Joyce, Ann, brought in Carl, and also incorporated Tom—entered into an agreement to effectuate the orderly transition in the office of trustee. The deal also provided Elmer and the overall family interest with prospect of recovering the stolen funds.

By May 9, 2002 the group, signing in counterparts, had entered into The Conditions of Resignation Agreement [Between Thomas J. Willenborg and Trust "A" and Trust "B" of the Martha Willenborg Estate, by and through its beneficiaries]. The arrangement was premised upon Tom's personal and voluntary written Resignation as Trustee, and it called for him to make financial restitution through a combination of collateralization, promissory notes, relinquishment of beneficial rights in potential trust distributions, and indemnity of the replacement trustee. All with any type of beneficial interest in Martha's Trusts, including Tom, also executed a Consent to Appointment of American Trust & Savings Bank as the successor trustee. Recognizing the urgency of the situation, John O'Connor took care to arrange for express mailings and returns of the legal documents. There is no evidence that Tom sought any professional legal advice on snatching up the opportunity he had to move on from his thefts in this manner.

At the outset of American Trust's involvement as successor trustee under its formal appointment May 28, 2002, the O'Connor firm's service was trained on taking care of issues surrounding the farm asset—including Elmer's personal interests as half owner. At the time, it made sense to Elmer, his daughters, the new trustee's Trust Officer Robert Donovan, and all others who were looking on, for things to be coordinated, and that is how the law firm proceeded. Consequently, it also was observed to be reasonable and appropriate for fee billings for all of the O'Connor firm's work to be serviced through the financial-management protocol of the trustee. For all practical purposes, American Trust had merely taken over those tasks

Tom had earlier performed. The new trustee intended that John O'Connor would act as its attorney and he and his firm would work directly with the Bank to accomplish what needed to be done to protect and further Elmer's interests and the supportive purposes of Martha's Trusts, into the future.

So, from the earliest point in American Trust's service, John O'Connor performed under the official title of being the trustee's designated attorney. It was a legal undertaking that inured to Elmer's aligned interests with the various aspects of Martha's trust administrations. The arrangement allowed an efficiency that saved Elmer time, money, and worry; it also eased potential strain on his supportive relatives—Mary, Joyce, and Ann—to have everything coordinated for their father by a knowledgeable and approachable professional.

In the context of the Willenborg family travails in 2002, it would have appeared hyper-technical and counter-productive to Elmer's overall financial interests, for John O'Connor to refuse to render service broad enough to benefit all of Elmer's interests in the farm and in his deceased wife's trusts. Of the stakeholders involved with attorney O'Connor at the time, none had differing interests.

Carl, for his part as a young and remotely situated contingent beneficiary, assumed only passive interest in what was happening back in Iowa. After signing the necessary documents to get administration of his grandmother's Trusts A and B back on track, he went back to the priorities of a 21-year-old in college at Butler University in Indianapolis.

After The Conditions of Resignation Agreement went into effect, Tom quietly withdrew into family exile—no doubt relieved that his relatives would not refer his embezzlements to law-enforcement authorities, or otherwise elevate the matter to a public scandal through court action. He was grateful to be able to avert any notice of his dishonesty to C.P.A. regulators. In

the family's final analysis, and consistent with the direction John O'Connor received from Elmer and his daughters at the time, it was a priority to secure restitution, if possible. In furtherance of that goal, it was seen as reasonable to accord Tom an ongoing ability to make a living.

In a new will executed June 25, 2002 and within a month of the trustee turnover, Elmer disinherited Tom. No one at the time doubted that Elmer had the requisite testamentary capacity to take that step. And, everyone aware of Elmer's decision understood the merit of it.

VI. Elmer's Disavowal of Documents

As part of retrieving control over his own business affairs, Elmer asserted that the newly-minted Tenth Addendum farm lease, the Purchase Agreement Extension, and the acreage-sale documents Tom had processed in the spring of 2002, contained forged signatures. Elmer was reeling from the discovery of Tom's self-dealing and skullduggery; and in that frame of mind he professed no memory of having signed the three legal documents Tom had sponsored. Elmer was a cautious soul, and was convinced that he had not done it. His resolve was likely bolstered by the counter-part signing of pre-dated instruments that Tom had orchestrated: the date was March 25, 2002 for Douglas and Nikki Recker's Offer to Buy Real Estate [Acreage] and Acceptance, and an April 4, 2002 date was featured on both the Tenth Addendum [to the Farm Lease] and the Option Agreement Extension. Unlike real-estate instruments of a similar nature affecting real estate, these were not drafted to require execution before a notary public—a step that would have confirmed identities of signatories and memorialized the actual date signatures had been affixed. Tom had overlooked the importance of that legal step.

By appearance, the documents featured signatures of Tom as trustee, Elmer individually, and the Reckers—which suggested to the reader that all parties signed on the same date. That phenomenon drew skepticism from not only Elmer, but from his daughters who saw the suspect documents as the last visible acts by their disgraced brother under license as trustee and *de facto* manager of Elmer's affairs. Elmer's denial of signing was a bold move, amounting to a damning revue on his son's trustworthiness. It was a pivotal act in Elmer's re-assertion of control over his own life.

The disavowed signatures bore striking resemblance to Elmer's customary hand. At the time, care was taken by Mary and by John O'Connor to assess the import of Elmer's assertion, given the intensity and sincerity of his belief and the consequences inherent in disavowing legitimacy of legal documents. Elmer was legally competent by everyone's assessment at the time, was known to be an honest and careful individual in taking positions on matters of importance, and was adamant that he did not sign the documents. He wanted relief from Tom's machinations, and other parties involved—the successor trustee and Joan Recker as survivor of Don who had abruptly passed away in the meantime—were empathetic and inclined to honor Elmer's stance.

Mary, still holding Power of Attorney responsibility for her father, advocated his position after speaking candidly and confidentially with him, and scrutinizing the signatures herself. She rallied and coordinated the support of her sisters. She reported her findings to John O'Connor, expecting that her father's position would be fully respected and his interests would be protected. Mary oversaw her father's consideration and signing of an affidavit prepared by attorney O'Connor to memorialize what Elmer had orally said. Mary wrote back to the attorney to confirm the situation.

> Dear John, I have three signed and notarized originals of affidavit. My father did not see, sign or have discussion with my brother Tom about the three documents.

It was reasonable under the totality of circumstances of the time, for the lawyer to proceed on Elmer's charge, and for him to regard Mary as supportive of her father's position.

All involved with the contested documents knew of the upheaval wrought upon Elmer by Tom's indiscretions. Don Recker had died shortly after the documents had been signed, and was not available to weigh in on the matter. Joan Recker was now working with legal counsel, and was sensitive to the situation Elmer faced. No doubt she factored into her decision, the solid legal position she still held under the 1998 Option Agreement—one that granted her until March 1, 2004 to exercise the option to buy the whole Willenborg farm for $375,000. Notwithstanding that safe harbor, though, Joan Recker had incentive to set about negotiation because she did not want her son's house-building plans to be delayed.

Even if the questioned Option Agreement Extension was a legally binding document, it did not take effect until March 1, 2004. Further, the parties under that Extension had expressed discretion to modify it: Section 6 read, "The parties may modify this option at any time by agreement." Thus, Elmer's repudiation of signature on the Option Agreement Extension and related documents was not seen at the time, to be of material legal consequence. The circumstances essentially amounted to an invitation, or opportunity, to modify—thus prompting further discussions toward a new agreement that emerged as the ACRE.

To the extent that Elmer's repudiation of the Option Agreement Extension presented a dispute among the parties to that contract, they realized that they held discretion to enter into a settlement of any such contested matters. In this vein, the development of the ACRE was accurately seen as a compromise to resolve disagreement, or to avoid potential litigation.

Despite the recognition by all concerned—Elmer, American Trust as trustee, and Joan Recker—that there were good reasons to enter into a comprehensive agreement that would have benefits for all. But, the negotiation process drug on. It was that months-long delay that prompted Joan Recker, on February 13, 2003, to exercise the option to buy the whole farm under the existing 1998 Option Agreement. This move added to the consideration supporting a timely approval of the ACRE's terms, as the Willenborg family interests did not want to risk having the farm purchase occur before Elmer's death. The situation was ripe for a new deal that would accomplish, as trial expert Daryl Morf keenly observed in his testimony, "what everyone wanted."

VII. The Agreement Concerning Real Estate (ACRE)

The O'Connor firm coordinated the drafting of the new agreement that assured Joan Recker the right to purchase the Willenborg farm in the future at the established pricing per acre, $2,500, and allowed the Willenborgs to delay the sale until after Elmer's death. The ACRE terms that were developed embraced Elmer's priorities, protected his and the Trusts' interests, and conformed to standards of good real-estate practice. The ACRE was a legally-sound instrument, supported by valuable consideration for all parties, and it expressed the actual intent of the parties with regard to the farm.

In the process of finalizing the ACRE, draft terms were vetted transparently and in a timely manner with Elmer's daughters. Mary, Joyce, and Ann understood what was happening at each juncture, and took an active role in considering their father's circumstances, the family's economic interests in capturing capital-gains savings, and other pertinent factors known and discussed at the time. Each daughter, in her own manner, participated and each felt knowledgeable about what was going on. When the ACRE was finalized and declared

acceptable by Joan Recker's attorney, all three Willenborg sisters were on board and expected that their father and American Trust as Martha's trustee would sign it. Collectively, the Willenborg sisters understood the realities of the time as the ACRE was being negotiated and finalized: land was going up in value, the family farm was good ground in a desirable location on the edge of Dyersville, and the price had been set years before in the 1998 Option Agreement.

Using the benefit of hindsight, trial expert Daryl Morf would evaluate the nature of John O'Connor's inclusion of Elmer's family representatives Mary, Joyce, and Ann in the project, as being exemplary: "[I]t would be hard to imagine doing any better."

There was an immediate impact with the ACRE in the sale of the homestead for a building site; but, in the end that drew no objection from Mary, Joyce, and Ann. The Willenborg landowners, Elmer and Martha's Trust B were to immediately receive $20,000 for the first phase of the farm transfer, the sale of five acres. The ACRE parties also bound one another for a transaction on the rest of the farm, less the premium price paid for the acreage, at $355,000—but with delayed timing so that the Willenborg family could reap the advantage of tax savings on Elmer's half, available only after his death. In a climate where farmland values were going up, there was valuable consideration for the Willenborgs in tempering the fixed price with a provision that required a sharing of profit should there be a Recker sale of the farm within five years of the Willenborg closing. Also, in the years awaiting the sale, the landlords could be protected in the robust rental market with the ACRE's escalating rental rate that would yield a competitive return on their land assets.

The ACRE was of advantage to Joan Recker, too, as it relieved her of having to mobilize the entire $375,000 purchase price for a 2003 closing on the exercised option under

the 1998 Option Agreement. She secured a sustained leasehold for the farm's operation with her son, at a reasonable rent. Important, too, was the fact that the lease terms spelled out customized terms of landlord/tenant rights and responsibilities.

The ACRE represented a marked improvement of legal position for Elmer, the Trust B trustee, and all contingent beneficiaries. Tom's language in the 2002 Option Agreement Extension was not tight; it would not have been a legal certainty that the Option could only be exercised upon Elmer's death. Tom's defective provision read:

> 5. It is generally understood that it is the intent of the Parties to exercise this OPTION AGREEMENT EXTENSION within one year after the death of the one-half owner, Elmer V. Willenborg, born November 5, 1911.

(Emphasis in original.) The wording opened the Willenborg family up to the prospect of losing a stepped-up tax basis on Elmer's half of the farm, especially when the foregoing section 5 language was read in conjunction with the option's deadline.

In drafting the Option Extension Agreement in 2002, Tom inserted the expiration date of December 31, 2011 for a reason. He explains in testimony that he was acting on a belief that an option, to be legal, had to specify a date for expiration. In actuality, the Willenborgs' circumstances dictated that it was an event—Elmer's death—that was to control timing of the option's exercise. Tom assumed, incorrectly, that his father would die before reaching age 100. That arbitrary presumption presented a problem for the family interests: Tom's paragraph 5 language would not have prevented a pre-death exercise of the option in order to beat the deadline, and that would defeat the Willenborgs' purpose in delaying sale for capital-gains tax savings.

Tom's farm-lease renewal, the Tenth Addendum as he called it, failed to protect the landlords' interests with wise management of the farm. The most glaring example is Tom's use of a static $21,000 rental rate over an eight-year span—for land Tom knew was escalating in value, and which was situated in an active rental market. Tom also gave short shrift to defining respective landlord and tenant responsibilities.

The necessary parties to the ACRE agreed with its terms and adopted it. Martha's trustee lawfully entered into the contract under its vest of full authority to lease and sell the farm, without permission from any beneficiary or court. That grant of discretion emanates directly from Martha's Last Will and Testament. The broad trustee power had been in place since inception of Trusts A and B. It had been utilized previously by Tom when, as trustee, he drafted and signed the 1998 Option Agreement that first granted the farm tenants opportunity to buy the farm at a fixed price of $375,000. That Option remained a binding contract on its parties, including American Trust when it became the successor trustee. The ACRE was a good contract for the trustee, and it was a decision beneficial to Trust B and to the family interested in Martha's Trusts, to enter into it.

In signing the ACRE on his own behalf, Elmer exercised his lawful authority, possessing full legal capacity. Elmer wanted to keep his bargain on the farm price. The abiding understanding between Elmer and Martha's trustee, and Joan Recker had supported a years-long dance: the sellers wanted to postpone sale until after Elmer's death to reap a step-up in tax basis on his half of the land, and the buyers would accommodate delay as long as their right to buy at the pre-determined price was preserved. That premise was constructed during Tom's tenure as trustee and as business advisor to Elmer. It was that core agreement that was

honored and shored-up to all parties' satisfaction in the execution of the ACRE—a new, and binding contract.

VIII. Implementation of the ACRE

The ACRE, while not recorded for public inspection, immediately implicated some public profile in the normal course of real-estate transfer. The agreement ushered an immediate sale to Joan Recker of the building site, marked by transfer of the five-acre parcel via her receipt and recording of two warranty deeds, one from American Trust as trustee of Martha's Trust B and one from Elmer as grantor. The sale of a piece of the historic Willenborg place was not only a family milestone, it was necessarily commemorated in the Dubuque County public record through the act of recording May 7, 2003. That official step put all, including but not limited to Tom, on constructive notice that a new deal had been reached—one resulting in five acres being sold off for $20,000, rather than the lesser transaction Tom had attempted the year involving sale of two acres at $2,500 each.

From 2002 and as Elmer continued to lead a vibrant life in his 90s, American Trust administered the farm under the ACRE. Annually the Bank reported to the Iowa District Court with an accounting of receipts and disbursements of money for Martha's Trusts. The yearly ritual was initiated by the trustee and facilitated by John O'Connor who, with the aid of others in his office drafted court pleadings that incorporated the trustee's standardized accounting. Attorney O'Connor made courthouse appearances to secure judicial approval of orders he drafted and proposed for the judge's convenience. Each year, copies of the Annual Report were provided to Elmer, as the beneficiary—and also as a courtesy to the trusts' contingent beneficiaries—Martha's children, Tom, Mary, Joyce, Ann, and her grandson, Carl as the only child of deceased son John.

Over the years, all involved—trustee American Trust, the trustee's lawyer John O'Connor, the life-time beneficiary Elmer, the contingent beneficiaries, and the various judges presiding in the District Court—treated the reports as routine, with little scrutiny. At the earliest point of trustee reporting, though, it was apparent that at least Joyce was carefully reading the material, for she inquired about a matter she recognized as out of sync—the reference to the December 31, 2011 option-expiration date. Joyce realized that that date had only appeared in the discredited documents Tom had sponsored in 2002, and she knew that the ACRE which was the binding contract controlling management and disposition of the farm, had no such expiration date.

IX. Tom Returns

As Elmer was approaching his 100th birthday in the fall of 2011, Tom took notice of the extraordinarily long life his father had lived. Oblivious to his father's allegations of forged signatures on the 2002 farm documents and the voiding of them, Tom had never been specifically informed about the execution of the lawyer-drafted ACRE that framed the Recker right to buy the farm since its inception April 1, 2003. Tom reflected on the 2002 version of the Option Agreement Extension that he had prepared; he presumed it was in place; and he fashioned an opportunity to redeem himself. The December 31, 2011 expiration date, he speculated, would defeat a Recker purchase—if Elmer just lived past that date! Tom dreamed of reaping a windfall on the appreciated farmland, now worth well over $2,500 an acre.

Tom had been reading the courtesy copies of American Trust's Annual Reports over the years, and his assumption that the 2002 Option Agreement Extension was controlling was not

expressly contradicted. There was that reference to an option that American Trust had "S/K"[2] and that reflected the December 31, 2011 expiration date.

Tom was exuberant at the prospect of averting sale of the Willenborg farmland, despite the fact that the transaction had been forestalled many years to accommodate the family's desire for post-death tax savings. Tom attempted to meet with American Trust to lay groundwork for acting on the opportunity. He shared his epiphany with his sisters. Yet, Tom said nothing to Joan Recker, hoping she did not act before the end of the 2011 calendar year.

Elmer continued to live. Tom testimonially recounted the drama: how, right after December 31st, he called the Shawnee, Kansas nursing home where Elmer had been living near Mary in his final months, to see if his father was still alive. Tom was delighted at the news.

Elmer died shortly thereafter, and a few days after that Tom learned of the April 1, 2003 ACRE which did not feature a date-specific expiration—geared as it was, to accomplishing Willenborg family goal of timing the Recker purchase of the remaining acres of the farm "at the end of the lease year following the death of Seller Elmer V. Willenborg." In the 10 years that had followed Tom's 2002 ouster as trustee, he had seen his father and sisters only occasionally in controlled and awkward family social scenarios. No one had broached the subject of all the legal work that had been undertaken in 2002-2003, or the adoption of the ACRE. Elmer never spoke to Tom personally about being victimized by theft and betrayal. It was at Elmer's funeral that Tom learned from his sisters that he had been disinherited by his father.

2 The "S/K" code referred to "safe-keeping," which in the context of the voided 2002 Option Agreement Extension, meant that the paperwork had been archived by the trustee. For unexplained reasons, American Trust did not make a data entry to reflect in the annual report print-outs, the existence of the 2003 ACRE that was actually the contract in effect.

As Tom processed what had happened, he rationalized that the absence of the arbitrary expiration date in the attorney-drawn ACRE must have been a legal gaffe. Tom's deduction seemed logical to him in a period of hindsight, unrequited indignation, and greed. He convened Mary, Joyce, and Ann and persuaded them to join him in exposing a legal malpractice. No longer just "contingent" beneficiaries of Martha's Trusts, and now also bearing banner as beneficiaries of Elmer's Estate, the sisters decided to follow their brother's lead. They adopted a belief that their rights had been compromised when Elmer was allowed to back away from the 2002 Option Agreement Extension. Thereupon, this lawsuit was conceived. At the time of trial, the beneficiaries believed that the farm was worth over $1 million more than the ACRE requires Joan Recker to pay.

X. Litigation Posture

Even though Mary, Joyce, and Ann had been integrally involved in their father's decision-making throughout 2002 – 2003 and they had specifically endorsed his course of action, they testified in this trial through a much different lens. In sworn statements made to support the joint malpractice claim, the sisters' recount facts that are irreconcilable with the reliable proof of their historic acuity and their collective activism in clear support of their father's decisions. The women parse recollection about their involvement with John O'Connor. They introduce the feeling of doubts, and they variously claim inability to recall their actions that are contradicted by the credible body of evidence about past dealings. In a fair evaluation of this evidence, it must be called out for what it is: a collusive charade to construct a malpractice scenario for financial gain.

Moreover, the altered allegiance of Mary, Joyce, and Ann from their past support of their father to a retrospective attack on his mental capacity, is opportunistic. The sisters even

portray themselves, variously, as being confused, ignorant of what was going on, blindly deferential, and even intimidated by "threatening" demeanor of John O'Connor. The startling self-portraits painted in the courtroom were akin to their own character assassination, when compared with the overwhelming evidence that these women had actually acted in the past as the engaged, smart, and deliberative individuals they are. In 2002 - 2003 Mary, Joyce, and Ann were all looking out for their dad, and were doing a good job of it. They were life-seasoned adults who were interactive with one another and with their father in the course of sorting out tough family issues. In the courtroom, the sisters had lost the outrage they had over Tom's embezzlement, and acted as if it were no big deal now.

Contrary to what Elmer's daughters tried to portray, John O'Connor and his law firm helped them as they asked for it to protect their father and their aligned family interests in the their mother's Trusts A and B. Reliable evidence is clear, that the legal work was done with professionalism and skill. While the Willenborg siblings are in concert in their criticism of all aspects of the O'Connor firm's professional allegiance and quality of work, an objective look at the ACRE project dispels the aspersions cast.

The O'Connor firm delivered a good result for the interests it served: farm owners, Elmer and Trust B; and, to the extent that there would be any assets remaining for distribution to the family of contingent beneficiaries after Elmer's death, the result was good one for Elmer's children as well. The ACRE document was soundly drafted and lawfully executed. Its terms were consistent with the standard of care incumbent upon an attorney protecting a client with the interests Elmer had in his own land, as well as land under supportive trust, and also beneficial rights under Martha's estate plan. The lawyer took necessary steps to recognize existing contract terms, to honor Elmer's word, to use lawful means to scuttle Tom's crudely-

drafted documentation, and to introduce a well-drawn and legally sufficient replacement. In all respects, the work of John O'Connor and his firm was done without concurrent conflict in its representation. Trial expert Daryl Morf persuasively described how the O'Connor firm lawyers used the degree of skill, care, and learning ordinarily possessed and exercised by other attorneys in similar circumstances, as they dealt with matters of trust and estate practice.

There is no evidentiary basis for Tom's suggestion that, based on incidental contact with lawyers in the O'Connor firm, he had a right to assume that he was being personally represented. Leading up to John O'Connor's preparation and processing of The Conditions of Resignation Agreement and its supporting documentation, the attorney did have telephone contact with Tom. However, it is unreasonable to deduce that an attorney-client relationship with Tom ensued from that incidental contact, made necessary by the lawyer's task at hand as he worked to protect Elmer and Martha's Trusts. Even Tom's behavior at the time is inconsistent with any such belief on his part of an attorney-client relationship. For example, there is no evidence that Tom sought or got any legal advice from the attorney during that minimal contact. Rather, as in the decades leading up to Tom's resignation as trustee, he endeavored to tackle legal matters, *pro se*, and believed he was knowledgeable enough to do it. It was characteristic for Tom to fall back on that habit, and represented himself in all matters surrounding his resignation as trustee and the casting of terms for restitution on his thefts. Tom's claim now, that he always had looked to John O'Connor as his attorney and that he trusted the firm to look out for his personal interest in a way that should have frustrated the Recker sale, is unworthy of belief and entitled to no evidentiary weight.

Contrary to Tom's suggestion, the O'Connor firm's incidental contact with him circa 1977, did not engender an attorney-client relationship. Tom suggests that such a relationship

developed when the firm processed paperwork for Tom to be officially appointed as an inaugural co-trustee for Martha's Trusts. However, evidence fails to show that any such engagement occurred, or that there was any consultation or other legal service ever provided to Tom. Actually, the 25 intervening years from 1977 to 2002 reflect a record replete with Tom's avoidance of lawyers and his propensity for self-directed legal maneuvering and document drafting.

With respect to Mary, Joyce, and Ann and their interactions with John O'Connor and other lawyers in the firm in 2002, 2003, and incidentally thereafter, all involvement was geared toward furthering their father's interests and restoring and then maintaining integrity in administration of Martha's Trusts—which directly benefited Elmer, and only contingently affected them. The daughters' interests in all documented points of service were never concurrently in conflict with those of their father and the Martha's Trustee. The trial record also establishes that none of the daughters ever sought personal advice from the O'Connor firm on a topic related to the farm, the Trusts, or any other subject.

XI. Lawyer Allegiance

John O'Connor and his firm delivered competent, client-centered service to promote the interests of the Willenborg farm owners, Elmer and Martha's Trust B and all beneficial interests thereunder. These interests had been historically aligned as evident through the estate plans Martha and Elmer adopted in 1974 and as initially implemented through Tom's involvement during the first 25 years—both as a trustee for Martha's Trusts and as his dad's financial manager. The family farm was the centerpiece, requiring a coordinated approach due to the duality in title. In the realm of the legal issues brought to attorney O'Connor, Martha's estate plan was being executed with Elmer was the direct stakeholder and with his children and

grandson Carl contingently interested at some level yet to be determined. Elmer also presented with interrelated, personal legal issues.

Attorney John O'Conner recounted at trial, his vision of service undertaken to address Willenborg issues that were brought to him. Notably, once American Trust was in place as successor trustee and the attorney could provide services for the benefit of the family plan through the vehicle of the Trusts, the common goals of the family could be addressed through that vehicle. Speaking specifically to the interests of Mary, Joyce, and Ann—he observed, "They were all on the same page in terms of what they wanted."

From experience in servicing legal issues with family estate plans and trust administration over the years, John O'Connor recognized the family dynamic at play. He and his law firm accorded courtesies of open communication to Elmer's daughters from the time that they first approached him in their father's interest and to secure a new trustee. The spirit of transparency was well-received by the sisters, and well-exercised by them.

John O'Connor was an excellent choice for counsel in the crisis wrought upon Elmer and Martha's Trusts in 2002, given his extensive training and experience with the very issues confronting them. Not only had he been seasoned by 28 years of service in an estate-planning, real-estate, and tax practice, but he was familiar with the Dubuque County area and its resources. He was a C.P.A. And, he had the stature that earned him admission as a Fellow of the American College of Trust and Estate Counsel.

John O'Connor's testimony is reconcilable with the significant documentary evidence surrounding circumstances of his defense of the family estate plan and furtherance of Elmer's interests in 2002 - 2003, and beyond. The attorney's experience informed the approach he took with Elmer and his daughters, and guided the services performed as he identified for them the

various issues, counseled on alternatives and recommendations for action, and drafted necessary legal documents.

Attorney Daryl Morf, pre-eminently qualified to assess matters of professional responsibility in estate planning, trust administration, and real-estate issues, testified as an expert on lawyer ethics and duty. He recognized that it is not only common, but of benefit for a lawyer to collectively represent the interests of beneficiaries of a trust. Advantages include those typically seen in situations involving family estate plans and trusts: better coordination of plan terms, broader understanding of relevant family and property considerations, cost-effective representation, and achievement of common goals.

Adversity of position, which is certainly a premise of litigation, is not the predominant relational focus that probate lawyers find themselves tending as they embark upon estate-plan implementation, trust administration, and the like. As expert Morf convincingly opined to the court, John O'Connor and his firm did not encounter concurrent conflict among clients in working with Elmer and his daughters in 2002 – 2003 in furtherance of the lawful purposes of Martha's Trusts. And, thus, the standard of attorney allegiance with regard to aligned interests, was met.

In the course of the O'Connor firm's work, contingent-beneficiaries' interests necessarily rode the coattails of protective actions taken to secure Elmer's assets and those of Martha's Trusts. Nonetheless, as the overall regime of trustee replacement and ACRE development went forward, incidental and contingent benefits for all of Martha's and Elmer's children did not elevate Tom's status to that of client for whom John O'Connor owed an independent duty of representation. Similarly, no such client status ever accreted to Carl, either.

XII. Lawyer Performance

At trial, attorney O'Connor illustrated the careful, analytical, and sensitive approach taken with the Willenborg affairs brought to him in the spring of 2002. Supported by attorney Kerrie Liedtke in his firm, he made timely investigation of relevant facts and acted promptly in providing recommendations, offering alternatives, and following up with service in negotiation and drafting. He was empathetic to the impact Tom's betrayal and theft had exacted on Elmer and the Willenborg sisters. According to the well-supported opinion of expert Daryl Morf who studied the circumstances of representation involved in this lawsuit, attorney O'Connor performed admirably; "it would be hard to imagine doing any better [in these circumstances]."

The plaintiff beneficiaries introduced expert testimony from Mark McCormick, also an attorney of stature within the State of Iowa, and one who has lectured, written, and testified often on issues of professional responsibility. While expert McCormick questions aspects of John O'Connor representation, the perspective he offers is less particularized to the considerations bearing upon aligned family interests in estate-plan and trust-administration situations. It was apparent that the beneficiaries' expert saw his role as one of introducing expertly-framed and thoughtful questions to accompany the plaintiff claims. While attorney McCormick is no light-weight in the field of attorney ethics and standards of behavior, in the case at bar, the insight offered by Daryl Morf is most relevant and probative in assisting the trial court as it sorts out performance and ethics-compliance issues. The greater weight of the evidence establishes that attorney O'Connor's service embodied the professional skill and ethical propriety required in the Willenborgs' situation, circa 2002 – 2003, and beyond as trust administration went forward.

Certainly, throughout 2002 - 2003 and beyond, Elmer's daughters believed they were all working toward the common goal of their father's support and protection, together with perpetuation of the concurrent purposes of their mother's Trusts. This was all done within the reality of executory contract rights. The daughters maintained their theme throughout the time of the O'Connor firm's service, and coincidentally throughout their father's lifetime. Never was there notice given that Mary, Joyce, or Ann wanted more, expected more, or needed more as contingent beneficiaries, or in some other personal role. There was no hint that they would eventually go rogue on the family plan in place, or seek to undermine the enforceability of the ACRE that they helped vet. Even the isolated retainer advanced by Mary in early 2002, and the entreaty by Joyce several years later to pay for daughter-initiated consultation with John O'Connor, were not meant to signal that divergent interests were at play. Attorney O'Connor recognized as much, and did not take advantage of the daughters' respective desire to communicate. All compensation was accomplished through the trustee payment arrangement put in place with Martha's trustee, and appropriate to the nature of the work undertaken.

Until Tom sold his idea to his sisters for a lawsuit against people associated with the ACRE—American Trust, Joan Recker, and eventually O'Connor & Thomas, Elmer's daughters never doubted the propriety and quality of fiduciary or legal work undertaken over the years to promote Elmer's well-being and preserve the protective purposes of their mother's Trusts A and B. The daughters had actual knowledge of what had been done when it happened, they contributed to the process, and they stayed connected as the family emerged from its 2002 crisis. They had been guided in significant respects by the O'Connor firm and they were grateful, and actually proud that they had been a part of a good result. If there was any inkling that contingent-beneficiary interests, either individual ones, or all of them collectively, had

been compromised through legal malpractice, Mary, Joyce, and Ann would have discussed it, would have been on it immediately, and would have taken any necessary action within the five-year limitations period. Their window to sue expired under the five-year statute of limitations, circa 2008.

To the extent that, arguably, Tom had any rights to a cause of action arising from the work of John O'Connor 2002 -2003, that right also expired in 2008, with the passage of the limitations period. Tom might claim that he did not know of the ACRE or the disavowal of the Option Agreement Extension and related documents until sometime after 2003, but his argument fails. He was on constructive notice of the newly-negotiated, $20,000 sale of five acres for a building site, purchased by Joan Recker—and not her son Douglas and daughter-in-law Nikki as Tom had put forward.

Moreover, Tom's suit now as a member of the beneficiary grouping, makes it reasonable to attribute the knowledge of fellow contingent beneficiaries Mary, Joyce, and Ann to him. And, as well to Carl. All malpractice claims were filed beyond the limitations period.

XIII. American Trust's Annual Accounting

Some of the annual paperwork published to the court by trustee American Trust is remiss in its accuracy and completeness. For example, the abandoned 2002 Option Agreement Extension remained in the trustee's "safe-keeping" repository, without mention of the ACRE that was actually the binding contract. While this anomaly is unexplained and embarrassing for a professional trustee, it does not legally undermine the application of the ACRE, nor engender any cause of action on any legal theory. Anyone—Elmer, individually or as the lifetime beneficiary of Martha's Trusts, the Trusts' contingent beneficiaries, or Elmer's future estate beneficiaries—could have made inquiry if confused. Joyce readily demonstrated the

reasonableness of this expectation in her email overture to American Trust upon noting the reference to the repudiated and superseded Option Agreement Extension in February of 2003. In the final analysis, not one of the plaintiff beneficiaries was actually confused, and no one else checked up on it. Readers either knew better—as did Elmer, Mary, Joyce, and Ann who had been privy to the development and implementation of the ACRE, or in the case of Tom and possibly Carl, it made no difference whatsoever.

The scenario with the "S/F" designation signifying the "safe-keeping" of the 2002 Option Agreement Extension, does reveal that John O'Connor's tasks over the years after the ACRE was put in place, involved a routine shuttling of the trustee's reports to the court, and did not include proofreading the trustee's accounting, or auditing trust holdings. American Trust accepts responsibility for the aberrant feature in its annual paperwork, and does not cite its designated attorney for oversight in any such regard.

Tom, Mary, Joyce, Ann, and Carl are unsuccessful in their attempt to prove a right to a windfall through allegations of breach of conduct owed by American Trust. Tom's assertion that he was misled by the inconsistent notation in trustee reporting is merely self-serving, and does not earn weight. His past actions of dishonesty, manipulation, and opportunism repel any reasonable reliance on his testimony. The claims that Mary, Joyce, and Ann make about being confused are irreconcilable with a plethora of credible documentation from the past that they knew precisely what the status of the ACRE was.

XIV. Recker Recourse

Even if the beneficiaries were able to prove their claims that they are entitled to reliance and recovery pursuant to the Option Agreement Extension's nonsensical deadline, Tom's portend of a windfall is still unsubstantiated in fact. Joan Recker testified credibly that, had the

December 31, 2011 expiration date been in effect, she would have exercised the option to buy the farm before ever allowing the opportunity to expire. Nothing in the language of the Extension would have prevented such a timely action to capture the farm-purchase right. History demonstrates that the Reckers, Joan included, were attentive to their rights, intended to purchase the farm, and were careful business operators. For decades it had been the Recker plan to buy the farm, and it was similarly the intent of Elmer and Martha's trustee for that to happen. Tom's scheme to argue the opposite, must fail on the measure of truth.

XV. Specific Performance Due

The sellers and the buyer under the ACRE have fully complied with terms of that contract, up to the time of this litigation. A specific performance of the sale of the rest of the Willenborg farm would close out the contract, and it is overdue.

In consideration of the foregoing findings of fact, the court now reaches conclusions of law.

CONCLUSIONS OF LAW

The court has the jurisdiction, and the responsibility, to resolve questions the parties pose. IOWA CODE §§ 633.10 (4), .33, and .155 (2015); IA.R.CIV.P. 1.1101 and 1.1104 (2) and (3). All issues are properly before the court, and rightfully addressed in equity, except that the Willenborg beneficiaries' third-party, legal-malpractice claim is tried at law.

The court considers all the trial evidence, and where it is conflicting, the court assigns more weight to that evidence judged most believable. Factors employed include but are not limited to: whether testimony is reasonable and consistent with other evidence believed; and the respective witnesses' knowledge of the facts, motive, partiality, and interest in the issue's outcome. The number of witnesses testifying for one party or for the other is not a factor, and

the presence or absence of family members or others who bolster a party's position is not legally relevant to any issues before the court.

For most of the claims before the court, the amount of evidence required to prove a certain point is a "preponderance"—a "quantitative measure" meaning evidence "that is more convincing than opposing evidence" or "more likely true than not true." *Holliday v. Rain and Hail L.L.C.*, 690 N.W.2d 59, 63-64 (Iowa 2004) (internal quotations and emphasis omitted). "[A] preponderance means superiority in weight, influence, or force." *Walthart v. Bd. of Dirs.*, 694 N.W.2d 740, 744 (Iowa 2005) (internal quotations omitted).

Issues of fraudulent misrepresentation require a heightened quantity of proof: preponderance of clear, satisfactory, and convincing evidence. *Van Sickle Const. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010) (citation omitted).

The plaintiff beneficiaries' claim for punitive damages would require proof by a "preponderance of clear, convincing, and satisfactory evidence." IOWA CODE § 668A.1 (1) (a).

I. Specific Performance/Authority to Sell

The ACRE is a legal contract that binds Martha's Trust B and Elmer's personal representative to sell the remaining acres of the Willenborg farm to Joan Recker at the established, $355,000 price. The parties to the contract—Elmer, American Trust as trustee, and Joan Recker—all possessed legal capacity and authority in 2003 to contract, and the meeting of their minds is clear in the language of the contract. The ACRE was supported by fair and adequate consideration. Joan Recker has performed all terms of the contract up to this point that have been required of her.

The beneficiaries fail to demonstrate a right to relief through operation of the affirmative defenses they have lodged. These include, but may not be limited to the

beneficiaries' charges of unenforceability of the contract, estoppel on the Bank's implementation of contract terms, unclean hands in dealings, and unjust enrichment by Joan Recker.

Joan Recker is entitled to specific performance under the ACRE terms that assure her a right to purchase the balance of the Willenborg farm for the declared price, and American Trust's Petition for Authority to Sell should be granted.

II. Unsuccessful Counterclaims Against Bank

None of the beneficiaries' claims are sustained by the weight of the evidence and all counterclaims against American Trust fail for lack of proof.

A. Theory of Breach of Fiduciary

The plaintiff beneficiaries unsuccessfully seek recovery against American Trust for breach of fiduciary duty. To establish such a right of recovery under this theory of Iowa law, a plaintiff must prove these elements:

> (1) the [Bank] owed the plaintiff a fiduciary duty;
>
> (2) the [Bank] breached this fiduciary duty;
>
> (3) the breach of the fiduciary duty was a proximate cause of the plaintiff's damages; and
>
> (4) the amount of the damages.

See Asa-Brandt, Inc. v. ADM Investor Services, Inc., 344 F.3d 738, 744 (8th Cir. 2003).

No breach of fiduciary duty is present. American Trust, acting as trustee of Martha's Trusts, had express authority under the trustor's directive, The Last Will and Testament of Martha Willenborg, to exercise discretion in managing trust assets. This included the power to sell, and that embraced the ability to modify the 1998 Option Agreement Extension (as its own terms

provided) as well as related documents; the trustee also wielded authority to rescind or compromise contract rights. The discretion also covered the Bank's acts in negotiating and entering into a new farm-management and sales contract, such as the ACRE.

The Bank's acts in safe-keeping of the 1998 Option with reference to its December 31, 2011 expiration date, and in annual accounting of that information to share the information with contingent beneficiaries, did not constitute any type of breach of fiduciary responsibility.

B. Theory of Negligent Misrepresentation

The facts proven at trial do not support the plaintiff beneficiaries' claim for recovery under a theory of negligent misrepresentation. "When a negligent misrepresentation results in personal injury or property damage, the claim is treated like any other negligence claim." *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 110–11 (Iowa 2012) (citation omitted). "However, when the negligent misrepresentation only interferes with intangible economic interests, courts have developed more restrictive rules of recovery." *Van Sickle Const. Co.*, 783 N.W.2d at 690. The Iowa courts have adopted the definition of negligent misrepresentation set forth in Restatement (Second) of Torts, section 552. *Pitts*, 818 N.W.2d at 111 (citation omitted). Thus, negligent misrepresentation is:

> (1) One who, in the course of [business] supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply

> it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Id. "[O]nly those in the business of supplying information to others can be liable for negligent misrepresentation." *Id*. (citation and internal quotation marks omitted).

In this case, American Trust supplied information to the plaintiff beneficiaries as a courtesy—only incidental to the Bank's different service of managing and accounting for assets subject to administration in Martha's Trusts. The information was not provided to the plaintiffs "for the guidance of [those contingent beneficiaries] in their business transactions". *Id.* Further, the information displayed in Annual Report accounting did accurately reference the archived Option Agreement Extension expiring December 31, 2011 as "S/F"—being held for safekeeping. That information did not become false by a failure to detail the existence of the ACRE that was binding on future sale of a trust asset. In any event, no plaintiff beneficiary relied upon the information about the archived Option document, nor suffered economic loss as a result .

C. Theory of Fraudulent Misrepresentation

To establish a claim for fraudulent misrepresentation, a plaintiff beneficiary who asserts the claim must show:

> (1) the [Bank] made a representation to the plaintiff,
>
> (2) the representation was false,

(3) the representation was material,

(4) the [Bank] knew the representation was false,

(5) the [Bank] intended to deceive the plaintiff,

(6) plaintiff acted in justifiable reliance on the truth of the representation,

(7) the representation was a proximate cause of the plaintiff's damages, and

(8) the amount of damages.

Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726, 735 (Iowa 2009) (citation omitted). The representation must have also been false at the time it was made, and a representation that was true when made cannot provide the basis for a claim of fraudulent misrepresentation. *Id*. (citation omitted). It is not sufficient that a plaintiff relied upon the representation; rather, the reliance must be justified. *Id*. at 736. And, "[t]hese elements must be established by a preponderance of clear, satisfactory, and convincing proof." *Van Sickle Const. Co.*, 783 N.W.2d at 687 (citation omitted).

Because American Trust's reporting of its archived Option document was not false, only incidental to its reporting function, and there was no actual reliance upon it, the counterclaim for fraudulent misrepresentation fails on but a cursory examination.

III. Claim of Legal Malpractice

"Legal malpractice claims sound in negligence." *Vossoughi v. Polaschek*, 859 N.W.2d 643, 649 (Iowa 2015). "To establish a prima facie claim of legal malpractice, the plaintiff [beneficiaries] must produce evidence showing the attorney's breach of duty caused actual injury, loss, or damage." *Id*. (citation omitted). There must be substantial evidence of:

> (1) the existence of an attorney-client relationship between the defendant and plaintiff [beneficiary] giving rise to a duty;
>
> (2) the attorney, by either an act or a failure to act, breached that duty;
>
> (3) this breach proximately caused injury to the plaintiff [beneficiary]; and
>
> (4) the plaintiff [beneficiary] sustained actual injury, loss, or damage.

Huber v. Watson, 568 N.W.2d 787, 790 (Iowa 1997) (citation omitted). "The injury must be concrete; an essential element to a legal malpractice cause of action is proof of actual loss rather than a breach of a professional duty causing speculative harm, or the threat of future harm." *Id*. (citation and internal quotation marks and alterations omitted).

The evidence demonstrates that the work of John O'Connor and the O'Connor & Thomas law firm in 2002 – 2003 and at all times thereafter at issue, comported with the degree of skill, care, and learning ordinarily possessed and exercised by other attorneys in similar circumstances. The expert testimony of Daryl Morf persuasively articulated the standard applicable in the type of work undertaken to protect and promote Elmer's interests. Evidence of attorney O'Connor's performance in meeting and exceeding the standard, is clear in the evidentiary record.

The plaintiff beneficiaries fail to establish an attorney-client relationship independent of the contingent, beneficial interests they had under Martha's Trusts; and those contingent interests were not concurrently in conflict at any point of John O'Connor's work as the trustee's designated attorney, with the interests of Elmer as the lifetime beneficiary and individually, nor adverse to lawful administration of the trusts by the trustee American Trust. No separate attorney-client relationship existed to frame any other duty, divergent or not.

All claims for legal malpractice fail on the merit of the facts proven.

IV. Statute of Limitations

A. Theory of Legal Malpractice

The plaintiff beneficiaries have failed, on the merits, to prove that John O'Connor or his law firm committed any legal malpractice. The third-party defendant, O'Connor & Thomas, P.C. is likewise entitled to alternative dismissal on its statute-of-limitations defense.

Even if it were shown that one of the myriad of services John O'Connor or other counsel in his firm performed in 2002 – 2003 arose to a malpractice and caused a plaintiff beneficiary any actual injury, loss, or damage, the five-year statute of limitations on claims brought pursuant to an unwritten contract of representation, would forestall suit. IOWA CODE § 614.1 (4). The beneficiaries had five years from the date of their discovery of any alleged breach of duty or the date "when, by the exercise of reasonable care, [they] should have discovered the wrongful act" within which to commence suit. *Millright v. Romer*, 322 N.W.2d 30, 33 (Iowa 1982) (citations omitted). All were on constructive notice of the ACRE at the recording of deeds at least by May 7, 2003. Hence, suit must have been brought by May 7, 2008 to avoid dismissal.

Under the specific circumstances of this litigation, it is fair to impute to all plaintiff beneficiaries, the knowledge of any member. The suit is brought by Tom, Mary, Joyce, Ann, and Carl in their beneficial capacities and which collectively constitute the class of individuals with rights of inheritance under Elmer's Last Will and Testament and final distribution under Martha's Trust B. A majority of the beneficial class were aware of the April 1, 2003 execution of the ACRE which formally superseded the 2002 Option Agreement Extension and related

documents. Any claims brought against O'Connor & Thomas after April 1, 2008 are thus barred as outside the limitations period.

Nothing in John O'Connor's routine court work to facilitate summary approval of American Trust's Annual Reports in Martha's Trusts, stands to extend the limitations period for any beneficiary. In fact, the inclusion of the "S/F" notation about the Option Extension Agreement expiring December 31, 2011 in the reporting noticed by Joyce February 23, 2003, places the fair date for reasonable inquiry, like the one she made. Even if the content of the Annual Reports could be argued to have created some actionable claim, the statute of limitations on that theory of recovery would have expired as early as February 23, 2008.

B. Theory of Trustee Breach, Misrepresentations

While the evidence also demonstrates that American Trust did not breach any fiduciary duty, committed no negligent misrepresentation, and did not engage in fraudulent misrepresentation, any such causes of action are barred by the statute of limitations, as analyzed above.

If the plaintiff beneficiaries' basis for recovery was duty through an unwritten contract owing to contingent beneficiaries, the claim would have been barred if not filed by April 1, 2008, the fifth anniversary of the execution of the ACRE by the Bank as trustee. For a claim grounded in the "S/F" disclosure in Annual Reports of the trustee, the suit would have to be brought by February 23, 2008, a date triggered by actual discovery of the archival information, and inquiry actually made by a plaintiff beneficiary.

V. Specific Performance Due

With Joan Recker's full performance under the terms of the ACRE, she is entitled to specific performance of the balance of the contract for the purchase of the remaining portion of

the Willenborg farm at the pre-determined price. There is no evidence to forestall full performance under the ACRE, as the plaintiff beneficiaries' affirmative defenses of unclean hands, unconscionability, and unenforceability have not been supported by evidence. Judgment should enter forthwith to accommodate timely transfer of the Willenborg farm in conclusion of the ACRE's terms.

VI. Costs

The outcome of trial on the disputed issues makes it fair and reasonable to assess all court costs to the plaintiff beneficiaries. IOWA CODE § 625.1. Given the beneficiaries litigation in their group beneficiary capacity, it is appropriate to enter judgment jointly and severally. The court should retain jurisdiction to address follow-up matters of cost and expense assessment.

VII. Motions Pending

At the time of the close of the beneficiaries' case in chief, the court reserved ruling on the O'Connor & Thomas Motion for Involuntary Dismissal of the third-party legal-malpractice claim against the firm, urged under Iowa Rule of Civil Procedure 1.945. The same relief was sought at the close of all the trial evidence, and the court likewise deferred ruling to this Declaratory Ruling. O'Connor & Thomas is entitled to dismissal relief on the motion made at the close of all the evidence.

Based upon the findings of fact and conclusions of law, a declaratory ruling should issue.

RULING

1. American Trust and Savings Bank's Petition for Authority to Sell is granted.
2. Joan L. Recker's Petitions for Specific Performance are granted.

3. All claims made by Mary Zirul, Joyce Willenborg, Ann Holst, Thomas Willenborg, Sr., and Carl Florian, as beneficiaries of Martha Willenborg's Trust B and as their claims may appear as beneficiaries of the Estate of Elmer Willenborg, are dismissed as against American Trust and Savings Bank, O'Connor & Thomas, P.C.,[3] and Joan L. Recker.

A. All such claims fail on the trial merits; and

B. As alternative relief, all such claims against American Trust and Savings Bank and O'Connor & Thomas, P.C. are barred by the statute of limitations.

4. All court costs are assessed jointly and severally to the beneficiaries, Mary Zirul, Joyce Willenborg, Ann Holst, Thomas Willenborg, Sr., and Carl Florian.

5. The court reserves jurisdiction to address follow-up matters of assessment of costs and expenses.

JUDGMENT IS ENTERED ACCORDINGLY APRIL 13, 2016.

Directions for Service

Service of an electronic copy of this Order shall be made upon:

David J. Dutton, Cheryl L. Weber, Steven K. Daniels, attorneys for Willenborg Trust/Estate beneficiaries/interested persons/executor
Gregory M. Lederer, attorney for American Trust and Savings Bank
Megan R. Dimitt, attorney for American Trust and Savings Bank
Robert V.P. Waterman and Andrea D. Mason, attorneys for O'Connor & Thomas, P.C.
Douglas M. Henry, attorney for Joan L. Recker
Carrie Nauman, court reporter
Dana Havertape, 1st District case coordinator
Hon. Michael D. Huppert, settlement judge

3 The O'Connor & Thomas Motion for Involuntary Dismissal re-urged at the close of all the trial evidence, is granted. The Motion, urged at the close of the plaintiffs' case in chief, is denied.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
TRPR027914	TRUST MARTHA WILLENBORG TRUST B

So Ordered

Annette J. Scieszinski, District Court Judge,
Eighth Judicial District of Iowa