2010 WL 2067981 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

Octavia BURTON, et al., Plaintiffs/Appellants,
v.
Bobby J. MCBRIDE, et al., Defendants,
and
Eleanor Walker, Intervening Defendant/Appellee.

No. 09-103335-A.
April 19, 2010.

Appeal from the District Court of Stevens County, Kansas,
Honorable Tom R. Smith, Judge, District Court Case No. 06 CV 05

**Brief of Appellants Octavia Burton, et al.**

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**ORAL ARGUNMENT 30 MINUTES**

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***1 I. INTRODUCTION AND OVERVIEW OF THE CASE**

Plaintiffs Octavia Burton, Bernard Walker, Edith Walker, and Richard Walker were heirs at law of Robert J. Walker, deceased. Mr. Walker is often in the trial transcript referred to as “Bob” or “Uncle Bob.”

Plaintiffs Kenneth Burton and Dina Z. Walker were beneficiaries designated under trust agreements executed by Mr. Walker before January 2004. Defendants, Mr. and Mrs. McBride, are the Co-Trustees named in the Robert J. Walker living Trust dated December 20, 1996, hereafter (“Revocable Trust”).

The parties stipulated that Eleanor Walker, the Intervening Defendant at trial and Appellee here, occupied a fiduciary relationship vis-a-vis Robert J. Walker as his attorney in fact. *Pretrial Order. Vol. I, p 15*.

Robert J. Walker (hereafter “Mr. Walker”) died July 28, 2005. He had never married and had no children. He did have siblings; of these, Plaintiff Octavia Burton is the sole survivor. *Plaintiffs Exhibit 46 (Appendix)*.

Mr. Walker had many nieces and nephews. His sister Octavia Burton had two children, Kenneth (a plaintiff) and Linda Burton. Richard Walker, now deceased, also had two children, Edith and Richard Walker (both plaintiffs). His brother Wendell Walker (deceased) had one child, Bernard Walker (a plaintiff). And his brother George Walker (deceased) left eleven children: Tim Walker, Beverly Lohn, Stephen Walker, Gloria Linda Waters, Jonathan Walker, Gregory Walker, Thomas Walker, Eleanor Walker (the Intervening Defendant), Robert Walker, George Walker and another child named George Walker. In all Mr. Walker died leaving surviving fifteen nieces and nephews. *Plaintiffs Exhibit 46*.

***2** Plaintiffs had been the long-time beneficiaries of Mr. Walker's estate planning and, in the case of Bernard Walker, the trustee or successor trustee of a series of lifetime trusts.

The causes of action tried by the Stevens County District Court related to Robert J. Walker's end-of-life estate planning. Plaintiffs maintained that Mr. Walker was not competent to gift an annuity and make fundamental changes in his estate plan and, in any event, believed the events were the product of undue influence exercised by Eleanor Walker. In those beliefs, the Plaintiffs were supported by preeminent experts and by Mr. Walker's long-time family physician.

Plaintiffs sought a judgment setting aside the transfer of an Ameriprise annuity. They also asked that the 2004 amendments and revisions to Mr. Walker's 1996 revocable trust be nullified. They sought an order declaring that the 1996 revocable trust, as amended in 2003, continued and remained in full force and effect. And, finally, they sought a judgment (a) declaring that Eleanor Walker held property acquired from Robert J. Walker or his estate in trust for the benefit of Plaintiffs; (b) requiring Eleanor Walker to convey to Plaintiffs the property wrongfully acquired from Robert J. Walker or his estate; and (c) adjudging Eleanor Walker liable to Plaintiffs for the income derived from the property wrongfully acquired from Robert J. Walker or his estate.

Below is a recitation of additional salient facts generally and a summary of contextual facts that are not reasonably disputable.

***3 II. FACTS**

**A. *Contextual Facts*.**

In his estate planning before 2004, Mr. Walker had the consistent goals of providing for certain charitable causes and for his extended family. Those goals were perhaps not surprising since they were borrowed from his parents' estate planning. *Vol. III, p. 110*.

In a series of estate planning changes in 2004, Mr. Walker's previous estate planning was largely abandoned in favor of a distribution scheme that most of his estate to Eleanor Walker. Plaintiffs contend the 2004 changes represented a perversion of Mr. Walker's actual intent.
“Because what he (Robert J. Walker) had said all along was that he wanted half to family, the other half to charities. All of that was the same from the beginning, and the only thing that really changed was special authority to take care of Shorty Walker.” *Vol. IIA, p. 79 (Testimony of Bernard Walker)*.

“Q. And were you familiar with how James Walker's estate was distributed? A Yes, to his children. Q So his children would be, in this case, Wendell Walker and Robert Walker, Octavia Burton, James Walker, Richard Walker, and George Walker; is that right? A Yes. Q Did Bob Walker, if you know, have knowledge about how James Walker's estate had been distributed? A Yes. Q Did that, if you know, have any influence on Bob Walker's approach to his estate planning? A Yes. Q And what affect did it have, if any? A Well, what he told my father and myself what he wanted to do, basically what his father did, what his parents did. Q Meaning? A Distribute assets to the family. He didn't have children, other than that he felt that Robert P. Walker, he thought of Shorty as his child. Q Okay. A And then he wanted to distribute to his living siblings, and then to nieces and nephews.” *Vol. IIA, pp. 49-50 (Testimony of Edith Walker)*.

Eleanor Walker's view is different. She contends Mr. Walker was angered by an August 2003 change in his estate plan that was, in her view, orchestrated by Wendell Walker and Bernard Walker. That anger, according to Ms. Walker, resulted in Mr. Walker's decision to leave essentially his entire estate to her.

***4** By way of undisputed background, on or about December 20, 1996, Mr. Walker created the Robert J. Walker Trust Revocable Trust (hereafter the “1996 Revocable Trust”). After the gift of one-half of all assets to charity, the 1996 Revocable

Trust gives one-half of all assets to the Walker Family Trust (hereafter the "1996 Family Trust"). That trust gave income from the trust corpus to his brothers Wendell Walker (and wife Dina Walker), his brother George Walker and sister Octavia Burton for life and upon the last to the distributed corpus in equal shares to ten nieces and nephews set forth above. Excluded from that distribution were five of his brother George Walker's children: Thomas Walker, Eleanor Walker, Beverly Lohn, George Walker and Gregory Walker. All branches of Mr. Walker's family shared substantially evenly in Mr. Walker's estate.

Until the Fall of 1998, Eleanor Walker lived elsewhere and did not see Mr. Walker on a regular basis. In 1998, she moved to Hugoton, Kansas, and began working for Mr. Walker as housekeeper. *Vol. I, p. 326*.

In April 2000, Eleanor Walker was appointed Mr. Walker's attorney-in-fact under a general power of attorney and became his fiduciary. *Vol. II A., p. 161*. Thereafter, while continuing to occupy a fiduciary relationship vis-a-vis Mr. Walker, she was the recipient of a gift from Mr. Walker of an Ameriprise annuity in the approximate sum of $516,000.00. *Vol. I, p. 159*.

The 1996 Revocable Trust was amended and restated on April 4, 2002 (hereafter the "2002 Trust"). The 2002 Trust provided for a distribution of assets to a revised Family Trust that was very similar to the 1996 Family Trust in that it distributed substantial income to Mr. Walker's brother Wendell Walker and sister Octavia Walker for life (George Walker was ***5** deceased). But the 2002 Trust differed from the 1996 Family Trust because it added George Walker's children Thomas Walker, Eleanor Walker and Beverly Lohn as ultimate beneficiaries.

The 1996 Revocable Trust was restated on August 22, 2003. The principal change was a direction that the family home be distributed for the benefit of Robert P. Walker for life and then to Eleanor S. Walker. All remaining trust assets were to be distributed to the Robert Jackson Walker Irrevocable Family Trust dated August 22, 2003 (the "2003 Trust"). Otherwise, the 2003 Trust was similar to the 1996 Family Trust and the 2002 Trust with equal distributions to the same ultimate niece and nephew beneficiaries as in the 2002 Trust. Because he was dealt with specially by Mr. Walker, his nephew Robert P. Walker was removed as a beneficiary in the 2003 Trust. Again, all branches of Mr. Walker's family shared substantially evenly in Mr. Walker's estate.

The beginning of 2004 brought remarkable changes to Mr. Walker's estate plan. On January 22, 2004, the Revocable Trust dated December 20, 1996, was revised (hereafter the "2004 Trust"). The 2004 Trust was dramatically different from all estate planning documents set forth previously. *Vol. I, p. 165*. In the 2004 Trust Mr. Walker for the first time totally excluded his brother Wendell Walker and Wendell's son, Bernard Walker, while including gifts to two of George Walker's children not previously mentioned in any previous estate planning document -- Mr. Walker nephew's George Walker and Gregory Walker. For the first time the branches of Mr. Walker's family were treated differendy and did not share substantially evenly in Mr. Walker's estate.

***6** On April 2, 2004, the 2004 Trust was again revised to increase the gift to Eleanor Walker by distributing to her, free from estate tax, an additional three quarter sections of real estate situated in Stevens County, Kansas.

On May 7, 2004, the 2004 Trust was again revised to completely eliminate references to Mr. Walker's sister Octavia Burton and her children Kenneth Burton and Linda Burton. At this point Mr. Walker had excluded from his estate plan his only surviving brother and sister and their families while increasing the shares of the remaining beneficiaries. Within a few months following the initial exclusion of his brother and his brother's son, a second branch of Mr. Walker's family, consisting of his only surviving sister and her children, were for the first time excluded from his estate plan by the 2004 Trust.

On December 6, 2004, the 2004 Trust was again changed increasing the amount of the gift to Eleanor Walker by another four quarter sections of Stevens County real estate and by one quarter of Seward County real estate - again free from estate tax.

In connection with the 2004 estate planning, Eleanor Walker accompanied Robert J. Walker on each visit to Darrell Johnson and sat in as documents were executed by Mr. Walker that favored her.

**B. *Incompetency*.**

In support of their concerns that Mr. Walker had not been competent to gift the Ameriprise annuity and to effect the 2004 changes to his estate plan, Plaintiffs asked Bennett Blum, M.D., to review the circumstances and render an opinion on the question of Mr. Walker's competency and the related question of undue influence. Dr. Blum ultimately was called as an expert to discuss those subjects.

***7** Dr. Blum is Board Certified in Psychiatry. He has worked as a forensic psychiatry consultant and, among many other engagements, has been retained to provide consulting services and advice to United Nations - International Criminal Tribunal for the Former Yugoslavia, The Hague, Netherlands. *Plaintiffs' Exhibit 9 (Appendix)*. He is a frequent lecturer and author in relation to the assessment of mental capacity and the assessment of undue influence. *Plaintiffs' Exhibit 9; Vol. I, pp. 377 - 379*. Dr. Blum has testified before the United States Senate on the question of undue influence in **elder** financial **abuse**. *Vol. I, p. 379*.

Through his testimony and his expert report, *Plaintiffs' Exhibit 10 (Appendix)*, Dr. Blum offered the following opinions in respect to Robert J. Walker:
a. Robert J. Walker had cognitive impairments.

b. He had atrophy of his frontal lobes, abnormal reflexes associated with frontal lobe dysfunction, abnormal brain waves that are indicative of generalized brain dysfunction, and observable limitations including impaired short-term memory, and inability to understand new information of any significant complexity.

c. Mr. Walker had a dementia. "Dementia" refers to a syndrome of impaired memory, plus at least one of the following: problems in executive functions (thinking abstractly and understanding abstract concepts, understanding relationships, planning, monitoring behavior, appropriately starting or stopping behavior, switching focus, considering consequences); language disturbance; inability to recognize or identify objects despite intact sensory function; or, inability to perform basic and familiar tasks, such as brushing ***8** one's teeth. Mr. Walker had several potential causes for his condition, including diabetes, effects of hypertension, hypothyroidism, and cardiovascular disease.

d. Mr. Walker had damage to the frontal lobes of his brain and the associated neural circuits. This type of damage is often caused by Mr. Walker's various medical conditions.

e. The combination of memory impairment and frontal lobe dysfunction would have rendered Mr. Walker incompetent to enter into any transaction that involved understanding of abstract terms, or the consideration of likely consequences of his actions.

f. "And Mr. Walker had long ago -- long before 2004, had lost the ability to handle even simple issues. Even according to Dr. Sam, he couldn't - he couldn't understand even basic issues regarding his own health care." *Vol. , p. 429*.

g. Mr., Walker's cognitive impairments, plus his numerous physical ailments, rendered him much more vulnerable to manipulation tactics than the average person.

Mr. Walker was severely diabetic and had various other troubling health issues. Because Plaintiffs considered it likely that Mr. Walker's diabetes, and its effect on cognitive function, would be an important consideration for the District Court, the Plaintiffs additionally engaged Christopher M. Ryan, Ph.D., to consider that question.

***9** Dr. Ryan is a clinical psychologist who works and teaches at the University of Pittsburgh. He is on the faculty of the University of Pittsburgh School of Medicine. Dr. Ryan has specialized in medical neuropsychology over the last 25 years. *Vol. II, p. 137*.

Dr. Ryan has been studying the effects of diabetes on cognitive function or neurocognitive function since 1980. As he noted in his testimony: "I do a lot of teaching. But over the last 25 years, I have been invited to do more and more presentations specifically on diabetes. And this has been especially the case in the last four or five years, where I've traveled around the world giving lectures on the effects of diabetes and brain function." *Vol.II, p. 143*.

Dr. Ryan testified that Mr. Walker had very serious diabetes, with significant micro and macrovascular end organ damage. According to Dr. Ryan there is now a very large and compelling body of scientific literature that demonstrates that the presence of micro and macrovascular damage is associated with significant damage within the central nervous system to the brain. *Vol. II, p. 154*.

Robert J. Walker suffered from diabetic retinopathy. *Vol. II, p. 25*. Dr. Ryan testified that as an individual's retinopathy becomes more severe, there is a corresponding decline in cognitive function. *Vol. II, p. 157*. According to Dr. Ryan, there is a very strong correlation between diabetes and the decline of cognitive function. *Vol. II, p. 159*.

Dr. Blum and Dr. Ryan agreed in their testimony that the frontal lobe of Robert J. Walker's brain was, in 2004, atrophied. *Vol. II, p. 154; Vol. I, p. 404*. Dr. Blum and Dr. Ryan also agreed that atrophy of the frontal lobe is associated with a decrease in executive function. *Vol. I, p. 396, Vol. II, pp. 158 - 159*.

***10** Executive function was defined by Dr. Blum as follows: "And another area has to do with impairment in what is called executive functions. And that is a term of art, which refers to the brain's ability to analyze new information, put things in the right sequence, remember things in the right sequence, consider the likely consequences, to think logically, to reason. In other words, we're talking about judgment." *Vol. I, pp. 394, 395*.

Dr. Ryan found that Mr. Walker suffered from severe cognitive impairments that would have prevented him, in 2004, from managing his financial affairs. *Vol. II, pp. 171 - 172*. In fact, per Dr. Ryan, Robert J. Walker "did not have the ability to hold information in memory for more than a couple of minutes." *Vol. II, p. 174*.

Finally, and importantly, the Plaintiffs presented the testimony of Mr. Walker's longtime family physician. Samer Al-Hashmi was Robert J. Walker's personal physician for many years. Dr. Al-Hashmi testified at trial, beginning at page 55 of Volume II of the transcript, as follows in respect to various ailments with which Mr. Walker was afflicted in 2004:
Q. Do you recall describing Bob Walker as like a baby with a caring mother?

A Yes.

Q Is that an accurate description of Bob Walker's condition in January of 2004?

A In my professional opinion?

Q Yes.

A Very accurate.

Q Okay. Could he understand -- could Bob Walker understand medical issues that involved more than one variable?

A I'm not sure if he is understanding one variable only.

Q You're not sure if he could understand even one variable?

***11** A Yes.

Q Is that correct?

A Yes, absolutely correct.

Q That's all right. Did he lack the cognitive ability to use and monitor his insulin pump?

A Big time.

Q Could he accurately report on his medical condition?

A No.

Q Now in all fairness, if you asked him, “Bob do you feel okay?” Could he tell you how he feels at this moment?

A Yeah.

Q Yes?

A That's all right.

Q Is that yes?

A Yes.

Q By January 2004, was he routinely disoriented when you saw him?

A (No response.)

Q Alert, disoriented, but baseline.

A Since when you said?

Q By January of 2004.

A Yes.

Q And did he have dementia?

A Yes.

Q Did he have short-term memory impairment?

***12** A Severe.

Q Did he have -- was he virtually blind In his left eye by that time?

A Correct.

Q Did he have vision impairment in his right eye, if you know?

A Correct, but I'm not sure about extent.

Q Sure. And of course, we know that he had severe diabetes?

A Correct.

Q Did he have hypertension or high blood pressure?

A Yes.

Q Does hypertension, also, contribute to end organ damage?

A Correct, especially brain, heart, and kidneys.

Q Did he have syncopy or spells where he would pass out on a regular basis?

A Yes.

Q Did he have chronic renal failure or kidney failure?

A Correct.

Q Did he have polyneuropathy?

A Severe.

Q Did he have hyperlipidemia, which is?

A No, I just want to elaborate about the neuropathy. I don't remember the year, maybe 2003 or 2004. He had what we call diabetic systo -- let's make it simple, his bladder quit working, I believe In 2002 or 2003 because of diabetes neuropathy. Let me just make very quick about this neuropathy business. Our nerve in our body, in general, are three types. Motor, sensation nerve, and what we call it autonomic nerve. Let me make it simple. Sensation, the nerve we feel, you know, if we close our eyes and we touch, we know where we are touching. Motor, you know that one. They carry the ***13** function of, you know, moving stuff, and legs and that stuff. And that autonomic nerve is the nerve which supply our organs like the heart, the gut, the bladder, the intestine, you know. So, he does or he did have damage severely from the sensation nerve, like the one, you know, they feel. And the autonomic nerves. So that why he end up with heart problem, you know, with early or irregular heartbeats. And damage urinary bladder. So I remember his bladder quit working and so we have to get Foley catheter to relieve the problem.

Q And you mentioned the heart. Had Bob had a pacemaker put in approximately 2002?

A I'm -- I don't remember this.

Q Okay.

A But I remember he was on Coumadin, because what some people call it, atrial fibrillation.

Q And that's an abnormality of the heart?

A Irregular heartbeats, which make -- sorry, which make us more prone to get clots inside the heart. So usually patients with *this* kind of condition, we treat them with blood thinner to prevent from getting stroke, because if you have a clot in your heart, that clot might separate and move to the brain and cause stroke. So any patient with atrial fibrillation, usually, should be on blood thinner.

Q And was Bob seeing, at least by 2003, 2004, and 2005, a cardiologist in Denver?

A That's correct.

Q Did Bob have to be transported or airlifted to Denver on multiple occasions throughout the time that you saw him?

A Multiple. I don't know how many, but I'm sure that we airlifted him to Denver.

Q Did he have hyperlipidemia?

A That's correct.

Q And this is, again, by January of 2004?

***14** A That's correct.

Q And what is hyperlipidemia?

A Fat in our bloodstream are two major types, cholesterol and something we call it triglyceride. And that's the major big two. And when somebody get elevated, both elevated, we call it hyperlipidemia.

Q Had Bob had a heart attack by 2004?

A Yes.

Q Did you see episodes of confusion in Bob?

A (No response).

Q Maybe that's the same as what we've talked about already.

A So many.

Dr. Al-Hashmi echoed the opinions of Dr. Blum and Dr. Ryan regarding Mr. Walker's incompetency in 2004 for estate planning purposes: “Q. And then what you're telling me now is today, you do not believe that Bob Walker was in that vague area? A No, he was much worse than this. Q He was incompetent? A Incompetent, yes.” *Vol. II, p. 82*.

Troubling, in respect to the severity of Mr. Walker's cognitive issues, was Dr. Al-Hashmi's testimony that Mr. Walker was completely unable to find his way out of the Stevens County Medical Clinic without assistance. “Could Bob Walker have made it back out to the car by himself from your office? A No. Q Would he have been able -- and is that because he couldn't walk or was there some other reason? A No, some other reason. Q What was the other reason? A He wouldn't be able to get out by

himself. Q Why? A I believe he would be circling in the clinic. He would not be able to go outside by himself. Q Because he could not figure out how to get out? A That's correct." *Vol. II, pp. 52-53.*

***15** Bob McBride, a cotrustee of Robert J. Walker's trust, agreed that there were times when Mr. Walker did not know what he was doing: "A. I explained to you that he's a diabetic and if his insulin wasn't just right, they kind of go in a -- don't know what kind of phase you want to call it. They don't always know what they're doing. And Ellie takes care of his -- his insulin part and she was not allowed to go, is my understanding. And knew Bob couldn't see. He couldn't read what you've got on that paper there. Q So there would have been times, I take it, from your testimony, because of medical issues that Bob had that he would not know what he was doing? A I would say that." *Plaintiffs Designations Regarding the Deposition Testimony of Bobby J. McBride (p. 21:4 to 21:17).*

Various relatives and friends of Eleanor Walker, Mr. Walker's accountant and the lawyer who drafted the 2004 estate planning documents testified that either they did not observe that Mr. Walker was confused or unable to deal with his affairs or they stated affirmatively that they knew Mr. Walker to be competent. Dr. Blum was asked about the phenomenon of friends and relatives not recognizing the severity of an individual's cognitive deficit. His testimony suggested that the phenomenon was not uncommon:
Q. And the other issue that I think almost always arises in cases like this Dr. Blum, is the fact that if we were to look behind the bar out here or if we were to listen to people that who have testified or perhaps will testify in this case, who will say, "I was a neighbor of Bob Walker, I was a CPA that worked with Bob Walker, I knew Bob Walker, and he seemed okay to me," is there a reason -- can we square the fact that there is that kind of testimony with the notion that Bob Walker was not competent to enter into estate planning?

A. Yes, there is.

Q. And what is that?

A. There are several points to know, but the basic summary is that different parts of the brain control different functions, and the part of his brain that ***16** was -- one part of his brain was damaged, other parts were perfectly intact, and so you'd expect that those areas that were intact would function normally. So, for example -- okay, on this chart, the area right here that I'm pointing to, like between the words language and the word hearing, this part (indicating) r this is a different part of the brain that on your head would come right down by your basically by the temple on your skull. So right around here (indicating), if you can see that, this area is the area that lets you hear what someone's saying and comprehend what their saying. Basically, it turns sound into meaningful communication.

This area was okay in him. So someone could talk to him, and he would hear, and he would hear their words, and he would understand them as words and not as random noise.

This area back here (indicating), which corresponds to the area above and behind your ear here on the left-hand side of the brain, and there we have -- there's a box here, it has an arrow and says "functions of left parietal lobe," I'm talking about that area behind and above the ear. Up in here (indicating), this is the area that converts things in print into meaningful communications. In other words, this is the area that lets you read, and as opposed to seeing just squiggles on a board here that are meaningless, you see these as letters, and you can put these letters together to form words.

This is the part of his brain -- this is the part of the brain that does that. Again, this part of the brain was okay, so he should have been able to read, assuming he could see the document. But as far as his brain was concerned, he could read.

Down here towards the back end of the frontal lobe here (indicating), so again, kind of moving back again from the forehead, moving back towards the temple area down here, this is an area where that converts your thoughts into words, so it lets you come up with a word. So the ability to say, for example, this is a poster, and you can say poster, that's the area of the brain that works.

Now, for the most part, that area of the brain seems to have been functioning in Bob Walker. So for the most part, he would have been able to come up with words to say things.

Marshall Lewis said that he had some mild aphasia, which is a term of art, usually means that one of these three areas (indicating), and usually this last one, was mildly impacted. Again, that's according to Dr. Lewis. But I haven't seen anything elsewhere to indicate that that part of the brain was impaired.

***17** I already mentioned that movements of the eyes are controlled by part of the brain, so 7 that was okay. This area on the (indicating) -- that I said was behind and above the left ear, well, if you look on the right side of the head, again behind and above the right ear, that area is what lets you recognize familiar people and places. That area was okay In Bob Walker. So Eleanor Walker could walk into a room, he would say, "Oh, that's Eleanor." He could look at a photograph of his family members and neurologically he could accurately say this is that brother, this is that sister, this is this niece, this is that nephew, he could say that. All right?

One of the -- one of the questions that tends to get asked has to do with did he seem to know who he was. Well, yes, that tends to stay intact in most people until the very end stage of dementia.

Did he seem confused? Well, down here (indicating), it's thought that this bottom part of the frontal lobe, which on a person it would be -- if you imagine where your eyes go back into your head, if you kind of draw a line there, right above that line, so the underside of the brain, it's thought that that helps -- helps people kind of maintain some sort of equilibrium. And I don't mean balance, I mean sort of mental equilibrium.

So, for example, right now, everyone in this room, their brain is taking in all sorts of information: How does the chair feel, the temperature in the room, whether you're hungry or not, whether you have to go to the bathroom or not, whether or not you're listening to anything I'm saying, that sort of tiling. All right? And that -- and the brain is sort of quickly categorizing that and letting you know what's sort of most important to pay attention to right now and what's least important. If that area did not function, then people tend to get very -- well, most common place, that's what you call confused because they can't distinguish. So one moment they're paying attention to what you're saying, and the very next second they're paying equal attention to how their chair feels, and the very next moment they're paying attention to a light in the room, and the very next moment they're paying attention to God knows what. So their attention keeps flashing allover the place, and they can't focus. All right? This area was somewhat damaged with Mr. Walker. That was when, somewhat damaged, you get that sundowning, that confusion at night, because you're not getting in as much outside information for the brain to work on, plus people are tired.

*Vol. I, p. 414.*

Darrell Johnson, the Elkhart lawyer who drafted the 2004 estate planning documents testified that, though he believed Mr. Walker to be competent when he executed the ***18** documents, he believed it was important to have him evaluated by a psychologist before he signed the documents. *Vol.* I, *p. 147*. It is perhaps telling that of the thousands of estate planning clients with whom Mr. Johnson had dealt over the years, Mr. Walker was one of only two or three, and perhaps the only one, that Mr. Johnson had ever sent to be evaluated before preparing estate planning documents. *Vol. I, pp. 148 -- 149.*

The psychologist to whom Mr. Johnson referred Mr. Walker for an evaluation was Marshall Lewis. Mr. Lewis is staff psychologist with the Area Mental Health Center. *Vol. I, p. 21*.

Mr. Lewis observed Mr. Walker and performed certain tests after which he concluded that Mr. Walker was sufficiently competent to enter into the estate planning changes in January 2004. Unlike Dr. Blum and Dr. Ryan, Mr. Lewis had no opinion regarding Mr. Walker's competency to engage in estate planning after January 2004: "Q. Well, in any event, Mr. Lewis, I'll bet

you this is something we can agree on, and that is that as to whether Bob Walker was competent, whether Bob Walker was unduly influenced on any date after January 21st and 22nd of 2004 when he entered into other estate planning transactions, you would have no opinion about that? A. I would have no opinion about that." *Vol. I, pp. 71-72*.

Mr. Lewis did not profess to have any particular expertise in respect to the effect of diabetes on cognitive function: "Q. I think I would be correct, would I not, that you don't have any particular expertise in the effect of diabetes on cognitive function? A. That's correct." *Vol. I, p. 61*.

***19** Mr. Lewis conceded that questions of undue influence and competency are not the focus of his professional practice: "Q. Okay. And in terms of the -- at least the type and complexity and volume of work that Dr. Blum pursues in relation to undue influence and competency, that's something that's not a focus in your practice, either, correct? A. That's correct." *Vol. I, p. 61*. In fact, Mr. Lewis does hold himself out as a forensic psychologist. *Vol. I, pp. 70 -- 71*. "Q. And you wouldn't hold yourself out in having any particular expertise in your field in evaluating someone for purposes of determining their competency to engage in estate planning? *A*. True." *Vol. I, p. 71*.

The underlying test data used by Mr. Lewis as part of his analysis of Mr. Walker's cognitive abilities was destroyed shortly after the testing. As a consequence, Plaintiffs' experts were unable to review the data to determine whether it supported Mr. Lewis's opinion. "Q. So if anybody is trying to critique your work, in essence, what they have to do is take your word for it, correct? A. Correct." *Vol. I, p. 63*.

Mr. Lewis did not, as part of his assignment from Mr. Johnson, interview Mr. Walker's relatives or view his medical history. "Q. Okay. Is Dr. Blum correct that you did not interview Mr. Walker's relatives or view his medical history? A. That's correct. Q. And it's true, I think, is it not, Mr. Lewis, in this paragraph 3 that you did not know whether Mr. Walker had experienced a recent stroke, the extent of his visual impairment, or the impact of diabetes on cognition? A. That's correct." *Vol. I, p. 63 - 64*.

Mr. Lewis also largely concurred with the testimony and opinions of Dr. Blum and Dr. Ryan in all respects other than their ultimate opinions that Mr. Walker was not competent to engage in estate planning:
***20** a. "[W]hen dealing with legal documents, the cognitive functions characterized as executive functions by neuropsychologists are typically considered to be mediated by the frontal regions of the brain. And we agree with that because we just looked at this diagram, correct? A. Correct. Q. So Dr. Ryan's right about that, isn't he? A. Yes." *Vol. I, p. 64*.

b. "Q. And there are, according to Dr. Ryan, a number of well-known clinical tests of executive function, but none of those were administered by Mr. Lewis. And I think that's correct, isn't it? A. As he states there in the paragraph, I performed screening tests; so, yes. Q. Okay. So we agree with Dr. Ryan? A. Yes." *Vol. I, p. 64*.

c. I would defer to their [Dr. Blum and Dr. Ryan] expertise in the area of diabetes, in the areas of neuropsychology, the effects of diabetes...." *Vol. I, p. 71*.

**B. *Undue Influence*.**

Various factors, indeed suspicious circumstances, supported the notion that undue influence was present. For example, testimony at trial established that by January 2004 Robert J. Walker was completely dependent upon Eleanor Walker. "Q. Did it appear to you that Bob Walker was, and by January 2004, was completely dependent on Eleanor Walker? A Yes." *Dr. Al-Hashmi Testimony, Vol. II, p. 52*.

Not disputed at trial was the fact that Eleanor Walker made the initial arrangements to have Robert J. Walker meet with Darrell Johnson in 2004 to discuss changes in his estate plan. "Q. Okay. Ms. Walker, would you agree with me that you're the person

that made the ***21** arrangements with Darrell Johnson for Mr. Walker to come see him so that the 2004 trust could be prepared? A. Initially, yes, I was the one." *Vol I, p. 268*.

The testimony is conflicted in relation to Mr. Walker's ability to read, but no witness suggested that Mr. Walker could read without difficulty. Bob McBride is a cotrustee of Robert J. Walker's trust and his lifelong friend. In his deposition, designated by Plaintiffs, he testified as follows in regard to Mr. Walker's ability to read and stated, unequivocally, that Mr. Walker could not have read the 2004 trust documents:
a. "Q I guess I would be correct that to say from the period 2002 through his death, if he were to receive a mutual fund statement, he could not read it. Would that be right? A I would say you're probably right. You know, I couldn't tell you for sure on that, but -- Q And as you well know, obviously, one gets various sorts of statements -- A Yes. Q -- from different entities if -- whether it's a mutual fund or whether it's individual stocks. I guess it would be accurate that Bob in the last years of his life would not have been able to read those; is that right? A That's right." *Plaintiffs Designations Regarding the Deposition Testimony of Bobby J. McBride (p. 25:11 to 25:25)*.

b. Q. Okay. In relation to Exhibit 1 (the January 2004 Trust Restatement), Mr. McBride, is this a document that you read in its entirety before you signed it? A. I probably looked through it, but as far as telling you I read it entirely, I can't tell you that. Q. Okay. And we've already established that Bob Walker could not have read it; is that right? A. Right." *Plaintiffs Designations Regarding the Deposition Testimony of Bobby J. McBride (p. 38:1 to 38:15)*. ***22** When changes to Mr. Walker's estate plan were effected in 2004, Eleanor Walker was present in the room with Mr. Walker each time he executed any document. "Q. Every time at least as I understand your testimony, Mr. Johnson, every time that there was anything finally done in terms of changes in Bob Walker's estate plan or, for example, in the change in the beneficiary designation for the annuity, Eleanor Walker was present; is that right? A. Yes." *Vol. I, p. 153*.

Mr. Johnson both anticipated a claim of undue influence before he prepared the 2004 estate planning documents and believed Mr. Walker to be potentially susceptible to undue influence. "Q. Okay. It would be fair to say, I think, based on previous conversations with you that you anticipated a claim of undue influence when you were engaged in this estate planning with Bob Walker? A. Yes. Q. And it would also be fair, I think, to say that you felt that he was potentially susceptible to undue influence? A. Yes. Q. And you had enough concerns about competency that you felt like it was important that he be evaluated before you executed his estate planning documents? A. Yes." *Vol. I, pp. 154-155*.

Mr. Johnson's concerns regarding susceptibility to undue influence mirror those of Dr. Blum who opined in his report: "It is further my opinion that Mr. Walker's cognitive impairments, plus his numerous physical ailments, rendered him much more vulnerable to manipulation tactics than the average person." *Plaintiffs Exhibit 10*.

Both Plaintiffs and the Intervening Defendant described the relationship between Robert J. Walker and his brother, Wendell Walker, as being extremely close. The parties simply disagree about whether that relationship endured to the end of Robert J. Walker's life. As Eleanor Walker testified: "Q. Okay. Well, let's talk about Bernard Walker's father, ***23** Wendell, for a moment, if we may. I think we would all agree that at one point it would have been fair to say that Wendell Walker and Bob Walker were very close, wouldn't it? A. Yes. Q. And there has been testimony in the case at various times that one could characterize them, essentially, and at one time, as best friends; would you agree with that? A. Probably. Q. And I think we can agree that in 1996, Wendell and Bob were very close? A. I could agree. Q. I think we could agree that in 2000 and as late as 2002, in your view, that they were very close, couldn't we? A. Yes." *Vol. I, p. 271*.

According to Eleanor Walker and others that testified in her case in chief, the genesis of the difficulties between Robert J. Walker and Wendell and Bernard Walker was the estate planning that occurred in August 2003. *Vol. I, p. 116*. But that contention is virtually impossible to reconcile with Plaintiffs' Exhibit 1 (Appendix). Exhibit 1 is a copy of Darrell Johnson's handwritten notes of his initial consultation with Mr. Walker in September or October of 2003 -- after the execution of the August 2003 trust amendment. In that document, Mr. Johnson reports that Mr. Walker said, in the only meeting he had privately with Mr. Walker

outside the presence of Eleanor Walker, that "he wants his beneficiaries to be brother, sister, nephews and nieces, children of deceased children of deceased brothers." Thus the only time Mr. Johnson met with Mr. Walker alone outside Eleanor Walker's presence, Mr. Walker confirms precisely what Plaintiffs argued in this litigation was representative of his true intent. At that time, Wendell Walker, who Eleanor Walker attempts to paint as a manipulative schemer, was Robert J. Walker's only surviving brother; his only sister was Octavia, a plaintiff here; and the remaining plaintiffs, other than Dina Walker, were among the referenced nephews and nieces.

***24** Questioned about his notes of the meeting Mr. Johnson concedes that the notes repotted upon what was presumably Mr. Walker's intent as expressed in the only private meeting. "Q. And I believe I'm correct in saying that although the first time that Bob Walker met with you, where you had the note that he wanted to leave everything to his brothers and sisters, including Wendell, correct? A. Probably. Q. Okay. A. I don't know that -- I don't recall that specifically. Q. Well, at least you wrote brothers and sisters, and Wendell was the brother that was - was alive at that time? A. Only living brother. Q. Right. Okay. And so except for that initial what sounded like a fairly brief conference alone with Bob Walker, Eleanor Walker was always present when any of these transactions occurred, right? A. Except for that probably 15 to 30 minutes initially." *Vol. I, pp. 153-154 (Testimony of Darrell Johnson)*.

Interesting, Eleanor Walker, who vociferously supports the notion of Mr. Walker's competency in 2004, when asked about Mr. Walker's statement to Mr. Johnson expressing a desire to leave his estate to his brother, sister, nephews and nieces, stated: "Q. And I will I ask you again, in light of your comments, Darrell Johnson is reporting that in September or October of 2003 that Bob Walker is saying to him that Bob wants his beneficiaries to be brother, sister, nephews and nieces of children of deceased brothers, right? A. Right. Q. And you have no reason to think that's not exactly what Bob said, right? A. I have no reason, no." *Vol. I, pp. 274-275*.

Equally difficult to square with the facts established at trial is the notion that each of the six plaintiffs in this litigation was excluded from Mr. Walker's estate planning when no one suggested that Robert Walker had any reason to be angry or disappointed with any of ***25** them other than Bernard Walker. "Q. Okay. And I think you would say that, at least, you would never have heard Bob say an unkind word about Octavia? A. I would agree with that. Q. Okay. And I believe that you would also agree that you never heard Bob Walker say an unkind word about Ken Burton or Edith Walker or Dina Walker or Richard Walker, correct? A. Correct. Q. Okay. So do you know what a caption is on a lawsuit? A. I don't think so. Q. That's probably good that you don't. That is -- it shows who the Plaintiffs are and who the Defendants are in a case. And if we were to look at the caption in this case, there are six Plaintiffs, as you recall? A. Yes. Q. Five of them Bob Walker never said an unkind word about, correct? A. Correct." *Vol. I, p. 270 (Testimony of Eleanor Walker)*.

Defendant's Exhibit M-8 (Appendix) is a letter, angry in tone, that Eleanor Walker contends expresses the thinking of Robert Walker in respect to his brother Wendell. Eleanor Walker physically wrote the letter. *Vol. I, p. 315*. Bob McBride testified in his deposition that Bob Walker could have neither read nor typed the letter. *Plaintiffs Designations Regarding the Deposition of Bobby J. McBride (pp. 45:11 to 46:3)*.

Though Exhibit M-8 was directed to Wendell Walker it was not delivered to him. Though showing various persons who were to receive copies, no copies were sent. The letter is undated and unsigned. "First off, I want to make clear, did you send this letter to anybody? A. No. Q. Was it mailed to -- on the back page it says, "cc: Bernard, Gloria Linda, Larry Myers, Tim Walker, and Bobby McBride." To your knowledge, did any of those people receive a copy of this letter? A. No." *Vol. I, p. 337*.

Exhibit M-8 references events months in the past, e.g.

***26** a. "Afterwards, Sue had a paper made up to fire him dated the 1st of August. I signed that on the 18th of August and all of you had every paper there on the 21st of August for me to sign my entire estate over to you with a trust of your making that I had never seen."

b. “Q. Okay. Well, let's look, then, at this Paragraph 1 at the bottom of Page 3 and the highlighted portion where the author is saying, “She cancelled her appointment with Sue at 1:30 so we could have that time, but we waited until 4:00 to even leave this farm, and then you drove through Ulysses to go to Garden City, which I've never done in my life,” Bob Walker remembered those times? A. Yes. Q. And this is at a bare minimum, this is several months after the event, right? A. Yes. Q. Okay. And so he's remembering several months after the event that the appointment with Sue was at 1:30, and you didn't leave the farm until 4:00? A. Yes.” *Vol. I, pp. 325-326*.

Dr. Ryan opined that Mr. Walker's memory retention was measured in minutes (Robert J. Walker “did not have the ability to hold information in memory for more than a couple of minutes.” *Vol. II, p. 174.)* Dr. Al-Hashmi was similarly skeptical that Mr. Walker could have remembered an event for months. “Q. Based upon your knowledge of Bob's memory impairment as of January of 2004, did Bob have the ability to recall dates of events in the last several months? A. No.” *Vol. II, p. 70*.

In light of the medical testimony, Eleanor Walker's testimony (*Vol. I, pp. 328-330*) regarding Mr. Walker's participation in the preparation of Exhibit M-8 is noteworthy:

***27** Q. Okay. Well, let's do it this way: Do you know whether Bob Walker recalled five to six years later, given his medical condition, that when you arrived in 1998 that he weighed 130 pounds?

A. That's correct.

Q. And that was without any prompting from you?

A. That's correct.

Q. Okay. He recalled that he had lost the sight in his left eye?

A. Without a doubt.

Q. He recalled that his kidneys had shut down?

A. Yes, he knew that.

Q. He recalled that a catheter was put in place, which Ellie had to take care of?

A. Yes.

Q. He recalled that he was put in the hospital five or six times in the first five months?

A. Yes.

Q. So five or six years later, he recalls that he was in the hospital five or six times in 1998?

A. That he would recall -- he would recall that he was in the hospital, maybe not the numbers, maybe not five or six times.

Q. So you supplied that information?

A. Yes.

Q. Okay. He would have recalled that he was flown to Denver several times?

A. Yes.

Q. And I would assume that he was flown to Denver in circumstances in which his health was in danger?

***28** A. Yes, Dr. Sam thought so.

Q. Okay.

A. It turned out to be not so but on one flight.

Q. He recalled what his vision was over the past six years in terms of whether it had deteriorate [sic]?

A. Oh, yes.

Q. He knew that his kidneys -- that they read in the normal range? Would he recall that?

A. Yes. Well, sure, because I had told him. When the blood work was running normal, yes, I would tell him, "Your kidneys are running in normal."

Q. But he wouldn't have known that without you telling him, would he?

A. Well, no.

Q. Okay. And he recalled that "My heart" -- Bob's heart -- "had not deteriorated," since his first visit to Denver; is that your memory?

Q. Yes, he would have recalled that. The doctor told him that.

Q. Okay. And so would it be your memory of this period in Bob's life, which would have been 2003, 2004, that he really had a pretty good memory?

A. I would say so, yes.

In view of Ms. Walker's testimony that Robert J. Walker had a pretty good memory, it is instructive to review and consider the testimony of the medical professionals who testified, viz:
a. "And in fact, when I spoke with Dr. Sam, his recollection was that in 1996, when he started -- from the time he started treating Mr. Walker, that Mr. Walker seemed to be a very nice man who was of average intelligence, but had significant memory problems." *Vol. I, p. 389 (Blum).*

***29** b. "So here his memory problem is starting to reach a point that it's no longer a nuisance, but it's something that's seriously affecting his health, because if you have diabetes, if you have too much insulin or not enough, it can cause very serious problems. And here is someone who was not Mr. Walker, in 1997, was who did not remember whether or not he'd taken insulin. Then again later, in March of '97, Dr. Sam further notes that Mr. Walker has very poor *memory." Vol. I, p. 390 (Blum).*

c. "April 14th of 1998, essentially the same information is noted again, memory problems that's having an impact on his health. So already we have several entries that clearly indicate that Mr. Walker's memory, again, was of such severity that on an ongoing

basis and despite repeated interactions with Dr. Sam, he still was forgetting critically important information that was affecting his health." *Vol. I, p. 391 (Blum).*

d. "Now, in July of 1999, Eleanor is now reporting to Dr. Sam about Mr. Walker's memory problems." *Vol. I, p. 392 (Blum).*

e. "Q. Was there a time after you started seeing treating Bob Walker as your patient in 1996, that you began to notice failing memory? A From the beginning. Q Did that get worse with time? A Yes." *Vol. II, p. 20 (Al-Hasbmi).*

f. "Remote and recent few months, memory intact. Unable to register new memory, memorizing three objects is very lousy. Forgot to bring his blood sugar chart three times." *Vol. II, p. 23 (Al-Hashmi) (12/31/96).*

***30** g. "Q. And then the next sentence says, "Recently, patient becomes very forgetful and bis short memory becomes very unorganized." *Q*. What do you mean by unorganized? A Unorganized means very poor." *Vol. II, p. 27 (Al-Hashmi).*

h. "Q. And I asked you about whether he was still your patient in 1999, when you saw him. There's a medical record, it's number 1590 in your records. And in that record, it indicates that Eleanor reports lapses in Mr. Walker's memory to Dr. Sam. Was Eleanor Walker, to your knowledge, aware of Bob Walker's short-term memory problems? A Definitely." *Vol. II, p. 36 (Al-Hashmi).*

i. "Since Eleanor showed up in the picture, as I said, the decision making regarding Mr. Bob Walker treatment was directed from myself to Eleanor, not to Mr. Walker. Q Why not? A Because of his memory." *Vol. II, p. 37 (Al-Hashmi).*

j. "Q. By January 2004, was he routinely disoriented when you saw him? A (No response.) Q Alert [meaning awake], disoriented, but baseline. A Since when you said? Q By January of 2004. A Yes. Q And did he have dementia? A Yes. Q Did he have short-term memory impairment? A Severe." *Vol. II, p. 56 (Al-Hashmi).*

k. "[Y]ou don't have *to* be an expert *to know this* gentleman doesn't remember what he ate half an hour ago. Q What about yesterday? A Five minutes ago, he doesn't remember." *Vol. II, p. 118 (Al-Hashmi).*

***31** 1. Bob did not have the ability to hold information in memory for more than a couple of minutes. *Vol. II, p. 174 (Ryan).*

## III. ARGUMENTS AND AUTHORITIES

### A. *Trial Was Afflicted, and Materially Affected, by the Trial Court's Repeated Erroneous Admission. Over Timely Objection, of Hearsay Statements Purportedly Made by the Decedent.*

**1. *Standard of Review*. "A trial court's determination of whether a statement is admissible under the Kansas hearsay statute is reviewed by an appellate court for an abuse of discretion, which includes a determination that the trial court's discretion was exercised in light of a correct understanding of the applicable law; however, the interpretation of a statute is a question of law over which an appellate court has unlimited review. *State v. Miller*, 208 P.3d 774, 42 Kan.App.2d 12 (2009).**

**2. *The Court Repeatedly, Over Timely Objection, Admitted the Hearsay Testimony of the Decedent***

That the Court erred in admitting the hearsay testimony of Mr. Walker is not seriously debatable. Testimony of an unavailable declarant, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible. K.S.A. 60-460. The hearsay testimony attributed to Mr. Walker was, in large measure, offered to demonstrate that Mr. Walker was angry with the Plaintiffs and certain persons affiliated with them and, for that reason, changed his estate planning in pique. The testimony was only useful for its purported truth. And, as noted below, the evidence materially influenced the District Court's decision. Accordingly,

unless the errors were harmless, an issue addressed herein, they individually or cumulatively require reversal and remand for a new trial. The admissibility of Mr. Walker's testimony was broached relatively early in trial as evidenced by this exchange at *VolI, pp 79-80*:

***32** Q. (Mr. Casey) Do you recall the nature of the explanation that you made to [Mr. Walker] of these issues of confidentiality and other matters?

A. The nature of that would have been to ask him about why he was mere and to then discuss with him whether or not he wanted Eleanor Walker present in the room when we discussed the estate planning issues. Specifically, I don't recall specific conversation about that, but I think fairly early on he had told me some of what he was concerned about I assumed it would have been in that first initial discussion.

Q. And what were some of those things he told you about?

MR. LEE: Your Honor, I'm sorry to interrupt Mr. Casey, but there's obviously a significant hearsay issue here in relation to Mr. Walker, out-of-court witness, obviously, and I don't think that Mr. Johnson can testify about what Mr. Walker said to him. And I apologize to him for speaking the objection, but I just wanted to explain the Court my theory about that.

THE COURT: Overruled. It's not hearsay in this context that it's being expressed or, at least, these questions, nor is it -- has the rule of confidentiality been invoked. Proceed.

MR. LEE: Your Honor, just one other thing, just so as to not be a pest, could I lodge a continuing objection to questions of that kind?

THE COURT: Certainly.

MR. LEE: Thank you.

The record is thereafter replete with questions and responses regarding what Mr. Walker thought and what he said in relation to estate planning issues. See for example *Vol. I, p. 143:*

"Q. And I believe your testimony was that Bob was upset about that August 2003 trust, correct?

A. Yes;"

And *Vol. I, pp. 245-246:*

***33** "Q. (Mr. Casey) All right, we were talking about the bank statement. Karen McClure brought the mail down. You all's mailbox was up by hers, right?

A. Yes, there's three of us, yeah. So she brought the mail down and, as she always did, handed it to Uncle Bob. And Uncle Bob went through it, and he saw the bank statement that said Robert J. Walker and Wendell J. Walker. And he became *very* agitated, and he said, "I don't want this. I don't want him having control of my money, my bank account." And he said, "Let's go to the bank."

In light of the Court's election to admit unfettered testimony reporting upon Mr. Walker's statements and estate planning predilections, the District Court's observation in its memorandum opinion is important and telling:

> The evidence is overwhelming that in July of 2004, Robert J. Walker was angered by action done by his brother, Wendell and nephew, Bernard, because they had engaged an attorney in Colorado who never

> represented Robert J. Walker, or had any contact with him, to prepare a Trust in August of 2003 and Wendell and Bernard urged Robert J. Walker to sign that Trust and fund it. The upshot of that action was that the bank where Robert J. Walker held his accounts sent him a statement in the summer of 2003 that showed Bernard's and Wendell's names on his bank account.

*Journal Entry of Decision by the Court*, p. 12 (Appendix).

Recall that the witness recounting Mr. Walker's "anger" and reactions was principally Eleanor Walker from whom the Plaintiffs were seeking disgorgement. It was this reported anger by a gentle man (Vol. III, p. 80) that the Court found to be the sine quo non resulting in the dramatic and precipitous 2004 estate plan changes.
Clearly, Robert J. Walker was angered by one of the Plaintiffs in this action and took steps to thereafter make amendments to the January 22nd, 2004 restated Trust to exclude them in part and provide for Eleanor Walker and Shorty.

In fact this Court is convinced, after hearing all of the evidence, that had not Wendell and Bernard engaged the Colorado attorney to draft documents that ***34** they got Robert J. Walker to sign, this lawsuit probably never would have happened.

*Journal Entry of Decision by the Court*, pp. 12-13.

The Court's conclusion, based only upon inadmissible hearsay evidence, was contrary to the overwhelming empirical evidence demonstrating conclusively that Mr. Walker was incompetent and suggesting that he had been unduly influenced. And it makes no difference for evidentiary purposes whether Judge Smith relied for his conclusion upon the words reportedly spoken by Mr. Walker or the reported observation of his anger -- both represent hearsay. As defined in K.S.A. 60-460, "Statement" means not only an oral or written expression but also nonverbal conduct of a person intended by him or her as a substitute for words in expressing the matter stated.

**3. *The Hearsay Testimony Was Admitted for Its Truth***

Testimony offered by a witness not present in court is, of course, only subject to the stricture governing the admission of hearsay testimony to the extent it is offered for its truth. Here hearsay testimony that purported to report upon Mr. Walker's reactions to the events surrounding the 2003 Trust was offered, successfully, for the purpose of demonstrating that Mr. Walker had a rational purpose for changing his estate planning. Stated otherwise, it was important to Eleanor Walker to factually demonstrate that Mr. Walker was mad. If the Plaintiffs had angered him, posited Ms. Walker, the logical response by Mr. Walker was to change his estate plan and punish those with whom he was angry.

The problem with the Intervening Defendant's construct was that it relied for its vitality on adducing testimony from a decedent. Had that testimony been offered by an individual subject to cross examination, the witness would have been asked:
***35** • Why did you tell your lawyer *after* the execution of the 2003 trust that you wanted to keep your estate plan as it had always been?

• Why were you so angry with your brother, Wendell, who had been a lifetime soul mate?

• Did you, in fact, authorize an angry diatribe written by Eleanor Walker and directed to Wendell Walker?

• Why, if you did authorize and participate in the drafting of the letter, did you not sign it?

• Why was the letter not delivered to Wendell and, instead, delivered only to the lawyer with whom Eleanor Walker had made the first appointment?

• Why were you angry with your sister Octavia who had nothing to do with the August 2003 trust?

• Why were you disappointed in Ken Burton, Edith Walker and Richard Walker who were similarly uninvolved with the August 2003 trust?

Instead the Court heard words only from the grave that were recited by the individual who stood to retain assets valued well in excess of one million dollars if she could convince the Court that Mr. Walker was angry with the Plaintiffs for a reason. "The theory behind the hearsay rule is that when a statement is offered as evidence of the truth asserted in it, the credibility of the assertor is the basis for the inference, and therefore the assertor must be subject to cross-examination." *State v. Harris*, 259 Kan. 689, 698, 915 P.2d 758, 766 (1996).

***36 4. *The Testimony Cannot Be Considered Harmless Error*.**

It is unquestionably true that the ". . . court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. This court has previously held that harmless error is that which does not prejudice the substantial rights of a party." *Griffin v. Suzuki Motor Corp.*, 280 Kan. 447, 464 (2005).

Pursuant to K.S.A. 60-261, "errors regarding the admissibility of evidence are evaluated to determine whether the admission of the evidence: (1) was inconsistent with substantial justice; (2) affected the substantial rights of the defendant; and (3) had any likelihood of changing the results at trial." *State v. Anderson*, 2009 WL 3172761 (Kan.App.) at *6. "To determine whether trial errors are harmless or prejudicial, each case must be scrutinized in the light of the trial record as a whole. Reversal is required only where an erroneous admission of evidence is of such nature as to affect the outcome of the trial and deny substantial justice." *Id.*

In *Griffin*, the trial court allowed admission of evidence on a newer version of the vehicle involved in the accident and its improved stability. The Court of Appeals found that the admission of this evidence constituted reversible error "because of the huge role it played at trial." *Griffin* at 464. The Kansas Supreme Court found that the evidence was emphasized several times during the trial, leaving a strong impression on the jury that the changes in the vehicle could and should have been made before the accident. Thus it was determined that the admission of the evidence was not harmless error. "To determine whether a trial error is harmless error or prejudicial error, each case must be scrutinized and viewed in the light of ***37** the trial record as a whole, not on each isolated incident viewed by itself." *State v. Pruitt*, 211 P.3d 166, 172 (Kan.App. 2009).

Because of the outsized role played by the confrontation clause in criminal cases that discuss hearsay issues, they are of limited utility in the analysis here. In an unpublished decision, this Court in *Serine & Company, Inc. V. Simon Capital Limited Partnership*, 2007 WL 1175858 (Kan.App.), considered whether the admission of hearsay statements was harmless error. There the hearsay statements related to ongoing negotiations with a nonparty to lease the space that was the subject of the litigation. The court stated that in "applying the harmless error rule of K.S.A. 60-261 ... If this court is willing to declare that the error had little, if any, likelihood of having changed the result of the trial, the harmless error rule applies." at *9. Stated affirmatively, harmless error is error that does not ". . . have a substantial influence on the outcome of the trial; nor does it leave one in grave doubt as to whether it had such effect." *U.S. v. Collins*, 575 F.3d 1069, 1073 (10th Cir. 2009).

Can it be appropriately argued here that grave doubts do not attend the hearsay evidence provided through the tendentious testimony of Eleanor Walker? In answering that question, it is worth revisiting the District Court's written opinion:
Clearly, Robert J. Walker was angered by one of the Plaintiffs in this action and took steps to thereafter make amendments to the January 22nd, 2004 restated Trust to exclude them in part and provide for Eleanor Walker and Shorty.

In fact this Court is convinced, after hearing all of the evidence, that had not Wendell and Bernard engaged the Colorado attorney to draft documents that they got Robert J. Walker to sign, this lawsuit probably never would have happened.

*Journal Entry of Decision by the Court*, pp. 12-13.

***38** In the District Court's view, the quintessence of the controversy was Mr. Walker's reaction to the August 2003 trust. Because that is so, the admission of the hearsay testimony cannot be considered harmless.

**B. *Did the Trial Court Err in Implicitly Finding That Robert J. Walker Received Independent Advice in Respect to the Questioned Estate Planning?***

**1. *Standard of Review*. Substantial Competent Evidence.**

**2. *Independent Advice Is Required In Circumstances Where A Fiduciary Or Confidential Relationship Exists, And The Dominant Personality Is The Beneficiary In Some Transaction In Which A Presumption Of Undue Influence Arises*.**

Because of Eleanor Walker's status as a fiduciary, in ruling in her favor the Court necessarily concluded that Mr. Walker had received independent advice in relation to the annuity gift and estate plan changes. The issue was broached in opening statement (Vol. I, p. 17) and would have been addressed by Dr. Blum had he been allowed to testify. *See Proffer, Vol. I, p. 469*.

Courts of equity have long enunciated a principle "pertaining to gifts during life, where the donor gave all, or the principal part, of his property to one who stood in a confidential relation to him, which required the donee in such an instance to show not only that the donation was knowingly made, but that the donor had independent advice pertaining thereto." *In re Kuhn's Will, 241 P. 1087; Flintjer v. Rebm*, 120 Kan. 13, 241 P. 1087, 1089 (1926). The rule concerning independent advice is generally applied in Kansas when the beneficiary of a transaction stands in a confidential or fiduciary relationship, "and when that relationship is used by one of the parties to take advantage of the other for financial gain . . . the law throws around such other its protecting arm to see that no undue influence has ***39** been taken of the donor, and .... requites a showing of independent advice." *Peterson v. Peterson*, 10 Kan.App.2d 437, 441 (1985). The Kansas Supreme Court stated the purpose of the Independent Advice Rule in *In re Estate of Carlson*, 201 Kan. 635, Syl. P 5 (1968):

> The requirement of independent advice is designed to provide assurance that the aged or infirmed or otherwise dependent person conferring the benefit knew what he was doing and did it of his own free act and will, and to see that no undue advantage was taken of him.

**3. *The Requirements Of Independent Advice Ate A Full And Private Conference On The Subject Of The Intended Transaction With A Person Is Competent To Inform And Wholly Disassociated From The Interest Of The Beneficiary*.**

The Kansas Supreme Court defined the term 'independent advice' in *In re Kuhn's Will.:*

> That the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was, furthermore, so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidentially as to the consequences to himself of his proposed benefaction.

241 P. 1087 (1926).

Mr. Walker may have conferred fully -- though the more persuasive view is that he did not -- but he most assuredly did not confer privately.
"Q. Every time at least as I understand your testimony, Mr. Johnson, every time that there was anything finally done in terms of changes in Bob Walker's estate plan or, for example, in the change in the beneficiary designation for the annuity, Eleanor Walker was present; is that right? A. Yes." *Vol. , p. 153*.

Under the *Kuhn* rule, it is clear the donor must have the opportunity to confidentially confer with a person wholly disconnected from the beneficiary and devoted wholly to the donor's interest. It also requires that the independent advisor explain the actual intended gift or transaction privately with the donor so as to advise him impartially and confidentially as ***40** to the consequences. The requirements of independent advice have not been met when the private consultation did not encompass the legal consequences of the grant that is challenged. Nor are the requirements met when the consultation encompassing the legal consequences of the challenged transaction is not held privately and confidentially.

In the only private meeting Darrell Johnson had with Mr. Walker, Mr. Walker reaffirmed his desire to leave his estate plan unchanged. Thereafter, Mr. Walker never met privately with Mr. Johnson again and, Plaintiffs believe more than coincidentally, directed or acceded to a series of estate plan changes markedly favorable to Eleanor Walker -- the same Eleanor Walker who was seated in the room with him.

**C. *Did the Trial Court Err in Denying Plaintiffs' Motion in Limine to Exclude the Testimony of Marshall Lewis and in Admitting the Testimony Over Plaintiffs' Timely Objection at Trial?***

**1. *Standard of Review*. The standard of review for a trial court's decision on a motion in limine is abuse of discretion. *State v. Abu-Fakher*, 274 Kan. 584, 594, 56 P.3d 166, 175 (2002); The trial court has considerable discretion in specifying the consequences of spoliation and will not be reversed except for an abuse of discretion. *Cashman v. Pacific Scientific Co.*, 154 Wash.App. 1032, 2010 WL 428807 (Wash.App. Div. 1 Feb 08, 2010)**

As described herein, in January 2004, estate planning documents were executed at the office of attorney Darrel Johnson, changing the disposition of Robert Walker's estate in favor of Eleanor Walker. At Johnson's referral, Marshall Lewis, a licensed master's level psychologist, performed an psychological evaluation of Robert Walker at Johnson's office. The purpose of the evaluation, as understood by Lewis, was to determine whether Robert Walker had the cognitive capacity to execute estate planning documents. Additionally, Lewis understood that his psychological evaluation of Robert Walker was needed because of the possibility of litigation in the future.

***41** When a psychologist performs services for a client, he or she has a duty to maintain records of those services in accordance with state and industry standards, as they relate to the specific services provided by the psychologist. In this case, Marshall Lewis provided forensic psychological services.

In practicing forensic psychology, Marshall Lewis had an obligation to understand, be aware of, and comply with record-keeping requirements. The record-keeping requirements are not a mere formality to be observed on a voluntary or *ad hoc* basis. The requirements ate in place to provide the possibility of review by third parties, particularly when me underlying data is subject to dispute.

Contrary to his professional and legal obligations, Marshall Lewis, or his employer, failed to retain the raw data which formed the basis of his psychological evaluation of Robert Walker. That raw data, according to Mr. Lewis, was destroyed. In the absence of the underlying data that Lewis was required to retain, the review and analysis of that data that should have been the right of the Plaintiffs and their experts was not possible.

The statement by Mr. Lewis that the routine destruction of underlying adjunctive data is his employer's practice is at once too easy and, more importantly, unfair to other parties. Moreover, it ignores the underlying purpose for data retention for the forensic psychologist -- to provide the opportunity for review and cross-examination. The data is gone, and it can never be retrieved and reviewed.

When Marshall Lewis evaluated Robert Walker ancillary to the execution of estate planning documents, he had both a professional obligation and a legal obligation to preserve the data that formed the basis of his evaluation.

***42 1.** ***Lewis Had a Professional Obligation to Document and Preserve the Data that Formed the Basis of His Evaluation.***

Because courts and parlies to legal proceedings are relying on them, forensic psychologists must be aware of the guidelines that shape their professional obligations. More precisely, a person who chooses to practice forensic psychology has an obligation to know and to comply with the record-keeping requirements that are specific to the field.

Under the Guidelines adopted by the American Psychology-Law Society and endorsed by the American Academy of Forensic Psychology, Lewis had an obligation to document and preserve all of the data that formed the basis for his work.

**VI. METHODS AND PROCEDURES**

A. Because of their special status as persons qualified as experts to the court, forensic psychologists have an obligation to maintain current knowledge of scientific, professional and legal developments within their area of claimed competence. They are obligated also to use that knowledge, consistent with accepted clinical and scientific standards, in selecting data collection methods and procedures for an evaluation, treatment, consultation or scholarly/empirical investigation.
B. Forensic psychologists have an obligation to document and be prepared to make available, subject to court order or the rules of evidence, all data that form the basis for their evidence or services. The standard to be applied to such documentation or recording *anticipates* that the detail and quality of such documentation will be subject to reasonable judicial scrutiny; this standard is higher than the normative standard for general clinical practice. When forensic psychologists conduct an examination or engage in the treatment of a party to a legal proceeding, with foreknowledge that their professional services will be used in an adjudicative forum, they incur a special responsibility to provide the best documentation possible under the circumstances.

*Specialty Guidelines for Forensic Psychologists*, published in *Law and Human Behavior*, Vol. 15, No. 6, 1991, p. 661.

***43** The rationale for these requirements is self-evident. Without having access to the underlying data that form the basis for the forensic psychologist's evaluation and opinion, parties have no capacity to review the evaluation or cross-examine the forensic psychologist in any meaningful way. *(See, e.g., Vetre v. Kucich*, 771 N.E.2d 1084, 1094 (2002) ("As plaintiffs correctly point out, defendants' failure to disclose the protocols and data underlying the Elmhurst study denied plaintiffs the opportunity both to have their own experts evaluate the study and to appropriately cross-examine Dr. Hirsch.")

When Lewis destroyed the notes and test data underlying his evaluation summary, he destroyed the opportunity for the Plaintiffs to have their own expert review and evaluate the same data. In addition, because the underlying data was destroyed, and only Lewis' summary conclusions remained, the Plaintiffs permanently lost the opportunity to meaningfully cross-examine Lewis in regard to his evaluation of Walker.

**2.** ***Under Kansas Regulations, Lewis Had an Obligation to Preserve Records for Five Years.***

Even without the prospect of litigation, Lewis had an obligation to retain records for five years. The legal obligation is based in the requirements for certified psychologists, as set forth by the State of Kansas Behavioral Sciences Regulatory Board, and promulgated through the Kansas Administrative Regulations.

102-1-20 Unprofessional conduct regarding recordkeeping.
(a) Failure of a psychologist to comply with the recordkeeping requirements established in this regulation shall constitute unprofessional conduct.

(b) Content of psychological records. Each licensed psychologist shall maintain a record for each client or patient that accurately reflects the licensee's contact with the client or patient and the results of the psychological service provided. Each licensee shall have ultimate ***44** responsibility for the content of the licensee's records and the records of those persons under the licensee's supervision. The record may be maintained in a variety of media, if reasonable steps are taken to maintain confidentiality, accessibility, and durability. Each record shall be completed in a timely manner and shall include the following information for each client or patient who is a recipient of clinical psychological services:

(1) Adequate identifying data;

(2) the date or dates of services the licensee or the licensee's supervisee provided;

(3) the type or types of services the licensee or the licensee's supervisee provided;

(4) initial assessment, conclusions, and recommendations;

(5) a plan for service delivery or case disposition;

(6) clinical notes of each session; and

(7) sufficient detail to permit planning for continuity that would enable another psychologist to take over the delivery of services.

(c) Retention of records. If a licensee is the owner or custodian of client or patient records, the licensee shall retain a complete record for the following time periods, unless otherwise provided by law:

(1) At least five years after the date of termination of one or more contacts with an adult....

Kan. Admin. Regs. § 102-1-20.

Lewis acknowledged that the clinical notes and the test data that formed the basis for his evaluation were destroyed shortly after the evaluation took place in 2004. Under any circumstances, those records should have been maintained into 2009. That did not occur.

**3. *It Was Fundamentally Unfair to Allow Lewis' Evaluation to Be Introduced into Evidence, When the Underlying Data Was Unavailable for Review and Analysis*.**

When Darrel Johnson asked Marshall Lewis to evaluate Robert Walker to determine whether he met the minimal competency threshold to execute estate planning documents, Lewis went to Johnson's office, performed some tests, took notes, and made observations. Then, after writing a summary evaluation, he destroyed the notes and tests, and any underlying data.

***45** There was then no possibility of reviewing the initial data, no opportunity to determine whether his professional judgment may have been clouded by the immediate desires of those who sought his assistance. Despite professional requirements and legal obligations that records be kept, the underlying data that would provide a third party the opportunity for meaningful review and cross-examination were destroyed. It was simply unfair to allow the Defendants to introduce Lewis' evaluation into evidence.

Additionally, Lewis testified as an expert. The Federal discovery rules (to which Kansas has its corollary) have been interpreted to require preservation of underlying data when a party expert intends to testify on the basis of that data.
The plaintiff has also requested copies of the raw data of the test and related documents. Under Rule 35(b)(1), Dr. Cancro is required to submit to the plaintiff a "detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions." Furthermore, pursuant to *Rule 26(a)(2)(B)*, ASOMA is required to disclose the raw data from the MMPI-II if it intends to call either Dr. Cancro or Dr. Maxfield as a witness at trial, since the data forms part of the basis for their expert testimony.

*Hirschheimer v. Associated Metals and Minerals, Corp.*, 1995 WL 736901, p. 5 (S.D.N.Y.), 7 NDLR P 318.

The failure of Lewis to maintain records and underlying data in accordance with the professional standards of forensic psychology meant that the Plaintiffs and their expert simply had no opportunity to counter Lewis' evaluation of Mr. Walker with anything but conclusory statements. Fundamental fairness required the exclusion of Lewis' testimony to prevent the Intervening Defendant from testimony that cannot be effectively contradicted or verified.

***46** The District Court found that Lewis destroyed the data, but inexplicably excused the destruction on the theory that it was Lewis' supervisor that directed the destruction of the materials. Apparendy the Court believed that Mr. Lewis was not particularly complicit in the destruction of the evidence and should not, therefore, be prevented from testifying.

But the theory underpinning exclusion of Lewis's testimony has much less to do with an assessment of blame than it does enforcement of the salutary principle that the opposing party is entitled to the data upon which an expert relies. It is the party that has the potential to benefit from spoliation -- here Eleanor Walter -- that must bear the consequences.

A failure to preserve evidence is sanctionable pursuant to the Federal Rules of Civil Procedure and the court's inherent power to control litigation. See *In re WRT Energy Securities Litigation*, 246 F.R.D. 185 (S.D.N.Y. Sept. 28, 2007) ("[A] court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs.")(citation omitted); *see also In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179, 191, 2007 WL 241344, at *13 (S.D.N.Y. Jan. 30, 2007) (same).

A party that spoliates evidence is subject to sanctions where: (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed "with a culpable state of mind" (mere negligence being sufficient); and (3) the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *In re WRT Energy*, 246 F.R.D. 185 (S.D.N.Y. Sept. 28, 2007); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430-431 (S.D.N.Y. 2004) ("Zubulake V"). These three requirements are met here. As a result, Mr. Lewis' testimony and report should have been excluded.

***47 IV. CONCLUSION**

The evidence adduced at trial supported the proposition urged by the Plaintiffs -- that Bob Walker's cognitive impairments were so severe that he was utterly incapable of making an informed decision about his estate planning and was probably unduly influenced to make the gifts and estate plan changes noted herein.

But the playing field was not level. The Court received inadmissible hearsay evidence on a question that proved fundamental to its determination. It ignored or misconstrued the requirement for independent advice under the circumstances that prevailed. And the Court admitted the testimony of an expert who, intentionally or otherwise, spoliated evidence.

The remedy for the enumerated errors is reversal of the trial court's decision and remand for trial with appropriate instructions.

**Appendix not available.**

**End of Document**