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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,693

SHARON ZUCKERMAN,

Petitioner,

vs.

JACK ALTER, individually and as trustee,

Respondent.

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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TABLE OF CASES

Page

LAWOFFICES. PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN. P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
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I. STATEMENT OF THE CASE AND FACTS

Ms. Zuckerman's statement of the case and facts is superficial, inaccurate in some respects, and entirely inadequate. Her brief also attempts to finesse the primary issue presented here by claiming that counsel for Mr. Alter actually stipulated to the correctness of her position in the trial court, No such agreement occurred. To supply the deficiencies and explain the background to Ms. Zuckerman's erroneous assertion, it is necessary to restate the case and facts.

This is an appeal from a summary final judgment which (1) invalidated two inter vivos trust accounts set up by the late Celia Kahn during her lifetime, for the benefit of her nephew, Jack Alter, and (2) ordered that the assets in those accounts pass through probate to Ms. Kahn's nieces, Sharon Zuckerman and Beverly Kanter, who were the residuary beneficiaries of her Will (R. 196).[1] This anomalous result, which was contrary to Ms. Kahn's express wishes, was bottomed upon a single, highly technical legal ground: the written Declaration of Trust which gave rise to one of the accounts, although executed by Ms. Kahn and witnessed by a notary public and in active existence for four years during her lifetime, lacked the signature of a second witness. The facts upon which the trial court reached this draconian legal conclusion are not in dispute.

In 1977, Ms. Kahn executed a Will which left approximately 60% of her estate to Mr. Alter; in 1980, she executed a new Will, which left approximately 70% of her estate to Mr. Alter (R. 183, 188; SR. 64).[2] In May, 1982, Ms. Kahn advised Mr. Alter (who lived nearby,

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[1] R.: Record on Appeal.
SR.: Supplemental Record on Appeal (filed with the district court as attachment to "Agreed Motion to Supplement Record on Appeal" and accepted as supplemental record by order dated March 16, 1990).

[2] This background information is contained in three affidavits, at R. 183, 188, and SR. 64. One of these affidavits was stricken in the summary final judgment under review (R. 183, 185, 196). The other affidavits were not stricken (R. 188; SR. 64). Their factual statements are therefore available for inclusion as background here. For good measure, we will demonstrate briefly in our argument that the trial court erred in striking the affidavit at R. 183, which will make our reference to it here appropriate as well. In any event, we

and who visited her regularly) that she was going to place all her liquid assets in a bank account or stock brokerage account, in trust for him in the event of her death, and she requested him to manage the accounts for her (*id.*). She also advised him that she was going to execute a new Will which did not include him, since his share of the assets would pass separately to him through the trust accounts (*id.*).

Shortly thereafter, Ms. Kahn sought the opinion of a local attorney concerning the validity of a form "Declaration of Trust" which she had apparently obtained from Norman Dacey's book, "How to Avoid Probate"; the attorney provided a written opinion that the form was valid under Florida law (R. 161-63; exhs. D, F to m/s/j at R. 263). On June 11, 1982, Ms. Kahn executed the Declaration of Trust in Dade County, Florida, naming herself as trustee of "a brokerage account with the firm of Discount Brokerage Corp." located in New York, "for the use and benefit of' Mr. Alter (R. 161-62). The instrument conveyed a beneficial interest in the assets of the account to Mr. Alter; it reserved to Ms. Kahn the "right to collect any dividends, interest or other income which may accrue from the trust property . . .," as well as a power of revocation; and it provided that it was to "be construed and enforced in accordance with the laws of the State of Florida." Ms. Kahn's execution of this instrument was witnessed by a notary public, as the form required; it did not contain the signature of a second witness (*id.*). (A copy of the Declaration of Trust is included in the appendix to this brief for the convenience of the Court.)

Ms. Kahn then submitted an application for a new brokerage account to Discount Brokerage Corp., in her name, as 'Trustee FBO Jack Alter," and she instructed Discount to transfer the stock holdings in her personal account to the new trust account (R. 154-60,164). Discount complied, and opened the new brokerage account in New York, in the name of

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should emphasize that the factual background contained in the affidavits is merely background; because of the narrow ground upon which the summary final judgment was ultimately bottomed, the background has no material bearing on the legal issues presented here.

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"Celia R. Kahn, Trustee, FBO Jack Alter" (R. 166-71). Discount later changed its name to Norstar Brokerage Corporation, and we will refer to it by that name hereinafter. (Exh. C to m/s/j at R. 263). Mr. Alter then undertook the active management of this brokerage account (R. 183, 188; SR. 64). Ms. Kahn then executed a new Will on April 28, 1983 (R. 2). This Will (which was prepared and notarized by the same attorney who had opined that the Declaration of Trust was valid) appointed Mr. Alter to be the personal representative of her estate; devised all her household goods and personal effects to Mr. Alter; and devised the residuary of her estate to two nieces in California, Sharon Zuckerman and Beverly Kanter, in equal shares (id.).

Ms. Kahn died in 1986 (R. 6). Following the opening of her estate, Ms. Zuckerman and Ms. Kanter (appearing "*in propria persona*") filed a lengthy "Petition to Establish Estate's Claim of Ownership to Assets, for Order Directing Transfer of Assets to Estate, Contest, and Grounds of Opposition to Trust, to Establish Constructive Trust, and for Punitive Damages" (R. 107). Mr. Alter was named as the respondent to the petition. Included in the lengthy petition (as Count 111) was a claim that the trust account established with Norstar Brokerage Corp. (which allegedly had a value in excess of $450,000.00) was invalid for, among other things, the lack of a second witness's signature on the June 11, 1982, Declaration of Trust (id.). (The petition did not contain any claim for invalidation of the separate trust account which Ms. Kahn had opened for the benefit of Mr. Alter at 1st Nationwide Bank,) Ms. Zuckerman and Ms. Kanter thereafter obtained counsel, who filed a motion for summary judgment on their behalf (R. 251). The motion was limited to a single contention -- that the Declaration of Trust which gave rise to the Norstar brokerage account was invalid under Florida law because it lacked the signature of a second witness, as purportedly required by the Statute of Wills (id.). The documents on file at Norstar (which we have previously discussed) were filed in opposition to the motion (R. 152).

A hearing was held on the motion before the Honorable Robert M. Deehl (SR. 1).

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The residuary beneficiaries argued simply that the June **11, 1982,** Declaration of Trust which gave rise to the Norstar account was a testamentary disposition, and was invalid because it lacked the signature of a second witness, as required by the Statute of Wills (SR, 6-8). Mr. Alter's counsel responded that the June **11, 1982,** Declaration of Trust could not be considered in **a** vacuum, since it required that an account be opened in New York **by** the brokerage company for the benefit of Mr. Alter, and because that account was thereafter opened in her lifetime, it was not a testamentary disposition which required compliance with the Statute of Wills. (Counsel chose to describe his theory of validity by labelling it "Totten Trust" or "oral trust"; labels are a matter of mere form, however, and the substance of his position, fairly read, was that the establishment of the account in Ms. Kahn's lifetime meant that it was not an invalid "testamentary disposition" requiring compliance with the Statute of Wills.) Counsel for the residuary beneficiaries conceded that issues of fact remained as to whether the account was valid under some other theory, and narrowed his argument to a request for a simple declaration that the June **11,1982,** Declaration of Trust, to the extent that it amounted to a "testamentary disposition," was invalid under Florida law (SR. 10-16).

Counsel for Mr. Alter then stated that he was prepared to stipulate that the Declaration of Trust did not comply with the Statute of Wills, but he insisted that the trust to which it gave rise was nevertheless valid (SR. **16-17).** Counsel for the residuary beneficiaries interpreted this response as an agreement with his position, and proposed that an order be entered declaring the Declaration of Trust to be an invalid "grantor trust," but leaving open the question of whether the Norstar trust account was an otherwise valid trust which did not make a testamentary disposition (SR. **17-18).** Counsel **for** Mr. Alter expressed his suspicions, and balked at this proposal (SR. **18-22).** However, the trial court thought it detected "common ground," and ultimately obtained a concession from Mr. Alter's counsel that "there can be no written trust, grantor trust, that makes an attempted testamentary disposition, that's not **executed** in accordance with the formalities" (SR. **23).**

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The trial court thereafter entered an "Order Granting Partial Summary Judgment," which reads in pertinent part as follows (R. 180):

> ORDERED AND ADJUDGED that the motion is granted. To the extent that the writing signed by the decedent and dated June 11, 1982 constitutes a written, express trust in which the decedent was the settlor, lifetime trustee and lifetime beneficiary, and in which the assets of the trust passed to Jack Alter on the settlor's death, the testamentary aspects of the trust located in paragraph 1 of that instrument, are invalid.
>
> This adjudication in no way prevents the Respondent, Jack Alter, from arguing that the writing referred to in this order is evidence of some other kind of trust or is evidence of some other intent of the decedent.

Ms. Zuckerman contends here that the "concession" quoted above (which found its way into the first paragraph of the order quoted above) constituted an ***agreement*** with the position she took on her motion for summary judgment. It clearly was not. In fact, the respective legal positions of the parties were not being argued in the same language or on common ground. Instead, they were being advanced like two ships passing in the night -- and we think a brief digression here to clarify the misunderstanding will shed a great deal of light on the primary issue before the Court.

In effect, the residuary beneficiaries were arguing below that Ms, Kahn's June 11, 1982, Declaration of Trust was a valid ***inter*** vivos trust to the extent that it contained provisions governing its operation during Ms. Kahn's lifetime -- but the provision within that otherwise valid inter ***vivos*** trust which governed the disposition of the trust's assets upon Ms. Kahn's death was *necessarily* a "testamentary disposition," simply because it became operative only upon her death, and that aspect of the trust was therefore invalid for lack of compliance with the Statute of Wills. However, this position was bottomed upon a fundamental misunderstanding of both the law of trusts and the issue presented to the trial court (and, of course, our own position on the issue presented here).

A provision in a trust instrument governing the disposition of the trust's assets an the

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death of the settlor is not automatically a ***testamentary*** disposition simply because it operates at the death of the settlor. ***As*** we shall take considerable pains to demonstrate in the argument which follows, a trust instrument containing a provision for the disposition of the trust's assets upon the death of the settlor must be viewed as whole, rather than a composite of pre-death and post-death provisions which are to be divided into separate parts for separate analysis and the application of separate rules of law. Such a trust is ***either*** an ***inter vivos*** trust or it is a testamentary disposition. It cannot be both, and it cannot be one containing the other, because the two concepts are mutually exclusive. By definition, if a trust is an ***inter vivos*** trust, a provision for disposition of the trust's assets at the settlor's death is ***not*** a testamentary disposition; it is simply a provision governing disposition of the "contingent equitable interest in remainder" created during the lifetime of the settlor by the ***inter vivos*** trust. ***Compare*** **§56,** Restatement (Second) of Trusts **(1957)** ***with*** **§57,** Restatement (Second) of Trusts (1957).

With that understanding, it should be clear that Mr. Alter's counsel did not agree with Ms. Zuckerman's position at all. What he agreed to (and we quote the relevant portion of the record again) was this: that "there can be no written trust, grantor trust, that makes an attempted testamentary disposition, that's not executed in accordance with the formalities" **(SR.**23). That "agreement" was perfectly consistent with his opposition to Ms. Zuckerman's motion for **summary** judgment; it was perfectly consistent with everything we argued in the district court; and it was perfectly consistent with everything which we will argue here. A trust which is a "testamentary disposition," rather than an ***inter vivos*** trust, ***is*** invalid if it does not comply with the Statute of Wills. Section 56, Restatement (Second) of Trusts **(1957).** But a valid ***inter vivos*** trust is simply not **a** "testamentary disposition," so compliance with the Statute of Wills is unnecessary. Section **57,** Restatement (Second) of Trusts (1957). Mr. Alter's trial counsel therefore agreed with a simple legal truism, stated in general terms; he did not agree that the specific trust in issue (or any paragraph of that trust) **was** invalid.

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In fact, as an examination of the transcript of the entire hearing will reveal (and we previously walked the Court through that transcript in some detail), Mr. Alter's counsel consistently maintained that the trust was not a "testamentary disposition" at all, and insisted it was a valid trust under other theories. The order which the trial court entered after this hearing also expressly reserved the issue of whether "the writing referred to in this order is evidence of some other *kind of trust*" than a "testamentary" trust (R. 180; emphasis supplied). And at the next hearing (on the *second* motion for summary judgment, which we will address in a moment), Mr. Alter's counsel continued to maintain his position that the Norstar trust account was not a "testamentary disposition," and was sustainable as a valid trust created during Ms. Kahn's lifetime -- a position which was clearly reserved to him by the language of the first order quoted above (SR. 42-56).

What has happened here, we believe, is that respective counsel were simply not communicating on the same wavelength in the trial court. Counsel for the residuary beneficiaries was arguing for the invalidity of one provision of the trust instrument; counsel for Mr. Alter was arguing for the validity of the whole -- and neither understood the thrust of the other's approach. The confusion generated by this miscommunication has now resurfaced here, in the form of a claim that Mr. Alter's trial counsel actually agreed with Ms. Zuckerman's position. We submit simply that Mr. Alter's trial counsel stipulated only to a legal truism which had no bearing on the validity of Ms. Kahn's trust; that he did not stipulate to the invalidity of Ms. Kahn's trust below; that the merits of the primary issue presented here were clearly preserved below (as the district court properly concluded, when it rejected the claim to a "stipulation" when Ms. Zuckerman raised it there); and that the rights of the respective parties to the substantial trust assets in issue here are far too important to be decided on anything other than the merits.?'

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[3] We also remind the Court that the issue is before the Court on a *summary* final judgment. Mr. Alter therefore had no burden below to prove the *validity* of the trust; it was the residuary beneficiaries' burden below to prove the *invalidity* of the trust (and therefore to

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With that clarification behind us, we return to our chronology. Shortly thereafter (and notwithstanding their prior concession that they were not entitled to summary judgment on the theories reserved in the second paragraph of the initial order), the residuary beneficiaries moved for summary judgment once again (R. 263). The motion asserted that Ms. Kahn's Norstar account could not be a Totten Trust because, in the words of an affidavit of a vice-president of Norstar attached to the motion, the account had been "opened . . . in accordance with her 'Living Trust' dated June 11, 1982 . . ." (Exh. C to m/s/j at R. 263). The motion also asserted that the same conclusion was required by a letter which Mr. Alter had written Ms. Zuckerman, in which he had stated that the bulk of Ms. Kahn's "assets were in a living trust which passed directly to me when she died" (Exh. G to m/s/j at R. 263). The motion asserted in addition that any oral trust which attempts to make a testamentary disposition is simply invalid.

Although the residuary beneficiaries had nowhere claimed in their petition that Ms. Kahn's trust account at 1st Nationwide Bank was also invalid, the motion alluded to the invalidity of this account as well. Attached to the motion was an affidavit of an employee of 1st Nationwide, which reads in pertinent part as follows (Exh. E to m/s/j at R. 263):

> 3. I am personally familiar with the documentation related to the accounts held at our Bank in the name of "Celia K. Kahn FBO Jack Alter UTA dated 6/11/82." The account number is **302-425931-36.**

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prove that the trust fit into no legal pigeonhole supporting its validity, by whatever name). Given the rigor with which that settled rule must be applied here, any doubt as to whether Mr. Alter's trial counsel stipulated away Mr. Alter's rights or properly preserved his position simply must be resolved in Mr. Alter's favor here.

There are two other settled propositions of law which are equally relevant to this point: (1) parties can only stipulate to facts, so stipulations to conclusions of law are not binding on appellate courts; and (2) stipulations must be clear and definite before they will be enforced, and ambiguity within a purported stipulation will render it unenforceable. *Troup v.* Bird, 53 So.2d 717 (Fla. 1951); Massachusetts *Bonding & Insurance* Co. *v. Bryant*, 175 So.2d 88 (Fla. 1st DCA 1965), *aff'd*, 189 So.2d 614 (Ha, 1966). Because the exchange upon which Ms. Zuckerman relies is, at best, an ambiguous statement concerning a conclusion of law, it clearly ought to be disregarded here for any purpose.

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> **4.** The documentation in our files indicates this account was established in accordance with a written "Living Trust" presented to us upon the opening of the account by Celia K. Kahn. It was then and is now our policy that once the Living Trust Agreement has been viewed and the account opened, copies of the trust agreement are not retained in the Bank's records.
>
> **5.** The documentation in our files indicates this account was not set up as **a** totten trust. Indeed, totten trust accounts at our Bank were not then and are not now worded in the same manner as this account.

The trust agreement referred to in this affidavit was not placed in the record, and there is nothing in the record which even arguably suggests that the trust agreement which was "not retained" by 1st Nationwide was the same trust agreement which gave rise to the brokerage account at Norstar. In fact, the residuary beneficiaries' petition affirmatively alleged that "[t]he trust, dated June 11, **1982,** solely ***pertained to one account at Norstar Brokerage Corporation. . . ."*** (R. 109-10; emphasis supplied).

Mr. Alter filed an affidavit in opposition to the motion (R. 183). The affidavit provided the background facts concerning Ms. Kahn's intent, all of which we have previously discussed. Although only a portion of the affidavit related conversations with the decedent, the residuary beneficiaries moved to strike the entire affidavit on the ground that the "Deadman's Statute" rendered it incompetent **(R. 185).** At the hearing held on the two motions before The Honorable Harold G. Featherstone, counsel for the residuary beneficiaries argued essentially what he had stated in the motions (SR. **28-42).** During the course of this argument counsel for Mr. Alter initially objected to the affidavit of the employee of 1st Nationwide, since "we're talking about an account at North Star **[sic]"** (SR. **33).** After counsel for the residuary beneficiaries stated that he was only talking about "a trust," the "North Star [sic]" account and "the nature of the trust," counsel for **Mr.** Alter withdrew his objection (SR. **33-34).**

Counsel for Mr. Alter then opposed both motions; he argued (as he had previously) that the absence of a second witness's signature on the Declaration of Trust was immaterial

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because the Norstar account was not a testamentary disposition, and was sustainable as a valid trust on various theories (SR. 42-56). Apparently because of opposing counsel's assurances that the evidentiary material submitted with respect to the 1st Nationwide account was relevant only to the issue of the validity of the Declaration of Trust which gave rise to the Norstar account, counsel for Mr. Alter did not address any specific argument to the validity of the 1st Nationwide account itself.

The trial court granted both motions (SR, 60). It then entered an "Order Granting Final Summary Judgment" which struck Mr. Alter's affidavit, and which concluded generally that "no assets of the decedent were left in trust by the decedent and her assets passed through probate in accordance with her Last Will and Testament" (R. 196-97). This language is broad enough to include the trust account at 1st Nationwide Bank. Counsel for the residuary beneficiaries also took that position in a post-judgment "Motion for Appointment of Administrator ad Litem," in which he claimed as "probate assets" all "bank accounts and brokerage accounts previously thought to be held in trust" (SR. 66). We therefore assume that the validity of both accounts was adjudicated by the trial court, and that the validity of both accounts is in issue here. Mr. Alter's timely motion for rehearing was denied without hearing, and a timely appeal followed to the District Court of Appeal, Third District (R. 186, 190, 191).

The district court reversed the residuary beneficiaries' summary judgment, and certified the following question of great public importance:

> WHETHER PARAGRAPH 689.075(1)(g), FLORIDA STATUTES (1989), CREATES A SINGLE TEST, OR TWO ALTERNATIVE TESTS, FOR THE VALIDITY OF AN INTER VIVOS TRUST EXECUTED ON OR AFTER JULY 1,1969, WHERE THE SETTLOR IS THE SOLE TRUSTEE?

Alter v. Zuckerman, 585 So.2d 303, 311 (Fla. 3rd DCA 1991). Although both of the residuary beneficiaries appeared and defended their summary judgment in the district court, only Ms. Zuckerman filed post-decision motions there, and only Ms. Zuckerman petitioned

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this Court for review. The district court's decision is therefore final as ta Ms. Kanter, and any relief which this Court may ultimately grant must therefore be limited to Ms. Zuckerman alone.

II. ISSUES PRESENTED FOR REVIEW

A. WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT MS. KAHN'S TRUST ACCOUNT AT 1ST NATIONWIDE BANK WAS INVALID AS A MATTER OF LAW, AND THAT ITS ASSETS THEREFORE BELONG, NOT TO THE DESIGNATED BENEFICIARY OF THE TRUST ACCOUNT, BUT TO THE RESIDUARY BENEFICIARIES OF HER ESTATE.

B. WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT MS. KAHN'S TRUST ACCOUNT AT NORSTAR BROKERAGE CORP. WAS INVALID AS A MATTER OF LAW, AND THAT ITS ASSETS THEREFORE BELONG, NOT TO THE DESIGNATED BENEFICIARY OF THE TRUST ACCOUNT, BUT TO THE RESIDUARY BENEFICIARIES OF HER ESTATE.

III. SUMMARY OF ARGUMENT

In an introductory portion of our argument, we will explain that Mr. Alter's affidavit was unnecessary, because Ms. Kahn's intent is expressed on the face of the Declaration of Trust itself. For good measure, however, we will demonstrate that the affidavit was erroneously stricken. Once the residuary beneficiaries placed the Declaration of Trust (as well as all of Norstar's backup documents and an affidavit explaining the 1st Nationwide account) in evidence, the Deadman's Statute was waived. In any event, Ms. Kahn's intent is not really the issue; the issue is whether the obviously upside-down result in this case, which was exactly contrary to Ms. Kahn's uncontroverted and express intent, was mandated by law because of the simple absence of a second witness's signature on the trust instrument. It will be our position that it was not.

A. The trial court erred in summarily invalidating the account at 1st Nationwide Bank for three very simple reasons. First, there was no claim in the petition challenging the

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validity of this account, and it is axiomatic that summary judgment cannot be granted on an unpled claim. Second, the trust agreement giving rise to the account was not placed in the record, so the residuary beneficiaries could not carry their burden of proving it invalid for lack of a signature. Third, as a matter of substantive law, the trust account was a valid Totten Trust under Florida law, to which the Statute of Wills simply had no application.

B. The trial court also erred in summarily invalidating the Norstar account. As we shall explain in regrettable detail, Florida law -- as it has developed over the last 50 years and as it was codified by various legislative enactments between 1969 and 1975 -- parallels the principles presently stated in §§56 and 57 of the Restatement (Second) of Trusts (1957). Reduced to its essentials, §56 states that, if the settlor has failed to create a valid trust by passing a present interest to the beneficiary during her lifetime, then the disposition is testamentary and will be valid only if the instrument complies with the Statute of Wills. This is essentially Ms. Zuckerman's position in the instant case. On the other hand, §57 provides that, if the settlor has created a valid trust during her lifetime by passing a present interest (a "contingent equitable interest in remainder") to the beneficiary during her lifetime, then the disposition is not testamentary and the Statute of Wills is therefore inapplicable. Because Ms, Kahn's Declaration of Trust clearly created a present beneficial interest in Mr. Alter, the trust in issue here falls under §57, rather than §56.

If there had been no statutory developments between 1969 and 1975, the Florida decisional law, which presently follows §57, would clearly require the conclusion that the Declaration of Trust created a valid *inter* vivos trust which did not require the signature of a second witness. Unfortunately, when the legislature first attempted to incorporate §57 of the Restatement into the statutory law of Florida in 1969, it included a provision contrary to §57 which required that all trusts in which the settlor is the sole trustee must comply with the Statute of Wills. Shortly thereafter, however, it amended this provision to make it consistent with §57, by providing that *inter* vivos trusts in which the settlor is the sole trustee

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are not invalid for that reason alone, if the trust is otherwise valid under the law or if it complies with the Statute of Wills. It will be our position that this amendment must be given effect; that it must mean something different than compliance with the Statute of Wills; and that the only logical construction of the amendment is that it was meant to conform Florida law to §§56 and 57, as the courts had previously developed the common law. If we are correct about that, then Ms. Kahn's Declaration of Trust was a valid inter *vivos* trust, not a testamentary disposition requiring compliance with the Statute of Wills -- and the district court correctly held that the trial court erred in concluding otherwise.

IV. ARGUMENT

By way of introduction, and to place the two issues on appeal in proper perspective, it is worth reiterating briefly what is not in issue here. The authenticity of the June 11, 1982, Declaration of Trust is not in issue here. Ms. Kahn's intent is also not in issue here, because it is expressed on the face of the Declaration of Trust. Ms. Kahn intended to (and did) place the assets in her brokerage account in trust for Mr. Alter approximately four years before she died, reserving to herself only the right to use the income from that account, with the assets in the account to remain Mr. Alter's upon her death. On the record made below, it is simply indisputable that Ms. Kahn wanted those trust assets to pass to *Mr. Alter* when she died, and not to Ms. Zuckerman. The same is obviously true with respect to the 1st Nationwide account. The ***only*** reason the trial court ordered those assets distributed *contrary* to Ms. Kahn's express wishes was because the Declaration of Trust was witnessed by one signature rather than two, and the very narrow question presented here is therefore simply this: whether that obviously upside-down result, which was exactly contrary to Ms. Kahn's express wishes, was mandated by law because of the simple absence of that second signature. We will demonstrate in the argument which follows that it was not.

Since we are on the introductory subject of Ms. Kahn's intent, this is as good a place as any to discuss the propriety of the trial court's order striking Mr. Alter's affidavit. And,

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because that ruling has no material bearing on the legal issues presented here, there is no need for us to make it the subject of a separate issue on appeal. It is enough that the Court understand at this point that the affidavit was essentially superfluous. All that it contained was an elaboration upon Ms. Kahn's intent. That intent was independently expressed on the face of the Declaration of Trust and the two accounts, however, and it was not controverted in any way by the other evidentiary material submitted in support of the motions for summary judgment, so striking the affidavit's evidence of Ms. Kahn's intent accomplished nothing. Ms. Kahn's (uncontroverted) intent is still spread all over the face of the very instruments upon which the motions for summary judgment were based, and we therefore take it that her intent is unequivocally established by the record here, whether Mr. Alter's affidavit is considered a part of it or not.[4]

And even if the affidavit were necessary to support our position here, it is a simple matter to demonstrate that it was improperly stricken. In the first place, only a portion of the affidavit related conversations with the decedent, so the remaining portions obviously could not be legitimately stricken. More importantly, the dispute here is not between Ms. Kahn's estate and Mr. Alter; it is between a niece and a nephew of the decedent, both of whom are both "interested" and "protected" persons under the Deadman's Statute, 890.602, Fla. Stat. (1987). In that circumstance, the statute simply does not apply to prohibit Mr. Alter from testifying to conversations with the decedent.[5]

But that aspect of the Deadman's Statute is complicated enough that the Court deserves a simpler solution to the problem if one can be found (especially since the affidavit

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[4] See *Knauer v. Barnett*, 360 So.2d 399, 405 (Fla. 1978) ("[U]nless the trust instrument is ambiguous, the intent of the settlor must be ascertained from that which lies within the four corners of the instrument itself, and no extrinsic evidence of the settlor's intent is admissible); *Robbins v. Hunyady*, 498 So.2d 955 (Fla. 2nd DCA), review denied, 500 So.2d 544 (Fla. 1986) (same).

[5] *See, e. g., Barber v. Barber*, 128 Fla. 645, 175 So. 713 (1937); *Matthews v. Hines*, 444 F. Supp. 1201 (M.D. Fla. 1978). *See generally*, Ehrhardt, *Florida Evidence*, 5602.1 (2nd Ed. 1984).

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is immaterial to the issues on appeal). That simpler solution can be found in *Briscoe v. Florida National Bank of Miami,* 394 So.2d 492 (Fla. 3rd DCA 1981), which is simply indistinguishable from the instant case. In that case, during his lifetime, Mr. Koubek opened a joint account with right of survivorship, naming Mr. Briscoe as co-owner. The account was evidenced by a letter of authorization and a joint signatory card. After his death, Mr. Koubek's personal representatives sought to recover the assets in the account for the estate. They placed both the letter of authorization and the joint signataxy card in evidence at trial, and then convinced the trial court that the Deadman's Statute prohibited Mr. Briscoe from testifying to Mr. Koubek's intent in setting up the account.

The Third District held that ruling to be error:

> . . . Briscoe's personal testimony regarding the reason for his participation in the decedent's affairs was improperly excluded as being violative of the deadman's statute, . . . Clearly, the introduction of the letter of authorization and the joint signatory card, creating the joint account with right of survivorship, constituted a waiver of the deadman's statute. *Sessions v. Summers,* 177 So.2d 720 (Fla. 1st DCA 1965); *see also Josephson v. Kunhner*, 139 So.2d 440, 443 (Fla. 1st DCA 1962) (setting forth the reasons for the waiver rule). Once there was a waiver of the statute, it constituted a waiver for all purposes. *Bordacs v. Kimmel,* 139 So.2d 506 (Fla. 3d DCA 1962). Consequently, Briscoe's testimony, if otherwise admissible, was erroneously excluded under the deadman's statute.

394 So.2d at 493-94.[9]

In the instant case, the residuary beneficiaries placed the June 11, 1982, Declaration of Trust (as well as all of Norstar's backup documents and an affidavit explaining the 1st Nationwide account) in evidence. If *Briscoe* is the law, then the Deadman's Statute was clearly waived by that act. Mr. Alter's affidavit explaining the intent of his aunt in setting up the Norstar account for his benefit was therefore admissible, and the trial court erred in

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[9] *Cf. Smith v. Silberman*, 557 So.2d 78 (Fla. 3rd DCA 1990) (once estate called witness and established existence of conversation, Deadman's Statute was waived and details of conversation should not have been excluded). See *generally*, Ehrhardt, supra note 5.

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striking it. Although we continue to believe that the affidavit was immaterial to the narrow issues on appeal, if the Court feels otherwise, it is free to consider the affidavit as improperly stricken -- and therefore a legitimate part of the record on appeal. And with that collateral matter behind us, we turn to the issues on appeal.[7]

A. THE TRIAL COURT ERRED IN DETERMINING THAT MS. KAHN'S TRUST ACCOUNT AT 1ST NATIONWIDE BANK WAS INVALID AS A MATTER OF LAW, AND THAT ITS ASSETS THEREFORE BELONG, NOT TO THE DESIGNATED BENEFICIARY OF THE TRUST ACCOUNT, BUT TO THE RESIDUARY BENEFICIARIES OF HER ESTATE.

Although this issue was not certified to the Court, Ms. Zuckerman has argued it. We therefore have no choice but to respond to it. And of the two trust accounts in issue here, the trial court's error in summarily invalidating the account at 1st Nationwide Bank is the easiest to demonstrate, so we will discuss it first. There are three very simple reasons why this ruling was erroneous -- two procedural and one substantive: (1) there was no claim in the petition challenging the validity of this account; (2) the trust agreement giving rise to the account was not in the record, so the residuary beneficiaries could not carry their burden of proving it invalid for lack of a signature; and (3) in any event, the trust account was a valid Totten Trust under Florida law. We will elaborate upon these three positions in that order.

1. The absence of a claim in the petition.

First, we remind the Court that the petition filed by the residuary beneficiaries challenged only the validity of the Norstar account; the 1st Nationwide account is not mentioned in it in any way. The first time the 1st Natianwide account was ever mentioned in the litigation was in the residuary beneficiaries' second motion for summary judgment. Given those two procedural facts, it is simply indisputable that the trial court erred in

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[7] The opening gambit in the argument section of Ms. Zuckerman's brief is a contention that Mr. Alter's counsel actually stipulated that the trusts in issue here were invalid. We have previously demonstrated the error of that contention in our restatement of the case and facts (at pages 5-8, supra), so we will devote no separate argument to the contention here.

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declaring this account invalid on a motion for summary judgment:

> The central issue raised by this appeal is whether a final summary judgment may be entered in favor of a party on a cause of action not pled in the complaint. We hold that such a summary judgment can never be so rendered and reverse.
>
> ....
>
> ...It is axiomatic that a party is never entitled to summary judgment based on a cause of action not pled in the complaint, ...

Kuehne & Nagel, Inc. v. Lewis Marine Supply, Inc., *365* So.2d 204, **204-05 (Fla.** 3rd **DCA** 1978). Accord, *Meigs v. Lear*, **191 So.2d 286 (Fla.** 1st DCA 1966). This is but a specific application of the more general, thoroughly settled rule that, absent consent, a judgment can never be entered upon an unpled claim. ***See, e. g., Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.,*** *537* So.2d 561 (Fla. 1988).[8/]

Although Rule **1.510,** Fla. R. Civ. P. (the summary judgment rule) does not contain a provision comparable to Rule 1.190(b), Fla. R. Civ. P. -- which automatically amends the pleadings to include claims "tried by express or implied consent of the parties" -- we deem it prudent to demonstrate as well that Mr. Alter's counsel did nothing below which could be construed as "consent" to having this unpled claim adjudicated against his client. In the first place, the motion for summary judgment did not expressly seek a declaration of invalidity of the 1st Nationwide account; all that it said was this (R. 263-64):

> 3. Similarly, 1st Nationwide Bank advised us that its account related to this case was established pursuant to the same trust agreement. The Bank also advised us that the account was definitely not a Totten trust, contrary to the Respondent's argument at the first summary judgment hearing. The Bank's

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[8/] In addition, ***see Baring Industries, Inc. v. Rayglo, Inc.*, 303** So.2d **625** (Fla. 1974); *Cortina* ***v. Cortina*, 98** So.2d 334 (Fla. 1957); ***Designer's Tile International Corp. v. Capitol C Corp.***, 499 So.2d 4 (Fla. 3rd DCA), ***review denied, 508*** So.2d **13** (Fla. 1987); *Wassil v. Gilmour*, 465 So.2d *566* (Ha. 3rd DCA 1985); ***Hernandez v. Hernandez,*** 444 So.2d *35* **(Fla.** 3rd DCA 1983), ***review denied,* 451 So.2d** 848 (Fla. **1984); *Dysart v. Hunt,* 383** So.2d **259 (Fla.** 3rd **DCA), *review denied,* 392** So.2d 1373 **(Fla.** 1980).

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Affidavit and correspondence related to this matter are attached as Exhibit E.

Since the "Respondent's argument at the first summary judgment hearing" was directed solely to the validity of the Norstar account, and the 1st Nationwide account was never mentioned in that hearing, this paragraph of the motion for summary judgment appears to assert only additional support for the claimed invalidity of the Norstar account.

When the subject came up at the hearing on the motion, Mr. Alter's counsel objected, stating that "I don't understand -- we're talking about an account at North Star [sic]. What's the purpose of this affidavit?" (SR. 33). He was assured in response that the affidavit was relevant only to the account at "North Star [sic], and we're talking about the nature of the trust," and he withdrew his objection as a result (SR. 33-34). In addition, at no point during the hearing did counsel for the residuary beneficiaries ever directly request the trial court to adjudicate the validity of the 1st Nationwide account. In view of these facts, it simply cannot be argued that Mr. Alter "consented" to adjudication of that unpled claim. If *Kuehne & Nagel*, supra, is to be followed here, as it should be, this aspect of the summary final judgment was properly reversed by the district court.

2. The absence of the trust agreement from the record.

Second, even if the validity of the 1st Nationwide account had been appropriately challenged in the petition (or if Mr. Alter had consented ta the adjudication of its validity, notwithstanding its omission from the petition), the residuary beneficiaries did not carry their burden of conclusively proving that they were entitled to summary judgment on the claim, even under their **own** theory that the trust agreement giving rise to this account required the signature of **two** witnesses. Although their motion for summary judgment contains the hearsay statement that "1st Nationwide Bank advised us that its account related to this case was established pursuant to the same trust agreement [as the agreement giving rise to the Norstar account]," the affidavit attached to the motion provides no support for the

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statement. The affidavit states only that the account "was established in accordance with a written 'Living Trust'" which was "dated 6/11/82," and that this trust agreement was "not retained in the Bank's records." The trust agreement itself is not in the record, and it is a matter of mere speculation that it was the same trust agreement which gave rise to the Norstar account. That speculation is also directly contrary to an allegation of the residuary beneficiaries' petition, which affirmatively states that "[t]he trust, dated June 11, 1982, solely pertained to one account at Norstar Brokerage Corporation. . . ."

The *only* fact recited in the affidavit which even arguably suggests that the trust agreement presented to 1st Nationwide was the same trust agreement which gave rise to the Norstar account is that the date of the document was "6/11/82." That proves absolutely nothing, however, since Ms, Kahn may well have executed two separate documents on the same date. More importantly, it is readily inferable from the record that the trust agreement presented to 1st Nationwide was ***not*** the same agreement presented to Norstar. We reach that conclusion because the opening paragraph of the agreement presented to Norstar expressly entrusted "a brokerage account with the firm of Discount Brokerage Corp. located in the City/Town of New York . . .," and no other account -- and it therefore did not authorize the creation of the 1st Nationwide account in any way.

Given the specificity of the trust agreement giving rise to the Norstar account, we think most reasonable persons would conclude that the trust agreement which was "not retained" by 1st Nationwide simply had to be a different trust agreement -- and, of course, we are entitled to the benefit of that perfectly reasonable inference here. See *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29, 32 (Fla. 1977) (". . .we must draw every possible inference in favor of the party against whom the motion [for summary judgment] is made"). In short, proof of the absence of a second witness's signature on the agreement giving rise to the Norstar account proved nothing at all about the number of witness signatures on the trust agreement presented to 1st Nationwide.

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In sum, the residuary beneficiaries' contentions that the trust agreement presented to 1st Nationwide was the same agreement as the one presented to Norstar, and that the 1st Nationwide account was therefore invalid for lack of a second witness's signature on the trust agreement presented to it, simply was not proven by the evidence submitted in support of the contentions. The identity of the two documents is purely speculative on this record. And, because it is axiomatic that summary judgments cannot be entered upon mere speculation, the district court properly reversed this aspect of the summary final judgment. See Moore *v. Morris*, 475 So.2d 666, 668 (Fla. 1985) ("A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."); ***Meigs v. Lear,*** 210 So.2d 479, 480 (Fla. 1st DCA), ***cert. denied,*** 218 So.2d 172 (Fla. 1968) ("Summary judgments must be constructed on a granite foundation of uncontradicted material facts.").[9]

3. The substantive validity of the trust account.

Third, even if the residuary beneficiaries had pled and proved that the trust agreement which gave rise to the 1st Nationwide account did not contain the signatures of

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[9] Ms. Zuckerman argues, in effect, that she shifted the burden of proof to Mr. Alter. We disagree. Mere speculation is obviously insufficient to shift the burden of proof anywhere on a motion for summary judgment. In any event, even if the burden had been shifted, the fact that the opening paragraph of the very trust instrument relied upon by the residuary beneficiaries expressly entrusted "a brokerage account with the firm of Discount Brokerage Corp. located in . . . New York . . . ," and no other account, clearly provided a reasonable inference that the 1st Nationwide account was not established by the trust instrument establishing the Norstar account, which was sufficient by itself to defeat the motion for summary judgment.

We also remind the Court that it is perfectly clear from the transcript of the hearing held on the second motion for summary judgment that Mr. Alter's counsel had no idea that the residuary beneficiaries were pursuing the assets of the 1st Nationwide account in their challenge to the validity of the Norstar account (and he even obtained a clarification to that end on the record). Given the fact that the petition itself never mentioned such a claim, and given the fact that the petition even affirmatively alleged that the June 11, 1982, trust instrument pertained solely to the Norstar account, Mr. Alter's counsel can hardly be faulted for not actively disproving the unpled claim with hard evidence of the existence of a second trust instrument.

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two witnesses, they would not have proved the invalidity of the trust account -- because, as a matter of substantive law (both common law and statute), the trust account was a perfectly valid Totten Trust under Florida law. The seminal Florida decision is ***Seymour*** *v. Seymour*, ***85*** So.2d ***726*** (Fla. 1956). In that case, Euphemia Seymour opened a savings account (by the simple act of signing a signature card, with no witness signatures at all) in the fallowing name: "Euphemia Seymour in trust for Felton Seymour,"her son. When she died, both the administrator of her estate and her son laid claim to the assets in the account. The probate court ordered the assets paid into the estate.

On appeal, this Court reversed, and adopted the 'Totten trust" doctrine as follows ***(85*** So.2d at 727**):**

> . . . [T]he situation with which we are confronted is a typical 'Totten trust". The "Totten trust" doctrine was definitely stated in In re Totten, 179 N.Y. 112, **71 N.E. 748, 752, 70 L.R.A. 711.** In that case, the operation of the doctrine was described as follows:
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> > "**A** deposit by one person of his own money in his **own** name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. ***In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.***" (Emphasis added.)
>
> This well-known common-law doctrine has been adopted in many jurisdictions. See Annotations, 38 A.L.R.2d **1244,** Sec. **1,** and 91 **A.L.R.** 105; 7 ***Am.*** Jur., Sec. **438,** pp. 309-310, and Restatement of Trusts, Sec. 58. We accept it without hesitation. Thus in the present **case** even if there were no statute the prevailing common-law doctrine would, upon the showing made here, require the money on deposit **to** be paid to the beneficia-*ry,* Felton Seymour.

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This common law doctrine is presently codified (with respect to bank accounts) in §658.58, Fla. Stat. (1989), and it was codified in 1982, when the 1st Nationwide account was opened. Section ***658.58,*** Fla. Stat. (1981). It is also a *firm*, thoroughly-settled fixture of the decisional law.[10/]

With respect to the 1st Nationwide account in issue here, it is Ms. Zuckerman's position that the account was not a Totten Trust because it was established in accordance with a separate trust document, rather than the mere notation on a signature card -- and (although there was no proof of this) because this separate document lacked the signature of a second witness, the trust to which it gave rise was invalid. Quite apart from the obviously dispositive fact that separate trust agreements were also involved in some of the

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[10/] ***See, e.g., Castellano v. Cosgrove,*** 280 **So.2d 676, 677** (Fla. **1973)** (savings account opened upon revocable trust agreement "in the name of 'Nicholas Castellano as trustee for Angela Castellano'" was a valid Totten Trust, notwithstanding the absence of "two verifying witnesses" on the trust instruments; 1969 statute requiring compliance with the Statute of Wills [now amended] not applicable to savings accounts and could not be applied retroactively); ***Sanchez v. Sanchez de Davila,*** **547** So.2d 943, **944** (Fla. 3rd DCA), ***review denied,*** 554 So.2d 1167 (Fla. 1989) (bank accounts "opened in the name of Mario Sanchez in trust for two of his sons" were classic Totten Trusts which belonged to trust beneficiaries rather than estate of decedent-trustee); ***Abbale v.*** Lopez, 511 **So.2d** 340 (Fla. 3rd DCA 1987) (savings accounts in the name of decedent, as trustee for beneficiaries, were Totten Trusts and assets of accounts belonged to named beneficiaries upon trustee's death); ***Serpa v. North Ridge Bunk,*** 547 So.2d 199 (Fla. 4th DCA 1989) (savings account in name of depositor "in trust for" beneficiary was a Totten Trust which was not revoked by general reference in Will to "bank accounts"); ***First National Bank of Tampa v. First Federal Savings & Loan Ass'n of Tampa,*** 196 So.2d 211, 212 (Fla. 2nd DCA 1967) (bank account "in the name of Mrs. Kathryn Sharp, Trustee; Mrs. Viola Jones, beneficiary," accompanied by written trust agreement, was a classic Totten Trust which would belong to the named beneficiary upon the death of the trustee); ***Litsey v. First Federal Savings & Loan Ass'n of Tampa,*** 243 So.2d 239, 241 (Fla. 2nd DCA 1971) (bank accounts in decedent's name in trust for various beneficiaries were classic Totten Trusts, and accounts belonged to named beneficiaries rather than the estate of the decedent; expressly rejecting contention "that the Totten Trust doctrine should be overruled or at least receded from in Florida because it is contrary to the Statute of Wills. .."). *Cf. In re Mims,* **33 B.R. 95,** 96 (M.D. Fla. 1983) (bank account "in the name of Jack J. Mims and Patsy Mims in trust for Melinda Mims" was a Totten Trust, available to creditors in trustees' bankruptcy proceeding, since assets would not belong to beneficiary until trustees' deaths); ***Kearney v. Unibay Co., Inc.,*** **466 So.2d 271** (Fla. 4th **DCA** 1985) (certificates of deposit held in trust for beneficiary were Totten Trusts, available to creditor of trustee, since assets would not belong to beneficiary until trustee's death).

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decisions cited in footnote 10, supra, the contention simply makes no sense. If a valid Totten Trust can be opened with a single signature on a signature card, then a valid Totten Trust can certainly be opened with a single signature on a formal trust instrument setting up the trust account (which is probably why 1st Nationwide did not even bother to retain the trust agreement).[11] Put more simply, the Statute of Wills is simply irrelevant to Florida bank accounts opened in the name of a trustee for the benefit of a beneficiary. That is precisely what the cases say, and Ms. Zuckerman has offered the Court no decision which even remotely supports her contrary position.

The *only* authority offered for her position here is §658.58, Fla. Stat. (1981), which provides:

> When a bank deposit is made by any person describing himself as, and making such deposit as, trustee for another and no other or further notice of the existence and terms of a legal and valid trust than such description shall have been given in writing to the bank, the deposit or any part thereof, together with the dividends or interest thereon, may, in the event of the death of the person so described as trustee, be paid to the person for whom the deposit was thus stated to have been made.

To be sure, this statute provides that the mere notation on a signature card unaccompanied by a separate trust instrument is enough to create a valid Totten Trust in Florida -- but that is all that it says. It does not also say that a valid Totten Trust cannot be established with a separate trust instrument, and to read it that way would be nonsensical. If a valid Totten Trust can be opened with a single signature on a signature card, then a valid Totten Trust can certainly be opened with a single signature on a formal trust instrument setting up the trust account -- and, we remind the Court, several of the decisions

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[11] The result might be different, of course, if the separate trust instrument contained provisions inconsistent with the law governing Totten Trusts. The separate document is not in the record, however, and the Declaration of Trust which gave rise to the Norstar account (which the residuary beneficiaries apparently believe was the document setting up the 1st Nationwide account) is not inconsistent with the law governing Totten Trusts. This potential exception is therefore not proven by the record.

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upon which we have relied here validate Totten Trusts which were set up in exactly that way. The obvious purpose of the portion of the statute upon which Ms. Zuckerman relies is to prevent payment to the beneficiary of an account which might appear to be a Totten Trust if a separate trust instrument requires a different disposition -- but it makes no sense to read it as a prohibition against the establishment of a valid Totten Trust by a separate trust instrument authorizing the creation of a Totten Trust.[12/]

Since there is no support in either the decisional or statutory law for her position, Ms. Zuckerman falls back upon a secondary position here -- the position implicit in the last paragraph of the affidavit which was procured from 1st Nationwide's employee, which reads: 'The documentation in our files indicates this account was not set up as a totten trust. Indeed, totten trust accounts at our Bank were not then and are not now worded in the same manner as this account." This position is, however, no position at all. As we have explained above, the *law* is that a bank account opened in the name of a trustee, for the benefit of another, is a Totten Trust -- to which the Statute of Wills simply has no application. An account set up in that manner is therefore a Totten Trust, no matter how the bank may or may not have "worded" the account. The bank account in issue here was "in the name of 'Celia K. Kahn FBO Jack Alter UTA dated 6/11/82'." As a matter of both substance and form, the bank account was therefore in the name of Celia K. Kahn as trustee for the benefit of Jack Alter, which is exactly what is needed to create a valid Totten Trust, The law therefore requires a conclusion that the assets in that account belonged to Mr. Alter at Ms. Kahn's death, and to no one else.

This conclusion is not affected in any way by the affidavit of 1st Nationwide's employee, in which she offered her opinion that the account in issue was not a Totten Trust.

[12/] In this connection, we remind the Court that the trust instrument setting up the 1st Nationwide account was "not retained in the Bank's records," which is a fair indication that the trust agreement did not require a disposition of the trust inconsistent with the law governing Totten Trusts.

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The opinion is simply a legal conclusion, not a statement of fact -- and it is apodictic that legal conclusions have no place in factual affidavits, and that they must be ignored when ruling upon motions for summary judgment.? And, in any event, as we have demonstrated above, the legal conclusion contained in the layman's affidavit is simply wrong. As a matter of well-settled Florida law, the bank account in issue here was a valid Totten Trust, and this Court is therefore obliged to say so. Most respectfully, for the three separate reasons set forth above, the district court correctly reversed this aspect of Ms. Zuckerman's summary final judgment.

B. THE TRIAL COURT ERRED IN DETERMINING THAT MS. KAHN'S TRUST ACCOUNT AT NORSTAR BROKERAGE CORP. WAS INVALID AS A MATTER OF LAW, AND THAT ITS ASSETS THEREFORE BELONG, NOT TO THE DESIGNATED BENEFICIARY OF THE TRUST ACCOUNT, BUT TO THE RESIDUARY BENEFICIARIES OF HER ESTATE.

The trial court's declaration of the invalidity of the Norstar account does not suffer from the same procedural infirmities which prevented invalidation of the 1st Nationwide account, so we can turn directly to the merits of this second issue. Unfortunately, this issue is more complex than the first, since it will require close examination of several Florida decisions, as well as some statutory developments impacting upon those decisions. We think that analysis will make more sense to the Court if we initially orient it with a general overview of the problem -- so we will do that first, and save the specifics of Florida law for subsequent discussion,

1. A general overview.

The competing positions of Ms. Zuckerman and Mr. Alter are presently represented

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[13] *See, e. g., Seinfeld v. Commercial Bank & Trust Co.*, 405 So.2d 1039 (Fla. 3rd DCA 1981); *Hurricane Boats, Inc. v. Certified Industrial Fabricators, Inc.*, 246 So.2d 174 (Fla. 3rd DCA 1971); *First Mortgage Corp. of Stuart v. DeGive*, 177 So.2d 741 (Fla. 2nd DCA 1965); *Deerfield Beach Bank v. Mager*, 140 So.2d 120 (Fla. 2nd DCA 1962); *Martin v. E. A. McCabe & Co.*, 113 So.2d 879 (Fla. 2nd DCA 1959).

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by §§56 and 57 of the Restatement (Second) of Trusts (1957).[14] Ms. Zuckerman's position is represented by §56, which reads as follows:

> Where no interest in the trust property is created in a beneficiary other than the settlor before the death of the settlor, the disposition is testamentary and is invalid unless the requirements of the Statute of Wills are complied with.

Comment a to this sections explains:

> ***a. Scope*** of the rule. Where the settlar makes a conveyance of property in trust, the intended trust may fail on the ground that it is not created prior to his death. This is the case where the conveyance is ineffective to transfer the property during his lifetime, or where although the conveyance is effective to transfer the property the beneficiary is not designated during his lifetime. The intended trust may fail, therefore, either (1) where the conveyance is incomplete for want of delivery or because it was not intended to be effective until the settlor's death; (2) where the conveyance is ineffective because the trust property is not designated during the lifetime of the settlor; (3) where the conveyance is ineffective because the trustee is not designated during the lifetime of the settlor; (4) where, although the conveyance is effective, the intended beneficiary is not designated during the lifetime of the settlor. . . . In these situations no trust for any beneficiary other than the settlor arises prior to the death of the settlor, either because he manifested an intention to create a trust in the future (see §26), or because the transaction was incomplete for want of the necessary formalities (see §32). No trust arises on his death unless the requirements of the Statute of Wills are complied with.

Because the Declaration of Trust in issue here designated the trust property, designated the trustee, and designated the intended beneficiary, only the first of these four potential failures of the trust are in issue here.

Comment *b* explains the first of these four potential reasons for failure of the intended trust as follows:

> ***b. Conveyance incomplete at settlor's death.*** If the owner of

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[14] The Totten Trust doctrine governing the first issue on appeal is a discrete exception to *§56,* and is expressed separately in §58 of the Restatement (Second) of Trusts (1957).

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property purports to transfer it to another person in trust but the conveyance is incomplete at the time of his death, the intended trust is invalid unless the requirements of the Statute of Wills are complied with. Thus, if the title to the property does not pass to the intended trustee because the conveyance is incomplete for want of delivery, no trust arises during his lifetime (see §32, Comment b), and no trust arises on his death. So also, if the owner of property delivers it or delivers a deed of conveyance to the intended trustee, but he manifests an intention that the conveyance shall not be effective until his death, the disposition is testamentary. So also, if the owner of property delivers it or delivers a deed of conveyance to a third person with instructions to deliver the property or the deed to the intended trustee on the death of the owner if he should not otherwise direct at any time prior to his death, the disposition is testamentary. In all these cases the conveyance of the property is incomplete at the death of the owner, and no trust arises on his death since the disposition is testamentary, unless the requirements of the Statute of Wills are complied with.

Anticipating §57, Comment *f* explains that there is an exception to §56:

> ***f. Postponement of enjoyment until settlor's death.*** If by the terms of the trust an interest passes to the beneficiary during the life of the settlar, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not a testamentary trust. See §57. The disposition is not testamentary and the intended trust is valid, even though the interest of the beneficiary is contingent upon the existence of a certain state of facts at the time of the settlor's death.
>
> **Illustrations:**
>
> . . . .
>
> 8. A transfers certain securities to B in trust to pay the income to A during his lifetime and upon his death to transfer the securities to C if C survives A. C takes a contingent equitable interest in remainder and the trust is not a testamentary trust. If C survives A, he can compel B to transfer the securities to him.
>
> If the beneficiary is designated by the settlor during his lifetime, the mere fact that the settlor reserves a beneficial life estate and a power to revoke and modify the trust does not make the disposition testamentary. See §57.

Finally, Comment h explains that the rule of §56 applies whether the settlor has designated a separate trustee, or has designated himself as trustee:

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h. Declaration of *Trust.* The rule stated in this Section is applicable where the owner of property declares himself trustee thereof as well as where he transfers the property to another person in trust. Thus, where the owner of property declares himself trustee of the property, the intended trust may fail either because the trust property is not designated prior to his death, or because the beneficiary is not designated prior to his death, or because he does not intend the trust to become effective until his death.

Illustrations:

. . . .

12. **A** declares himself trustee of certain securities in trust to pay the income to himself for life and on his death to hold the securities in trust for such person as may be designated in a letter to be found after his death. After his death a letter is found, signed by him but not attested in accordance with the requirements of the Statute of Wills, declaring that he held the property in trust for C. The intended trust is invalid.

At this point, it should be evident to the Court that the central distinction to be drawn is whether the instrument creates no interest in the beneficiary until the death of the settlor, in which instance it is testamentary, or whether it creates an interest in the beneficiary during the life of the settlor to be enjoyed at the settlor's death, in which instance it is not testamentary. It should also be evident that Comment *f* and Illustration 8, rather than Illustration 12, represents the facts of the instant case, and that the instant case is therefore represented not by §56, but by §57 -- to which we now turn.

Although §56 has undergone no significant change since its initial adoption, §57 changed significantly in its second incarnation. The dean of Trusts, the late Professor Scott, explains:

> In the Restatement of Trusts §57, as adopted by The American Law Institute in 1935, it was stated that
>
> > Where the settlor transfers property in trust and reserves not only a beneficial life estate and **a** power to revoke and modify the trust but also such power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor, the disposition so far as

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> it is intended to take effect after his death is testamentary and is invalid unless the requirements of the statutes relating to the validity of wills are complied with.

This made the validity of the disposition dependent entirely on the amount of control reserved by the settlor. It failed to take into consideration the formality or lack of formality evidencing the disposition of the property. A formal trust instrument is very different from an instruction given orally or in a letter. If a trust is formally created, the danger of false claims is no greater because of the reservation of powers of control over the trustee reserved by the settlor, than it would be if no such power had been retained. Accordingly, in the Restatement of Trusts Second that was adopted in 1957, §57 was modified to read as follows:

> Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.

The trend of the modern authorities is to uphold an inter vivos trust no matter how extensive may be the powers over the administration of the trust reserved by the settlor.

Scott on Trusts, Vol. 1A, §57.2, pp. 139-40 (1987 Ed.).[15/]

Comment a explains §57 of the Restatement (Second) of Trusts (1957) as follows:

> ***a. where settlor reserves power to revoke or modify.*** Where the owner of property transfers it inter vivos to another person in trust, the disposition is not testamentary merely because the interest of the beneficiary does not take effect in enjoyment or possession before the death of the settlor (see §56, Comment

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[15/] Professor Scott's treatise collects numerous authorities supporting the modern view represented by §57 of the Restatement (Second) of Trusts (1957). ***See generally, Scott on Trusts, supra, §57.*** Instead of reiterating that extensive collection here, we simply refer the Court to the treatise. For four supportive decisions by respected courts involving facts very close to the instant case, ***see Dessar v. Bank of America National Trust & Savings Ass'n,*** 353 F.2d 468 (9th Cir. 1965); Roberts *v.* ***Roberts,*** 286 F.2d 647 (9th Cir. 1961); ***Farkas v. Williams,*** 5 Ill.2d 417,125 N.E.2d 600 (1955); ***National Shawmut Bank of Boston v. Joy,*** 315 Mass. 457, 53 N.E.2d 113 (1944).

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f), or because in addition he reserves power to revoke or modify the trust. In such a case the trust is created in the lifetime of the settlor, and the mere fact that he can destroy it or alter it does not make the disposition testamentary, although if the trust were not to arise until his death the disposition would be testamentary. See §56.

Illustrations:

1. By an unattested instrument **A** makes a transfer inter vivos of property to B to hold, manage, invest and reinvest it in B's discretion, and to pay the income during A's life to **A** or in accordance with A's directions and on A's death to pay the principal to C. **A** reserves power to revoke or amend the terms of the trust. A dies without having revoked or modified the trust. C is entitled to the trust property. The disposition is not testamentary and is valid although the requirements of the Statute of Wills are not complied with.

. . . .

3. By a deed of trust, A transfers shares of stock to B in trust to pay the dividends to A during his lifetime and to convey the shares to C on A's death. A reserves power to vote the shares and to direct a sale of the shares and to direct investments of the proceeds, **A** reserves power to revoke or modify the trust. The disposition is not testamentary and is valid although the requirements of the Statute of Wills are not complied with.

On the other hand, where the owner of property delivers possession of it to a person as his agent directing him to deliver the property to a third person on the owner's death, a mere agency is created which terminates on the death of the principal. The disposition in favor of the third person is testamentary and invalid unless the requirements of the Statute of Wills are complied with.

Illustration:

4. **A,** the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to **A,** and with power to sell the shares and to reinvest the proceeds. **A** writes a letter to the trust company directing it to convey the shares on A's death to C, unless A should otherwise direct. A dies. The disposition in favor C is testamentary, and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with.

Comment h also makes it clear that **$57** applies to the type of trust in issue in the

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instant case, where the settlor has appointed herself as trustee:

> *h.* Declaration of *Trust.* The rule stated in this Section is applicable not only where the owner of property transfers it to another as trustee, but also where he declares himself trustee of the property. The disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor-trustee reserves a beneficial life interest and power to revoke and modify the trust. The fact that as trustee he controls the administration of the trust does not invalidate it.

Given that general overview, it should be clear that the Declaration of Trust in issue here is governed by §57, not by §56. As in Illustration *8* to §56, and as in the several illustrations to §57, Ms. Kahn's Declaration of Trust created a "contingent equitable interest in remainder" in Mr. Alter at the time it was executed (and the account was opened) during her lifetime -- not an interest intended to arise only at the time of Ms. Kahn's death. And, under §57, it clearly established a valid inter *vivos* trust, notwithstanding that it reserved a life estate in the income of the trust assets to Ms. Kahn, and notwithstanding that it reserved a power of revocation to her as well. As a result, if these two sections of the Restatement (Second) of Trusts (1957) correctly state present Florida law (and we intend to demonstrate in a moment that they do), then the district court correctly held that the trial court erred in invalidating the Declaration of Trust on the ground that it was a "testamentary disposition" requiring compliance with the Statute of Wills.[16]

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[16] We should also note parenthetically that the American Law Institute is presently considering Tentative Draft No. 12 of the Restatement (Second) of the Law of Property: Donative Transfers -- which, if adopted, will effectively repeal §56 of the Restatement (Second) of Trusts (1957), and render valid all inter vivos donative documents of transfer, whether they comply with the Statute of Wills or not.

The relevant section of Tentative Draft No. 12 (Reporter: Professor A. James Casner) reads as follows:

> **§32.4 Document of Transfer as a Substitute far a** Will.
> *An* inter vivos donative document of transfer is valid even though it is a substitute for a will, in that the donor's current beneficial enjoyment of the gift property is not significantly curtailed during the donor's lifetime and the donee's interest in the gift property can be revoked by the donor.

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2. The Florida law.

We turn now to the specifics of Florida law, as it has developed over the past 50 years or so. We will examine those developments in roughly chronological order, The earliest relevant decision is ***Williams v. Collier***, 120 Fla. 248, 158 So. 815, 162 *So.* 868 (1935). In that case, a husband created an ***inter vivos*** trust for the benefit of his grandchildren. He named a third party as trustee; funded the trust with $50,000.00 in bonds; reserved a life estate in the income from the bonds; and reserved a power of revocation. Upon his death, his widow asserted her dower rights. She contended that the bonds were owned by her husband at the time of his death, rather than by the trustee, and that they were therefore subject to dower. This Court disagreed. It held that the trust was not merely a "testamentary disposition" (which would have made the husband the owner of the bonds at the time of his death, thereby rendering the bonds subject to dower), but that the trust was a valid ***inter vivos*** trust, not subject to dower. It reasoned that the trust instrument conveyed valid interests to the trustee and beneficiaries at the time of its execution, and it held that neither the reservation of a life estate in the income nor the power of revocation invalidated the ***inter vivos*** nature of the trust.

Williams did not squarely present the precise issue involved in the instant case, because the trust instrument in issue there was signed by two attesting witnesses. ***Williams*** is important here nevertheless, because it establishes in the law of Florida the distinction which the Restatement (Second) of Trusts (1957) has drawn between a trust which makes an attempted "testamentary disposition" (§56), and a valid ***inter vivos*** trust which creates an interest in its beneficiary at the time it is executed (§57). According to ***Williams***, an ***inter vivos*** trust is not a "testamentary disposition" if it creates an interest in its beneficiary at the time of its execution, notwithstanding that it reserves a life estate in the income of the trust, and notwithstanding that it reserves a power of revocation to the settlor -- which is to say that the trust in issue here, the June 11, 1982, Declaration of Trust which gave rise to the

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Norstar account, according to *Williams*, is not a "testamentary disposition."

The more particular issue presented here -- whether an instrument creating such a trust must comply with the Statute of Wills -- did not arise until 21 years later in *Hanson v.* Denckla, 100 So.2d 378 (Fla. 1956), *rev'd on other grounds*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). And because *Hanson* is the decision upon which Ms. Zuckerman stakes her position here, it deserves a careful analysis. At issue in *Hanson* was a trust instrument in which Dora Donner purported to create an *inter vivos* trust in intangible personal property, The trust instrument appointed a *third-party* as trustee, and it reserved to her a life estate in the income, a power of revocation, a continuing power of appointment with respect to the beneficiaries, and almost total control over the day-to-day management of the trust. The instrument did not comply with the Statute of Wills, because it lacked the signature of two attesting witnesses. The evidence reflected that the beneficiaries of the trust had been changed several times during Ms. Donner's lifetime by her exercise of the reserved power of appointment.

This Court did not overrule *Williams*; it distinguished it on the ground that Ms. Donner had reserved many more powers to herself than the settlor in *Williams*, and that the reservation of day-to-day control of the trust and the frequent exercise of the power of appointment rendered the trust essentially illusory. Then, relying on the 1935 version of §57 of the Restatement of Trusts (quoted at pages 28-29, *supra*), it declared the trust invalid as a testamentary disposition.

Hanson was not the last word on the subject of Dora Donner's trust, however. The Delaware courts had also assumed jurisdiction over Ms. Donner's trust, and they ultimately declared it valid. See Lewis *v.* Hanson, 36 Del.Ch. 235, 128 A.2d 819 (1957). The United States Supreme Court, on *certiorari* to both courts, thereafter reversed this Court's decision for lack of jurisdiction over the Delaware trustee and the trust assets, and upheld the Delaware judgment. According to Professor Scott, the ultimate result in the case was

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correct: "On the question of the validity of the disposition, it is submitted that the view of the Delaware court rather than that of the Florida court is sound and in accordance with the present trend of the authorities." *Scott* on *Trusts, $57.2,* p. 148 (1987 Ed). In addition, see Scott, *Hanson v. Denckla,* 71 Harv. L. Rev. 695 (1959).[17]

Within a year of this Court's decision in Hanson, the American Law Institute changed the provision of the Restatement upon which this Court had relied, and replaced it with a provision consistent with the Court's earlier decision in *Williams* and with the Delaware court's resolution of the validity of Ms. Donner's trust:

> Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to

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[17] It is worth noting at this point that Ms. Zuckerman does not purport to find any affirmative requirement in the present version of $689.075 that a settlor trust comply with the Statute of Wills. Instead, her argument is that, although §689.075 clearly rejects the various "control" factors upon which this Court declared Ms. Donner's trust "illusory" (and therefore a testamentary disposition), it does not reject the Court's other conclusion in Hamon that a trust is testamentary if the settlor is the sole trustee -- and Ms. Zuckerman's position here therefore depends upon both the validity of this reading of Hanson and the continuing validity of Hunson itself. *See* petitioner's brief, p. 18 (". . . the Legislature never intended to change the requirement that Florida trusts, in which the settlor was sole trustee, be executed with the formalities of a Florida will. This Court expressed the same view in *Hunson.* And it was the only part of Hanson the Legislature did not change by statute.").

In actuality, Hunson does *not* announce that a trust in which the settlor is the sole trustee is a testamentary disposition for that reason alone; Hanson involved a third-party trustee, and it announces only that a trust in which the settlor retains total control during his or her lifetime is a testamentary disposition requiring compliance with the Statute of Wills -- an announcement which is clearly no longer the law after §689.075. Ms. Zuckerman's position therefore depends in its entirety upon a misreading of Humon, and her position is clearly a chimera as a result. In any event, if the Court should conclude that *Humon* does announce that a trust is rendered a testamentary disposition by the single fact that the settlor is the sole trustee, it may overrule Hunson itself, of course (if it has not already done *so).* And because *Hunson* has no adherents anywhere anymore (as we will demonstrate), perhaps the easiest disposition of the issue presented here would be for this Court simply to overrule Hanson. That will not be necessary, however, unless the Court concludes, as Ms. Zuckerman contends, both that Hunson renders testamentary all trusts in which the settlor is the sole trustee and that the legislature left Hanson standing on that single point.

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> revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.

Restatement (Second) of Trusts, **$57 (1957).**

More recent Florida decisions follow this revised version of **$57. The** first to do so **was** *Lane v. Palmer First National Bank & Trust Co. of Sarasota,* 213 So.2d **301** (Fla. 2nd **DCA 1968).** In that case, the settlor created an ***inter vivos*** trust, naming a third party as trustee. The trust instrument reserved in the settlor a life estate in the income, **a** power to invade the corpus, **a** power of revocation, and a power to control the trustee. Justice Overton, then sitting as an associate judge on the district court of appeal, finessed Hanson as follows:

> It is well settled that the retention by the settlor of a power to revoke, modify and invade the corpus, in addition to the reservation of income for life, does not invalidate a trust. ***Williams v. Collier,* 120** Fla. 248, **158** So. **815, 162 So. 868; 1** Scott Trusts **474 §57.1** (3d ed. **1967);** Bogert, Trusts and Trustees, **531 §104** (2d ed. 1965); Restatement (Second) Trusts **557** (1959); Roth, The Revocable Inter Vivos Trust, **16** U.Fla.-L.Rev. **34, 43.** This court must determine in this case whether the power retained by the settlor Lane over the trustee is one power retained too many, and coupled with the other retained powers is of such cumulative effect that the instrument was not **a** trust but an agency agreement.
>
> The appellant, in contending the trust is invalid and illusory, relies upon the opinion of the Supreme Court of Florida in Hanson ***v. Denckla,* (Fla. 1956) 100 So.2d** 378, rev'd ***on other grounds*, 357** U.S. **235, 78** S.Ct. **1228,** 2 L.Ed.2d **1283 (1958),** ***conformed*** **106** So.2d **549** (Fla. **1958),** and particularly that portion which holds the settlor exercised too much control over the trustee, and quotes approvingly Scott, Trusts, and the Statute of Wills, 43 Harv.Rev. **521,529,** and the Restatement of Trusts (1935) **§§56, 57.**
>
> **The** trust in ***Hanson v. Denckla, supra,*** is not entirely the same as the trust now before the court. In *Hanson* the settlor retained the power of appointment which was exercised frequently. The Lane trust did not contain a power of appointment. Both trusts allowed the settlor to retain the power of control over the trustee. In ***Hanson*** it allowed the settlor to

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change the trustee and designate an advisor who had the power of investment management over the trust property. In the Lane trust the power of control over the trustee was personal in the settlor rather than residing in part in an advisor.

Hanson v. Denckla, supra, was prolific in its production of text commentaries and law review notes and articles. 1 Scott, Trusts 491 §57.2 (3d ed. 1967); 72 Harv.L.Rev. 695; **11** Stan.L.Rev. **344; 11** U.Fla.L.Rev. **266; 16** U.Fla.L.Rev. **46.** §57 of the original Restatement of Trusts **(1935)** cited by the court in Hanson ***v.*** Denckla has been rewritten in the Restatement of Trusts (2d **1959)** and now clearly states an inter vivos trust may be valid even though it allows the settlor to retain not only the life income and the power to revoke or modify, but also the power to control the trustee.

Professor Scott and the other mentioned text authorities state that Hanson *v.* Denckla, supra, is a minority view. Because of this decision the revocable inter vivos trust in Florida must be approached with caution. This, in turn, has brought forth concern since trusts created in jurisdictions where they are valid may, after the settlor has retired to Florida and died, be held invalid.

It is the opinion of this court that a valid inter vivos trust instrument may be created in Florida even though it contains a power to control the trustee, in addition to being revocable and retaining the life income to the settlor in accordance with the provisions of §57 Restatement (Second) Trusts **(1959).** The Lane trust **now** before the Court is, therefore, on its face a valid inter vivos trust instrument.

It is distinguished from ***Hanson v.*** Denckla by the fact that the Lane trust does not contain a power of appointment. Further, there is no actual evidence of day-to-day control by the settlor, The power to control the trustee more than any of the other powers subjects it to severe scrutiny. If the settlor exercises day-to-day control over the trust property by the use of this power, then he has divested himself of nothing, and the trust is nothing but an agency agreement. Evidence of the actual operation of **a** trust during the life of a settlor and the actual control exerted by him may properly influence a court in determining the validity of the instrument. This is not an issue in this case, although it was in part in Hanson *v.* Denckla, ***supra.***

213 So.2d at 302-04 (footnotes omitted). In the instant case, of course, Ms. Khan's

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Declaration of Trust does not reserve a power of appointment, and the evidence contained in Mr. Alter's affidavits proves that Ms. Khan did not exercise day-to-day control over the trust property, but left the management of the brokerage account to him. If Lane correctly states present Florida law, then the revocable ***inter vivos*** trust in issue here is clearly valid.

The problem recurred in In re ***Estate of Herron,*** *237* So.2d **563** (Fla. 4th DCA 1970), in which another revocable ***inter vivos*** trust was challenged as an illusory "testamentary disposition" under ***Hanson.*** The district court rejected the challenge, stating that "we do not believe the Hanson case is controlling today." 237 So.2d at **566.** To support that statement, it cited a 1969 legislative enactment (which we will discuss in a moment); the decisions in ***Williams*** and ***Lane;*** and §57 of the Restatement (Second) of Trusts (1957). If ***In re Estate of Herron*** correctly states present Florida law, then the revocable ***inter vivos*** trust in issue here is clearly valid.

The problem recurred again in ***Litsey v. First Federal Savings & Loan Ass'n of Tampa,*** 243 So.2d 239 (Fla. 2nd DCA 1971), in which the Totten Trust doctrine was challenged as inconsistent with ***Hanson,*** since a Totten Trust is the paradigm example of an illusory "testamentary disposition" (because it reserves total control to the settlor, and conveys nothing of interest to the beneficiary until the death of the settlor). The district court rejected the challenge, stating that "[w]e doubt that *Hanson* is controlling today". 243 So.2d at 239. To support that statement, it cited the same 1969 legislative enactment relied upon in In ***re Estate of Herron.***

"hat statute, in its initial 1969 incarnation, read as follows:

> (1) An otherwise valid trust which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any of the following reasons:
>
> (a) Because the settlor or another person or both possess the power to revoke, amend, alter, or modify the trust in whole or in part;
>
> (b) Because the settlor or another person or bath possess the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal

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distributed;

(c) Because the settlot or another person or both possess the power ta add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times;

(d) Because the settlor or another person or both possess the power to remove the trustee or trustees and appoint a successor trustee or trustees;

(e) Because the settlor or another person or both possess the power to control the trustee or trustees in the administration of the trust;

(f) Because the settlor has retained the right to receive all or part of the income of the trust during his life or for any part thereof;

(g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sale trustee.

(2) When the settlor is made sole trustee, the trust instrument shall be executed in accordance with the formalities for the execution of wills required at the time of the execution of the trust instrument in the jurisdiction where the trust instrument is executed.

(3) The fact that any one or more of the powers specified in subsection (1) are in fact exercised once, or mare than once, shall not affect the validity of the trust or its nontestamentary character.

(4) This section shall be applicable to trusts executed before or after July 1, 1969 by persons who are living on or after said date.

Ch. 69-192, Laws of Florida.

It should at once be apparent that, with one exception, this 1969 statute adopted §57 of the Restatement (Second) of Trusts (1957), and effectively rendered *Hanson* (and its reliance upon §57 of the first Restatement) "dead letter."[18] The one exception is subsection (2), which requires that a trust instrument in which the settlor is made sole trustee must

[18] A recent excursion into the law of trusts by this Court relies on various sections of the Restatement (Second) of Trusts (1957), and its description of valid revocable ***inter vivos*** trusts is consistent with the Restatement's current version af **§57.** ***See*** Florida ***National Bunk of Palm Beach County v. Genova***, 460 So.2d 895 (Fla. 1984). Curiously, and notwithstanding their reliance upon *Hanson* below, the residuary beneficiaries relied upon *Genova* for **a** rather telling concession below: ". . . we follow the restatement second in Florida" (SR, 39).

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comply with the Statute of Wills. (In actuality, this requirement was not derived from *Hanson* at all; it was a new requirement supported by no prior decisional law. *See* footnote 17, supra.) If this provision were still the law, of course, our position here would be no position at all -- since Ms. Kahn named herself as trustee of the Norstar account. This provision is no longer the law, however, as we shall demonstrate in a moment. Before we explain, it is necessary to examine another event in our roughly chronological presentation of the development of the law governing this issue on appeal.

The problem next recurred in *Castellano v. Cosgrove*, 280 So.2d 676 (Fla. 1973). In that case, the validity of a pre-1969 Totten Trust was challenged on the ground that, because the settlor was the sole trustee, the trust was invalid for failure to comply with the Statute of Wills, according to subsection (2) of the new statute. This Court rejected that challenge, holding that this provision of Ch. 69-192 related only to trusts in real property, and that it could not be constitutionally applied retroactively to pre-1969 trusts in any event. The decision also observed that, in an extraordinary 1969 session of the legislature, subsection (2) had been amended to exempt Totten Trusts from its requirement for compliance with the Statute of Wills. *See* Ch. 69-1747, Laws of Florida.

Contemporaneously with *Castellano*, in Ch. 71-126, Laws of Florida (and a revisor's bill, Ch. 73-333, Laws of Florida), the legislature also amended subsection (2) of its initial attempt to overrule *Hanson* and moved the amended version to subsection (1)(g) -- so that the "settlor as sole trustee" provision read as follows by 1973:

> (1) An otherwise valid trust which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any of the following reasons:
>
> . . . .
>
> (g) Because the settlor is, at the time of the execution of the instrument or thereafter becomes, sole trustee; provided that at the time the trust instrument is executed, it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction.

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Section 689.075, Fla. Stat. (1973).

The statute was amended again in a minor way in 1974, and again in a major way in 1975. Ch. 74-78, Laws of Florida, and Ch. 75-74, Laws of Florida. The obvious purpose of the 1975 amendment was to reject this Court's declaration in *Castellano* that the statute applied only to trusts in real property, and thereby ensure that *Hanson* was no longer good law in any area of the law of trusts, including the law governing revocable inter *vivos* trusts in both real and personal property. By 1975, the Statute read as follows:

> **689.075 Inter vivos trusts; powers retained by settlor.--**
>
> (1) A trust which is otherwise valid, including, but not limited to, a trust the principal of which is composed of real property, intangible personal property, tangible personal property, the possible expectancy of receiving as a named beneficiary death benefits as described in s. 733.808, or any combination thereof, and which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:
>
> (a) Because the settlor or another person or both possess the power to revoke, amend, alter, or modify the trust in whole or in part;
>
> (b) Because the settlor or another person or both possess the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;
>
> (c) Because the settlor or another person or both possess the power to add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times;
>
> (d) Because the settlor or another person or both possess the power to remove the trustee or trustees and appoint a successor trustee or trustees;
>
> (e) Because the settlor or another person or both possess the power to control the trustee or trustees in the administration of the trust;
>
> (f) Because the settlor has retained the right to receive all or part of the income of the trust during his life or for any part thereof;
>
> (g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee; provided that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is

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executed in accordance with the formalities for the execution of wills required in such jurisdiction.

(2) Nothing contained herein shall affect the validity of those accounts, including but not limited to bank accounts, share accounts, deposits, certificates of deposit, savings certificates, and other similar arrangements, heretofore or hereafter established at any bank, savings and loan association, or credit union by one or more persons, in trust for one or more other persons, which arrangements are, by their terms, revocable by the person making the same until his death or incompetency.

(3) The fact that any one or more of the powers specified in subsection (1) are in fact exercised once, or more than once, shall not affect the validity of the trust or its nontestamentary character.

(4) This section shall be applicable to trusts executed before or after July **1, 1969,** by persons who are living on or after said date. However, the requirement of conformity with the formalities for the execution of wills as found in paragraph (1)(g) shall not be imposed upon any trust executed prior to July **1, 1969.**

(5) The amendment of this section, by chapter 75-74, Laws of Florida, is intended to clarify the legislative intent of this section at the time of its original enactment that it apply to all otherwise valid trusts which are created by written instrument and which are not expressly excluded by the terms of this section and that no such trust shall be declared invalid for any of the reasons stated in subsections (1) and (3) regardless of whether the trust involves or relates to an interest in real property.

Section 689.075, Fla. Stat. **(1975).** That is the version of the statute that was in effect when Ms. Khan executed the Declaration of Trust in issue here in 1982 (and that is the current version of the statute).

The aspect of this statute which is critical to the instant case, of course, is subsection (1)(g):[19]

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[19] Although conceding that subsection **(4)** *of* this statute is merely an "effective date" provision, rather than a substantive requirement, Ms. Zuckerman argues that it requires the Court to read subsection (1)(g) as containing a requirement for conformity with the Statute of Wills. The district court explained the fallacy of this argument in its thorough and thoughtful opinion on rehearing, and instead of repeating that lengthy explanation here, **we** simply refer the Court to that opinion. We note the following briefly, however: because some versions of the statute which existed after 1969 *did* require compliance with the Statute

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> **(1)** a trust which is otherwise valid shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:
>
> . . . .
>
> **(g)** Because the settlor is, at the time of the execution of the instrument, or thereafter becomes sole trustee; provided that at the time the trust instrument is executed, it is either valid under **the** laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction.

It was the residuary beneficiaries' position below (and it is Ms. Zuckerman's position here) that this provision means that all Florida ***inter vivos*** trusts in which the settlor is the sole trustee are invalid unless they comply with the Statute of Wills (SR. 39-40). Not even *Hanson* went that far, of course. See footnote 17, ***supra.*** And since the obvious thrust of **5689.075** (in its several versions from **1969** to **1975)** was to ***reject*** the much less stringent limitations placed on the validity of ***inter vivos*** trusts by ***Hanson,*** and thereby considerably liberalize the law of Florida in favor of the validity of ***inter*** vivos trusts, the Court will be hard-pressed to find any legislative intent for such a reading of the statute. ***See*** Kent ***v. Katz,*** *528* So.2d 422 (Fla. 4th DCA 1988) ($689.075 clearly designed to liberalize law governing ***inter vivos*** trusts and protect them from the range of attacks theretofore available).[20]

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of Wills, it was perfectly appropriate for the legislature to specify, in the spirit of ***Castellano,*** that no version of the statute post-dating July **1,1969,** which might have required compliance with the Statute of Wills should be imposed on any trust executed prior to that date, and that, we believe, is all that the legislature meant in its qualifying second sentence of subsection (4). The substantive aspect of the statute is subsection (1)(g), and that is therefore the subsection which governs the issue before the Court.

[20] Additional legislative history is collected in the district court's opinion on rehearing, to which the Court is referred. Ms. Zuckerman responds by quoting **a** brief statement made by a legislator on the floor of the House in 1971. The statement is not in the record, and it has not been authenticated in any way here. It also represents only one legislator's perception of the purpose of the **1971** amendment, so it is obviously of little probative value here, even if it has been accurately reproduced. More importantly, our construction of the statute accomplishes exactly what the legislator's remarks say the amendment was designed to accomplish -- to prevent the invalidation of an ***inter vivos*** trust if it was valid in the jurisdiction in which it was executed -- for ***both*** Florida residents and persons **moving** to Florida from another jurisdiction, and nothing in the legislator's remarks is inconsistent with

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Neither will the Court find any support for Ms. Zuckerman's reading of the statute in the language of the statute itself.[21] If the legislature had meant that all Florida trust instruments in which the settlor is made sole trustee must comply with the Statute of Wills,

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that construction. There is also nothing in the legislator's remarks which even arguably suggests that Florida residents were intended to be held to more rigorous formalism than persons moving to Florida from another jurisdiction. In fact, the legislator's remarks appear to controvert Ms. Zuckerman's construction of the amendment, because they specifically define the phrase "valid under the laws of the jurisdiction in which it is executed" as "valid under the laws of *this state* or in the jurisdiction in which it was executed . . ." (petitioner's appendix; emphasis supplied) -- which is essentially the manner in which the district court construed the 1971 amendment. In short, the legislator's remarks provide little to no guidance at all on the issue presented here.

[21] The construction which Ms. Zuckerman purports to derive from the remarks of the legislator included in her appendix simply cannot be derived from the language of the statute. Ms. Zuckerman's position is that subsection (1)(g) should be "construed" to mean the following:

> (1) A trust which is otherwise valid . . . shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:
>
> . . . .
>
> (g) because the settlor is, at the time of the execution of the instrument, or thereafter becomes sole trustee; provided that at the time the trust instrument is executed [in any jurisdiction other than Florida], it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction[, but if the trust instrument is executed in Florida, it must be executed in accordance with the formalities for the execution of wills required in Florida].

Most respectfully, the statute, as written, does not draw the distinctions contained in the brackets, and it cannot be "construed" to include the bracketed distinctions without completely rewriting it and giving it an entirely different meaning. As written, if the second alternative basis for validity set forth in the statute applies to trust instruments executed in Florida (as Ms. Zuckerman contends), then the first alternative basis for validity must also apply to Florida trusts -- because the "jurisdiction" referred to in the second alternative ("such jurisdiction") is the same "jurisdiction" referred to in the first alternative. Ms. Zuckerman's construction of the statute is therefore affirmatively disproven by the face of the very statute which she seeks to have rewritten here, As the district court observed below: "Indeed, if the word 'jurisdiction' in the proviso in paragraph (1)(g) means 'foreign jurisdiction,' then (1) the proviso does not apply to inter vivos trusts executed in Florida, and (2) any such Florida trust is governed by the general requirements of subsection 689.075(1) -- which the trusts in the present case satisfy." Alter *v.* Zuckerman, *585* So.2d 303, 311 n. 8 (Fla. 3rd DCA 1991).

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then it could plainly have said so, as it did in the initial 1969 incarnation of the statute:

> (2) When the settlor is made sole trustee, the trust instrument shall be executed in accordance with the formalities for the execution of wills required at the time of the execution of the trust instrument in the jurisdiction where the trust instrument is executed.

But the legislature was obviously unhappy with this initial version of the statute, because it rather pointedly amended it shortly thereafter, to provide ***two*** grounds for recognizing the validity of an *inter vivos* trust in which the settlor is the sole trustee -- and it pointedly separated those two grounds with the words "either" and "or": "provided that at the time the trust instrument is executed, it is ***either*** valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction" (emphasis supplied).

Ms. Zuckerman's position is therefore that the statute, as amended, means exactly the same thing that it said before it was changed -- and that the first ground for validity expressed in the statute is exactly the same ground as the second ground for validity expressed in the statute, notwithstanding that the two grounds are separately stated and then purposely separated by the alternative word "or." The statute is a patchwork quilt, to be sure, and it therefore lacks the clarity which ought to have been the legislature's goal in this difficult area -- but clear or not, there should be no need to belabor the obvious impermissibility of Ms. Zuckerman's reading of the statute. Surely, the first ground for validity expressed in subsection (1)(g) is a ***different*** ground than the second (which is essentially what Mr. Alter argued in response below, at SR.49), and the only relevant inquiry here is the meaning of the phrase "at the time the trust instrument is executed it is . . . valid under the laws of the jurisdiction in which it is executed."[22]

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[22] It is the lack of clarity in the statute which has provoked the "trust law expert" or two (cited at pages 10-11 of the petitioner's brief) to recommend that prudent practitioners obtain the signature of two witnesses on one-party trusts. Given the imbroglio created by the trial court's rulings in the instant case, that is certainly good advice -- but it hardly

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We submit that there is only one sensible way to read this phrase and only one sensible way to give both alternative grounds stated in subsection (1)(g) their separate effect -- and that is to read the statute as incorporating §§56 and 57 of the Restatement (Second) of Trusts (1957) into the law of Florida, which (with the exception of the brief aberration in *Hanson*) is what the Florida courts had already done in the first place. In other words, as §57 states, if the settlor has created a ***valid*** inter ***vivos*** trust during her lifetime by passing a present interest (a "contingent equitable interest in remainder") to the beneficiary during her lifetime, then the disposition is not testamentary (and the Statute of Wills is therefore inapplicable), and the fact that the settlor has named herself as sole trustee does not invalidate the otherwise valid trust. On the other hand, as §56 states, if the settlor has failed to create a valid trust by passing a present interest to the beneficiary during her lifetime, then the disposition is testamentary and will be valid under Florida law only if the instrument "is executed in accordance with the formalities for the execution of wills." In our judgment, there is no other sensible reading of subsection (1)(g), unless the phrase "it is either valid under the laws of the jurisdiction in which it is executed or" is to be altogether ignored.[23/]

Settled rules of statutory construction fully support our reading of the statute. For

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answers the question of whether two signatures are required by 0689.075 to create a valid inter *vivos* trust in Florida.

[23/] Ms. Zuckerman argues that our construction of the statute renders its "meaningless, if not absurd, for Florida trusts," because it allows an inter ***vivos*** trust containing "testamentary aspects" to serve as a will without meeting the formal requirements of the Statute of Wills (petitioner's brief, p. 22). This argument derives from the same critical misunderstanding of the law of trusts which pervades Ms. Zuckerman's entire brief. Our construction of the statute allows no such thing. An ***inter vivos*** trust, like the one in issue here, which passes a present interest to the beneficiary during the settlor's lifetime is simply not a "testamentary disposition," so our construction of the statute does not allow "testamentary dispositions" which do not meet the requirements of the Statute of Wills. Section 57, Restatement (Second) of Trusts. If the trust ***is*** invalid because testamentary, as where it fails to pass a present interest to the beneficiary during the settlor's lifetime, then it must comply with the Statute of Wills. Section 56, Restatement (Second) of Trusts. That is neither "meaningless" nor "absurd"; that is the law according to the Restatement, and it is the law nearly everywhere.

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example, it is settled that the legislature's use of the word "or" is ordinarily meant to create disjunctive alternatives:

> . . . We first note the word "or" is generally construed in the disjunctive when used in a statute or rule. *Telophase Society* of *Florida, Inc. v. State Board of Funeral Directors & Embalmers,* 334 So.2d 563 (Fla. 1976). The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended. *United States v. Garcia,* 718 F.2d 1528 (11th Cir. 1983), *affirmed,* 469 U.S. 70, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984); Brown v. Brown, 432 So.2d 704 (Fla. 3rd DCA 1983), *review dismissed,* 458 So.2d 271 (Fla. 1984). . . .

Sparkman v. McClure, 498 So.2d 892, 895 (Fla. 1986). That principle of statutory construction ought to be especially compelling when the legislature uses the clearly disjunctive words "either. . . or," and the *two* grounds of validity in §689.075(1)(g) therefore must be considered as separate alternatives, not two ways of saying the same thing,

It is also settled that an *amendment* to a statute is ordinarily taken to reflect a purposeful change in the statute -- to provide it with a different meaning than it had before the amendment:

> The rule of construction, instead, is to assume that the legislature by the amendment intended it to serve a useful purpose. *Sharer v. Hotel Corp.* of *America,* 144 So.2d 813,817 (Fla. 1962); *Webb v. Hill,* 75 So.2d 596, 603 (Fla, 1954). Likewise, when a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment. . . .

Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977), quoting *Arnold v. Shumpert,* 217 So.2d 116, 119 (Fla. 1968).

The point is stated similarly in *State v. Zimmerman,* 370 So.2d 1179, 1180 (Fla. 1979):

> It is an axiom of statutory construction that the legislature would not enact a purposeless and therefore useless piece of legislation. *Sharer v. Hotel Corporation of America,* 144 So.2d 813 (Fla. 1962). It is the judiciary's duty to uphold and give effect to all provisions of a legislative enactment, and to adopt any reasonable view that will do so. *Tyson v. Lanier,* 156 So.2d 833 (Fla. 1963).

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Accord, Girard Trust Co. v. Tampashores Development Co., 95 Fla. **1010,** 117 So. **786 (1928);**[24] ***Bacon v. Marden*, 518** So.2d **925** (Fla. 3rd DCA **1987).** Given this principle, it simply must be assumed that the disjunctive alternative added after the initial 1969 version of the statute meant to add an additional and different ground for validity of a settlor trust than mere compliance with the Statute of Wills.

Finally, there is the settled principle that the common law, as developed by the judiciary, will not be deemed displaced unless the legislature's intent to do **so** is clearly and plainly expressed:

> Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. . . .

Carlile, supra at ***364. See*** **49** Fla. Jur. 2d, ***Statutes,*** §192 (and decisions cited therein),

Although the provision in the 1969 version of the statute requiring that settlor trusts comply with the Statute of Wills plainly displaced the common law of Florida in this area, the later amendment of the statute appears to relax this displacement and reinstate the common law concerning the validity of ***inter vivos*** trusts. Given the rule that the common law prevails unless clearly repealed, surely an amendment which appears to ***reinstate*** the

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[24] The Court will find the ***Girurd Trust Co.*** decision particularly instructive here. In that case, **a** statute plainly provided that foreign trust companies not chartered under Florida law could perform no functions in Florida. The statute was subsequently amended by adding **a** "provided that" provision stating that the statute did not apply to the passing of legal title to **a** trust estate. When a foreign trust company brought suit in Florida ***to*** foreclose a mortgage it held as trustee, the defendants demurred on the ground that the statute's prohibition prevented the trust company from suing in Florida. This Court disagreed. It held that the amendment must have had some useful purpose, or it would not have been enacted -- and that it must therefore be construed to authorize all otherwise expressly prohibited functions if related to the passing of title to a trust estate, including the ability to foreclose a mortgage in Florida, else the amendment would have amounted to nothing,

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common law, if ambiguous, ought to be construed in favor of the common law, rather than the other way round. **See** Bacon *v. Marden*, 518 So.2d 925 (Fla. 3rd DCA **1987)** (where legislature amends statute by omitting provision contrary to common law, it would be assumed that it intended to reinstate the common law). As we have demonstrated, at the time the legislature first entered this field, the common law in Florida was reflected by §§56 and **57** of the Restatement (Second) of Trusts (1957) (and not even *Hanson* required compliance with the Statute of Wills simply because a settlor was the sole trustee) -- and since the only logical construction of the present version of §689.075(1)(g) is consistent with that common law, absent a plain and unambiguous statement to the contrary (which is clearly not there), that is the manner in which it ought to be construed.

In addition to the decision under review, another recent decision on the question is consistent with our reading of the statute. In In re *Estate* of Pearce, 481 So.2d 69 (Fla, 4th **DCA** 1985), *review denied,* **491** So.2d **280** (Fla. 1986), Rosa Pearce set up an inter *vivos* trust in which she, as trustee, held the stock of a corporation (which, in turn, owned her real estate), for the benefit of several beneficiaries. Unfortunately, the stock certificates were issued in her name, individually, rather than in her capacity as trustee. After her death, her estate brought an action to recover the stock as assets of the estate. The beneficiaries contended that the stocks were held in trust for them. The district court held that a valid inter *vivos* trust in personal property could be created in Florida **by** oral declaration; that it could be proven by parol evidence; and that Ms. Pearce's trust was valid, and the assets of the trust therefore **beyond** the reach of the estate. This recent decision is, of course, exactly contrary to Ms. Zuckerman's position here -- that all settlor trusts in Florida must be in writing, signed by the settlor and witnessed by two attesting witnesses.[25/]

[25/] Ms. Zuckerman attempts to distinguish this case by positing that Ms. Pearce's trust contained "no testamentary aspects." Of course, Ms. Kahn's trust contains "no testamentary aspects" either, if §57 of the Restatement (Second) of Trusts is the law of Florida. In any event, the trust **at** issue in Estate *of Pearce* is legally indistinguishable from the trust in issue here, and Ms. Zuckerman's attempt to distinguish it is facile, For additional decisions

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In short, our reading of 5689.075 is consistent with the national consensus reflected in the Restatement (Second) of Trusts (1957); it is consistent with the Florida decisional law; and it is consistent with the several rules of statutory construction by which its meaning must be ascertained. In contrast, Ms. Zuckerman's reading of the statute is consistent only with the initial 1969 incarnation of the statute; it depends upon attributing ***no meaning*** at ***all*** (or an insupportable meaning, inconsistent with its language) to the language ***added*** to that statute shortly thereafter ***(see*** footnote 21, ***supra);*** and it depends upon attributing a holding to *Hanson* which does not appear there at all ***(see*** footnote 17, ***supra).*** Ms. Zuckerman's position also means that no ***inter vivos*** trust in which the settlor is trustee -- no matter how carefully it has been documented in writing, and no matter how many years it has been in active existence prior to the settlor's death -- can ever be valid at the instant of the settlor's death, unless it has been cast in the form of a Last Will and Testament, as required by a statute which is addressed only to Wills, and which does not even mention ***inter vivos*** trusts. For all its now discredited faults, not even *Hanson* went that far -- and we respectfully submit that 5689.075, Fla. Stat., evidences no intention to impose such draconian formalism upon the law of trusts in Florida.[26]

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holding that trusts in personalty can be created by oral declaration, see In ***re Estate of Craft,*** 320 So.2d 874 (Fla. 4th DCA 1975), ***cert. denied,*** 336 So.2d 105 (Fla. 1976); ***Rosen v. Rosen,*** 167 So.2d 70 (Fla. 3rd DCA 1964); ***Fraser v. Lewis,*** 187 So.2d 684 (Fla. 3rd DCA 1966).

[26] Ms. Zuckerman argues that this draconian formalism is necessary because a settlor trust "possesses the same risks of fraud as a will" (petitioner's brief, p. 23). That assertion is simply wrong. Unlike a will, which is usually opened only at the testator's death (at a time when the testator is not available to confirm it or disclaim it), the trust in issue here was created ***four*** years before Ms. Kahn's death; she transferred assets into it; she managed it (with Mr. Alter's assistance); she received monthly statements concerning it; and it is proven by a paper trail which was four years long before she died. Surely, if Ms. Kahn had not meant to do what the trust instrument said, she had ample time to disclaim it during her lifetime; and because she clearly confirmed it during her lifetime, it is simply absurd to suggest that a second witness's signature upon the trust instrument was necessary to ensure that the document was not a fraud. And that, of course, is one of the reasons why the American Law Institute adopted §57 of the Restatement (Second) of Trusts in the first place. See pages 28-29, supra.

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We also respectfully submit that the June 11, 1982, Declaration of Trust in issue here created a valid inter vivos trust by transferring a present interest to Mr. Alter four years before Ms. Kahn's death, and it did not automatically become invalid four years later simply because it was witnessed by one, rather than two, attesting witnesses. The trial court erred in concluding otherwise, and the district court correctly reversed this aspect of Ms. Zuckerman's summary final judgment.

V. CONCLUSION

It is respectfully submitted that the 1st Nationwide account was, as a matter of law, a valid Totten Trust (or, at minimum, that the residuary beneficiaries did not carry their procedural burden of conclusively demonstrating that it was not). It is also respectfully submitted that the June 11, 1982, Declaration of Trust which gave rise to the Norstar account was, as a matter of law, a valid inter vivos trust. The assets of both of those trusts belonged to Mr. Alter at the time of Ms. Kahn's death -- not to Ms. Zuckerman -- and the trial court erred in concluding otherwise and in ordering those assets to pass contrary to Ms. Kahn's express intent. The district court correctly reversed Ms. Zuckerman's summary final judgment and its decision should be approved,

Respectfully submitted,

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APPENDIX