

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

In the Matter of the Estate of Leonhard F. Feldmann,  
Deceased

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Gerald O. Feldmann, Former Personal Representative and  
Personal Representative of the Estate of Dena Feldmann,

Petitioner and Appellee,

v.

Shannon Evans,

Respondent and Appellant,

and,

Karlice E. Valencia, Dena Feldmann, deceased; American  
Trust Center, Successor Personal Representative,

Respondents and Appellees.

**Supreme Court No:  
20170034**

**Golden Valley County  
Case No. 17-2011-PR-28**

**BRIEF OF RESPONDENT AND APPELLEE AMERICAN TRUST CENTER,  
SUCCESSOR PERSONAL REPRESENTATIVE**

APPEAL FROM THE MEMORANDUM OPINION FILED DECEMBER 8, 2016,  
AND ORDER APPROVING THE INVENTORY AND APPRAISEMENT AND  
PROPOSED DISTRIBUTION OF ESTATE ASSETS FILED DECEMBER 30, 2016,  
BY THE GOLDEN VALLEY COUNTY DISTRICT COURT, SOUTHWEST  
JUDICIAL DISTRICT, HONORABLE RHONDA R. EHLIS.

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## **I. STATEMENT OF THE ISSUES**

[¶ 1] Whether the district court was clearly erroneous when it found that the farm machinery owned by Leonhard Feldmann during his life was gifted to Gerald O. Feldmann prior to Leonhard's death.

[¶ 2] Whether the district court abused its discretion when it awarded the wheat crop proceeds to Gerald O. Feldmann.

## **II. STATEMENT OF THE CASE**

[¶ 3] The district court found that Leonhard Feldmann ("Leonhard") gave all of his farm equipment and machinery to Gerald Feldmann ("Gerald") prior to his death in 2011. This Court should uphold the lower court's ruling as it was not clearly erroneous.

[¶ 4] This Court should also find that the district court did not abuse its discretion in awarding the 2011 wheat crop proceeds to Gerald. The district court applied the proper legal precedent to the facts of this case. Therefore, the district court did not abuse its discretion.

## **III. STATEMENT OF THE FACTS**

[¶ 5] Leonhard Frederick Feldmann (hereinafter, the "Leonhard") died testate on September 4, 2011, at the age of 93 years old. Appellant's App. 1. At the time of his death, Leonhard left one son, Gerald Feldmann (hereinafter, "Gerald"), and two daughters, Shannon Evans (hereinafter, "Shannon") and Karlice Valencia (hereinafter, "Karlice"). Appellant's App. 1-2.

[¶ 6] Leonhard executed a will on November 20, 2007. Appellant's App. 16-21. Pursuant to Article V of Leonhard's will, Gerald received all of the real property that Leonhard owned at the time of his death. Appellant's App. 17. Additionally, Article V

specifically devises the sum of \$30,000 to Leonhard's sister, Dena Feldmann. Appellant's App. 17.

[¶ 7] Pursuant to Article VI, Leonhard gave "all of the rest of my property, of whatever character, to which I or my estate is in anyway entitled at the time of my death, hereafter referred to as my 'Residuary Estate', to my daughters: Shannon Feldmann Evans . . . and Carlice Feldmann Valencia . . . in equal shares and share alike." Appellant's App. 18.

[¶ 8] On September 20, 2011, Leonhard's Last Will and Testament (hereinafter, the "will") was submitted to the district court by his son, Gerald. Appellant's Br. ¶ 11. At this time, Gerald also filed his Application for Informal Probate of Will and Appointment of Personal Representative. Appellant's Br. ¶ 11.

[¶ 9] The district court subsequently signed Letters Testamentary appointing Gerald as Personal Representative of the Estate of Leonhard Frederick Feldmann. Appellant's Br. ¶ 12.

[¶ 10] On March 22, 2012, Gerald, as Personal Representative, signed an Inventory and Appraisement containing "all the property owned by the decedent at the time of his death on September 4, 2011, so far as is known to the personal representative." (hereinafter, "first Inventory"). Appellant's App. 22-24. Shortly thereafter, Shannon objected to the first Inventory taking the position that it did not include all of the machinery and farm equipment Leonhard owned at his death. Appellant's Br. ¶ 13.

[¶ 11] On October 25, 2012, Gerald signed a second Inventory and Appraisement (hereinafter, "second Inventory"). Appellant's App. 25-28. This second Inventory included all of the machinery and farm equipment at issue. See Appellant's App. 26-27.

The second Inventory also included, as Personal Property Item Number 28, the 7,133.31 bushels of wheat that were sold on the estate's account. Appellant's App. 26.

[¶ 12] On November 13, 2012, Karlice executed a Bill of Sale in favor of Shannon, which transferred Karlice's ownership in "All personal property including tools, machinery, and remaining household goods from the Estate of Leonhard F. Feldmann." Appellant's App. 31.

[¶ 13] On February 25, 2016, following Shannon's Petition to Remove Personal Representative for Breach of Fiduciary Duty and Conflict of Interest, Gerald agreed to resign as Personal Representative, and all parties stipulated to the appointment of American Trust Center, Dickinson, North Dakota as Successor Personal Representative. Appellant's Br. ¶ 18.

[¶ 14] On February 26, 2016, Successor Letters Testamentary were issued appointing Russell R. Murphy, American Trust Center, as Successor Personal Representative. Appellant's Br. ¶ 19.

[¶ 15] On October 25, 2016, the district court held a hearing regarding a final Inventory and Appraisal for Leonhard's estate and the proposed distribution of estate assets. Appellant's Br. ¶ 20. At the hearing, a final Inventory and Appraisal was submitted by American Trust Center as Personal Representative for the Estate of Leonhard Frederick Feldmann (hereinafter, "final Inventory"). Appellant's App. 11-13. The final Inventory did not include the farm equipment and machinery at issue in this appeal. See Appellant's App. 11-13.

[¶ 16] Specifically, the following farm equipment and machinery and the respective value of each were not included on the final Inventory: (1) 1990 IHC tractor, \$32,000.00;

(2) 1993 773 Bobcat, \$12,000.00; (3) 2001 Ford F1550 Reg, 4x2, \$5,500.00; (4) 1996 Ford 250, \$4,500.00; (5) 1981 IHC 2½ Ton Truck, \$2,500.00; (6) 1979 IHC 2½ Ton Truck, \$2,500.00; (7) 1961 Chevy 2 Ton Truck, \$2,000.00; (8) 1936 Ford 1½ Ton Truck, \$1,500.00; (9) 1994 14 foot stock trailer, \$1,100.00; (10) 1970 GMC 2 Ton Truck, \$800.00; (11) Turning Lathe, \$1,800.00; (12) Milling Machine, \$780.00; (13) 4690 Case 1980, \$5,000.00; (14) 3 unit 9350 disc drills, \$2,000.00; (15) 3 unit 9450 hoe drills, \$7,000.00; (16) 48' Summers harrow, \$4,000.00; (17) NS combine (not running since 2005), \$1,000.00; (18) 24' Haybuster blade plow, \$300.00; (19) 31' x 7" Westfield auger, \$375; (20) 1020 JD Tractor, \$3,000.00; (21) 07n2 10W V rake, \$300.00; (22) 41' #1400 Vibra chisel, \$500.00; (23) 215 spray Coupe, \$4,500.00; (24) 8050 AC tractor (81), \$8,250.00; (25) 8825 Swather, 2 heads, \$16,500.00; (26) IHC corn planter, \$100.00; (27) Hesston stakhand 30A, \$100.00; (28) 21' AC disc #2300, \$750.00; (29) IHC baler #37 square, \$375.00; (30) 51' x 8" Farm King auger, \$700.00; (31) Potato digger, \$200.00; (32) Bale loader, \$400.00; (33) NH Side delivery rake, \$400.00; (34) Grain cleaner and cart, \$200.00; (35) Case plow, \$50.00; (36) BN Ford, \$1,000.00.

#### **IV. STANDARD OF REVIEW**

[¶ 17] Appellant argues that the lower court erred when it found Leonhard transferred the farm equipment and machinery to Gerald prior to his death. Appellant's Br. ¶ 25. "Findings of fact... whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." N.D.R.Civ.P. 52. The district court's decision will only be set aside on appeal if "it is induced by an erroneous view of the law, no evidence exists to support it, or, on the entire record, we are left with a definite and



firm conviction a mistake has been made.” Vandal v. Leno, 2014 ND 45, ¶ 6, 843 N.W.2d 313 (emphasis added) (citing Smith v. Martinez, 2011 ND 132, ¶ 3, 800 N.W.2d 304); SNAPS Holding Company v. Leach, 2017 ND 140, ¶ 19, 895 N.W.2d 763 (citing Lagerquist v. Stergo, 2008 ND 138, ¶ 10, 752 N.W.2d 168).

[¶ 18] “The credibility of witnesses and the weight to be given their testimony is for the trier of fact” and not the appellate court. Klundt v. Pfeifle, 77 N.D. 132, 140, 41 N.W.2d 416, 420 (1950). Under the clearly erroneous standard, the Court does “not reweigh evidence, reassess witness credibility, retry a custody case, or substitute [the Court’s] judgment for the trial court’s decision merely because this Court may have reached a different result.” Hammeren v. Hammeren, 2012 ND 225, ¶ 8, 823 N.W.2d 482 (citing Morris v. Moller, 2012 ND 74, ¶ 5, 815 N.W.2d 266; Miller v. Mees, 2011 ND 166, ¶ 12, 802 N.W.2d 153). The Court “defer[s] to the district court’s opportunity to observe and assess the credibility of witnesses.” Heinle v. Heinle, 2010 ND 5, ¶ 19, 777 N.W.2d 590 (quoting Dronen v. Dronen, 2009 ND 70, ¶ 12, 764 N.W.2d 675).

[¶ 19] “[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. Peterson v. Hart, 278 N.W.2d 133, 136 (N.D. 1979). When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” Peterson, 278 N.W.2d at 136 (citing Bank of Sun Prairie v. Opstein, 273 N.W.2d 279, 282 (Wis. 1979)). The trial court is the judge of the credibility of the witnesses and the weight to be given their testimony. Peterson, 278 N.W.2d at 136. The trial court alone can observe the witnesses, judge their qualifications, appraise their credibility, and resolve the conflicts in the evidence. Id. When there is

substantial evidence upon which the decision might have gone either way, it necessarily follows that a decision either one way or the other cannot be clearly erroneous. Id. It is thus not sufficient to show that there is substantial evidence, which, if believed by the fact finder, would support the appellant's point of view. Id. Hence, “[a] choice between two permissible views of the weight of the evidence is not clearly erroneous.” Hammeren, 2012 ND 225, ¶ 8, 823 N.W.2d 482 (citing Duff v. Kearns-Duff, 2010 ND 247, ¶ 5, 792 N.W.2d 916); Vandal, 2014 ND 45, ¶ 6, 843 N.W.2d 313.

[¶ 20] Appellant also argues that the lower court erred when it awarded the 2011 wheat crop proceeds to Gerald. Appellant’s Br. ¶ 7. This Court reviews a district court’s “determination of discretionary matters under an abuse of discretion standard.” Kauk v. Kauk, 2017 ND 118, ¶ 10, 895 N.W.2d 295. A district court “abuses its discretion when its acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.” Mid Dakota Clinic P.C. v. Livengood, 2017 ND 99, ¶ 6, 892 N.W.2d 888 (quoting Norberg v. Norberg, 2017 ND 14, ¶ 7, 889 N.W.2d 889). “An abuse of discretion by the district court is never assumed, and the burden is on the complaining party to affirmatively establish an abuse of discretion.” In re Estate of Cashmore, 2010 ND 159, ¶ 21, 787 N.W.2d 261. The Appellant must show more than that the district court “made a ‘poor’ decision, but that it positively abused the discretion it has.” Id.

## **V. LAW AND ARGUMENT**

[¶ 21] This Court must address two issues. The first issue is whether certain farm equipment claimed by Gerald should be considered property of the estate or whether it is Gerald’s separate property. The second issue is whether the proceeds from the sale of

grain should be distributed as part of the residue of the estate or whether it goes to Gerald as part of the specific devise of the real property.

**A. The district court was not clearly erroneous when it found that Leonhard Feldmann had gifted the farm machinery and equipment to Gerald Feldmann prior to Leonhard Feldmann's death**

[¶ 22] The district court was not clearly erroneous in ruling that the farm equipment was gifted to Gerald prior to Leonhard's death. Gerald Feldmann's position is that items listed specifically as 16-23, 25-27, and 32-34 on the first Inventory filed with the district court, Appellant's App. 22-24, as well as items listed as 59-82 on the second Inventory dated October 25, 2012 that was not filed with the Court, Appellant's App. 25-28, are his property, having been transferred to him by his father prior to his death under their informal agreement regarding the farm. See Pet. Hr'g Tr. 75:18-24, Oct. 25, 2016. Shannon disputes this and argues that all the equipment listed on the first Inventory filed on March 23, 2012, as well as all equipment listed on the second Inventory dated October 25, 2012, should be included in the residue of the estate. However, Karlice, contrary to her own self-interest as an equal devisee of the residue, agrees with Gerald and testified that the farm equipment was given to Gerald by their father prior to his death. Pet. Hr'g Tr. 13:15-19, 19:3-12.

[¶ 23] Specifically, Karlice testified that about two years prior to his death, she heard her father talking to Gerald on the phone about some of the equipment. See Pet. Hr'g Tr. 17:21-25. After talking to Gerald, Leonhard told Karlice that the equipment was "all Gerald's now." Pet Hr'g Tr. 22:11-15; see Pet. Hr'g Tr. 28:6-11. Although Karlice testified that she had no knowledge of the terms of any agreement between their father and Gerald regarding the farm equipment or how they operated the farm, Pet. Hr'g Tr.

29:3-20, she did state that she believed the farm equipment belonged to Gerald at the time of their father's death, Pet. Hr'g Tr. 13:15-19.

[¶ 24] Karlice also testified that she believed that it was her father's intent that Gerald receive all farm equipment. Pet. Hr'g Tr. 24:23-25. She stated that her father had a separate list of equipment that was to go to Gerald that was part of his Will. Pet. Hr'g Tr. 19:5-12. However, Karlice stated that version of her father's Will was never found and believes it may have been destroyed. Pet. Hr'g Tr. 19:14-17, 20:2-15; 21:2-3.

[¶ 25] Karlice acknowledged that she signed a Bill of Sale purportedly assigning her interest in the farm equipment to her sister, Shannon. Pet. Hr'g Tr. 15:1-7; see Appellant's App. 34-39. Karlice testified that she signed this Bill of Sale as part of a settlement to try to resolve the dispute between Shannon and Gerald, not because she believed the equipment should be part of the estate. Pet. Hr'g Tr. 15:6-16:5. The agreement between Shannon and Karlice was that in exchange for Karlice assigning the equipment and other estate property to Shannon, Shannon was to give the equipment to Gerald to resolve their dispute. Pet. Hr'g Tr. 15:9-13. Shannon obviously did not follow through on the purported agreement.

[¶ 26] Gerald testified that the agreement he had with his father was that he was given all the farm equipment in exchange for his dad keeping all the proceeds of any crops that were grown on Leonhard's land. Pet. Hr'g Tr. 69:10-12; see also Pet. Hr'g Tr. 73:17-22; Pet. Hr'g Tr. 75:25-76:3. Gerald stated this was the agreement he had with his father since at least 2004, Pet. Hr'g Tr. 75:18-24, which was approximately when Leonhard retired and Gerald did nearly all the farm work, see Pet. Hr'g Tr. 69:8-10. Gerald paid for all maintenance on the equipment, Pet. Hr'g Tr. 76:4-18, and treated the equipment as his

property after that time, Pet. Hr'g Tr. 76:22-77:1. Gerald has not charged the estate for any repairs to the equipment since his father's death. Pet. Hr'g Tr. 76:19-21.

[¶ 27] While acting as Personal Representative, Gerald did sign and file the first Inventory listing the equipment he now claims is his property. Appellant's App. 22-24. Gerald also signed a second Inventory dated October 25, 2012, that included the disputed equipment, but this Inventory was never filed. Appellant's App. 25-28. Gerald testified that he did not agree with either versions of the Inventory that were prepared by his prior attorney, but felt obligated to sign them. Pet. Hr'g Tr. 64:6-12. Gerald also testified that he never authorized his prior attorney to send a written offer to purchase the disputed equipment to Shannon's attorney. Pet. Hr'g Tr. 65:21-66:7. Gerald did acknowledge making a later offer to try settling this dispute, but believed he was effectively buying the equipment twice by doing so. Pet. Hr'g Tr. 5-8.

[¶ 28] Russ Murphy with American Trust Center, the successor PR, testified that after reviewing all the probate information, he received and speaking with Gerald and Leonhard's accountant, he was unable to determine what the agreement was between Gerald and Leonhard with the respect to the equipment or the farming operation. Pet. Hr'g Tr. 43:14-19. Mr. Murphy acknowledged that in his experience as a trust officer, it is not uncommon for there to be no formal agreement between family members with respect to the operation of a family farm and that things are often handled very informally. Pet. Hr'g Tr. 39:5-10. Mr. Murphy did state that depreciation schedules on a tax return could indicate ownership of equipment. Pet. Hr'g Tr. 54:24-55:2. However, no tax returns or depreciation schedules were introduced as evidence at the hearing. See Pet. Hr'g Tr. 2. Notably, Gerald testified that because the farm equipment was fairly old and

fully depreciated by Leonhard, his accountant told him that there was no benefit to listing this equipment on Gerald's tax return, which is why he never bothered to do so. Pet. Hr'g Tr. 72:22-73:3, 81:23-82:5.

[¶ 29] Gerald testified that the arrangement with his father since at least 2004 was that the farm equipment was transferred to Gerald. Pet. Hr'g Tr. 69:10-12, 75:20-22. Gerald further testified that the only reason why the farm equipment was listed on Leonhard Feldmann's tax returns was because they were already fully depreciated. Pet. Hr'g Tr. 72:15-73:3. It was simply an oversight not to remove them since there was no further tax benefit to be gained by either Leonhard or Gerald.

[¶ 30] Although undisputed by any evidence offered by Shannon, Gerald's testimony could obviously be considered self-serving. However, Karlice also testified that she believed her father had already given the farm equipment to Gerald at least two years before their father's death. Pet. Hr'g Tr. 13:15-19, 19:3-12. As a devisee of the residue of the estate, Karlice's testimony actually hurts her own interests, and thus would seem to be the most credible evidence offered at the hearing. Although Gerald did sign the first Inventory listing the disputed equipment as estate property, based on Gerald's and Karlice's testimony and the lack of any other credible evidence to the contrary, the district court was not clearly erroneous by ruling that the farm equipment had been gifted to Gerald prior to Leonhard's death.

**B. The district court did not abuse its discretion regarding the wheat crop proceeds issue.**

[¶ 31] The district court did not abuse its discretion when it ruled that the majority of the crop proceeds should go to Gerald as devisee of the real estate where the crops were still growing at the date of Leonhard's death.

[¶ 32] Gerald Feldmann's testimony regarding this issue is credible and undisputed. Gerald Feldmann testified that approximately 300 bushels of wheat were harvested prior to Leonhard's death with a value of \$2,450.70. Pet. Hr'g Tr. 75:2-9; Appellant's App. 4. The remaining bushels of wheat, valued at \$55,821.96, were therefore unharvested at Leonhard's death. Appellant's App. 4; Pet. Hr'g Tr. 38:3-11.

[¶ 33] Leonard's Will specifically devised the farmland to Gerald. See Appellant's App. 17. Pursuant to chapter 30.1-12, a decedent's real and personal property transfers to the persons to whom it is devised by the decedent's last will. N.D.C.C. § 30.1-12-01. The ownership of real property carries the presumption of the ownership of the natural products of the land and the annually sown crops. Zeigler v. Blecha, 59 N.D. 258, 229 N.W. 365, 366 (1930). This Court has specifically held that growing crops are part of the real property. Schilichenmayer v. Luithle, 221 N.W.2d 77, 83 (N.D. 1974) (citing Tanous v. Tracy, 55 N.D. 100, 212 N.W. 521, 522 (1927)). When land is transferred upon death to a devisee, the crops planted prior to the decedent's death also transfer to the devisee. See Id. Thus, because Gerald was specifically devised the farmland, the unharvested crops also transferred to Gerald upon Leonhard's death. See Noss v. Hagen, 274 N.W.2d 228 (N.D. 1979) (real property in intestate's estate passes immediately to heirs upon death of intestate); Schilichenmayer, 221 N.W.2d at 83 (growing crops are part of the real estate until severed). Moreover, the ownership of growing crops follows the property whether or not the transfer of ownership is voluntary or involuntary. State v. Brakke, 474 N.W.2d 878, 880 (N.D. 1991).

[¶ 34] The district court applied the proper legal precedent to the facts of this case, and therefore did not abuse its discretion on this issue.

## **VI. CONCLUSION**

[¶ 35] For the reasons stated above, this Court should not reverse the district court's Memorandum Order granting Gerald Feldmann the farm equipment and machinery and the unharvested wheat crop proceeds.

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Dated this 7<sup>th</sup> day of July, 2017

/s/ Timothy G. Richard

Timothy G. Richard (ND#05454)

James R. Maring (ND#06712) of

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**Attorney for Respondent-Appellee**

**American Trust Center, Successor**

**Personal Representative**

## **CERTIFICATE OF COMPLIANCE**

[¶ 36] The undersigned, as attorney for the Appellee, American Trust Center, Successor Personal Representative, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and Rule 32(8)(a) of the North Dakota Rules of Appellate Procedure, that the above Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance, totals 3,409.

Dated this 7<sup>th</sup> day of July 2017.

/s/ Timothy G. Richard

Timothy G. Richard (ND#05454)

James R. Maring (ND#06712) of

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**American Trust Center, Successor**

**Personal Representative**

**IN THE SUPREME COURT  
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Respondents and Appellees.

**Supreme Court No:  
20170034**

**Golden Valley County  
Case No. 17-2011-PR-28**

**AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS AND BY U.S. MAIL**

STATE OF NORTH DAKOTA       )  
  ) ss.  
COUNTY OF CASS                )

Theresa A. Luehring, being duly sworn, deposes and says that she is a resident of the City of Fargo, State of North Dakota, is of legal age; and that she served the within:

**1. Brief of Respondent and Appellee American Trust Center, Successor Personal Representative**

on July 7, 2017 to:

**Bruce Selinger**  
**bruceselinger@ndsupernet.com**

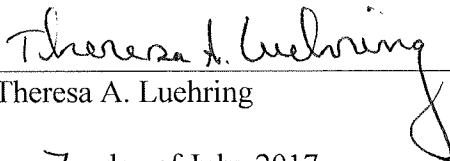
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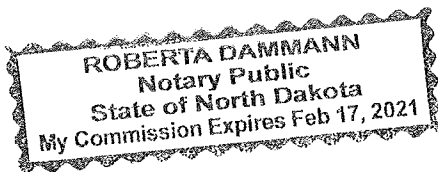
**Karlice Valencia**  
**Box 94794**  
**Albuquerque, NM 87199**

by depositing the same with postage prepaid in the United States Mail at Fargo, North Dakota.

To the best of affiant's knowledge, the addresses above given are the actual post office and e-mail addresses of the parties intended to be so served. The above document was mailed and emailed in accordance with the provisions of the Rules of Civil Procedure.

  
Theresa A. Luehring

Subscribed and sworn to before me this 7 day of July, 2017.



  
Notary Public