

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

In the Trust of Roger S. Linn Restated Trust
Agreement, deceased.

Scott Ottum, attorney in fact for Shirley A. Linn,

Petitioner, Appellant, and Cross-
Appellee,

v.

Wells Fargo Bank, N.A. and Harris W. Widmer as co-
Trustees of the Roger Linn Trust,

Respondents and Appellees,

and,

Stephen T. Linn, Deborah R. Wagner, and Mark
Wagner,

Respondents, Appellees, and Cross-
Appellants.

SUPREME COURT NO. 20180206
Civil No. 09-2017-CV-02936

ON APPEAL FROM AN ORDER DISMISSING PETITION DATED MARCH
29, 2018

CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA

THE HONORABLE STEVEN E. McCULLOUGH, PRESIDING

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	<u>Paragraph</u>
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	[¶1]
STATEMENT OF THE CASE.....	[¶5]
STATEMENT OF THE FACTS	[¶7]
LAW AND ARGUMENT	[¶10]
I. THE DISTRICT COURT ERRED BY CONCLUDING THE TRUST IS UNAMBIGUOUS, BECAUSE THE TRUST CONTAINS ELEMENTS OF BOTH A DISCRETIONARY TRUST AND SUPPORT TRUST	[¶12]
II. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE TRUST PROVIDES FOR ONLY NET INCOME TO BE USED FOR SHIRLEY’S ASSISTED LIVING AND NURSING HOME COSTS.	[¶16]
III. THE COURT ERRED BY FINDING THAT USE OF THE WORD “ACQUIRING” CLEARLY SHOWED ROGER’S INTENT WAS NOT TO PAY FOR SHIRLEY’S CONTINUED ASSISTED LIVING OR NURSING HOME CARE COSTS	[¶22]
IV. THE COURT OUGHT TO REVERSE AND REMAND FOR THE DISTRICT COURT TO CONSIDER EXTRINSIC EVIDENCE ON ROGER’S INTENT	[¶24]
CONCLUSION.....	[¶26]

TABLE OF AUTHORITIES

Page

Cases

<u>Bohac v. Graham</u> , 424 N.W.2d 144 (N.D. 1988)	[¶12], [¶14], [¶15], [¶24]
<u>Eckes v. Richland Cty. Soc. Servs.</u> , 2001 ND 16, ¶¶ 10, 621 N.W.2d 851	[¶12]
<u>Kryzsko v. Ramsey County Soc. Servs.</u> , 2000 ND 43, ¶ 17, 607 N.W.2d 237	[¶12], [¶13], [¶15]
<u>Langer v. Pender</u> , 2009 ND 51, ¶ 13, 764 N.W.2d 159	[¶10], [¶11]

Statutes

N.D.C.C. § 09-07-06	[¶11], [¶19], [¶23]
N.D.C.C. § 09-07-08	[¶11]
N.D.C.C. § 09-07-1	[¶11]
N.D.C.C. § 09-07-17	[¶11]
N.D.C.C. § 09-07-18	[¶11]

Other Authorities

Abravanel, <u>Discretionary Support Trusts</u> , 68 Iowa L.Rev. 273, 293 n. 88 (1983)	[¶14]
Black's Law Dictionary	[¶22]
George G. Bogert, <u>Trusts and Trustees</u> § 228 (1981)	[¶13]
Restatement (Second) of Trusts § 154 (1959)	[¶14]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] The district court erred by concluding the trust is unambiguous, because the trust contains elements of both a discretionary trust and support trust;

[¶2] The district court erred by concluding that the trust provides for only net income to be used for Shirley's assisted living and nursing home costs;

[¶3] The court erred by finding that use of the word "acquiring" clearly showed Roger's intent was not to pay for Shirley's continued assisted living or nursing home care costs; and

[¶4] The Court ought to reverse and remand for the district court to consider extrinsic evidence on Roger's intent.

STATEMENT OF THE CASE

[¶5] Petitioner and Appellant Shirley A. Linn (“Shirley”) petitioned the Cass County District Court for an Order for Distribution of Trust Assets in October 2017. (App. at 3-6.) Shirley alleged that the Trustees of the Roger S. Linn Restated Trust Agreement, Respondents and Appellees Wells Fargo Bank, N.A. and Harris W. Widmer (collectively, “Trustees”) breached their duty to administer the Trust, their duty of loyalty, and their duty of a prudent administrator for failing to pay all costs related to Shirley’s assisted living and nursing home care. (App. at 4-5.) Shirley sought an Order compelling the Trustees to repay all her costs, including past costs, related to her assisted living and nursing home care. (App. at 5.) The Trustees responded denying that they breached their duties, and further argued that the Roger S. Linn Restated Trust Agreement should not be construed to provide for payment of all costs related to Shirley’s assisted living and nursing home care. (App. 25-30.) Respondents, Appellees, and Cross-Appellants Stephen T. Linn, Mark Wagner and Deborah R. Wagner (collectively, “Remainder Beneficiaries”) responded to the Petition denying that Shirley was entitled to the relief sought. (App. 31-34.)

[¶6] A hearing on the Petition was held on February 14, 2018. The parties agreed that they would proceed with a hearing including extrinsic evidence of the settlor’s intent, should the court determine the Roger S. Linn Restated Trust Agreement was ambiguous. The district court entered its Order on March 29, 2018, denying and dismissing the Petition, after determining that the contested provisions of the Roger S. Linn Restated Trust Agreement were unambiguous. (App. 35-40.) The district court found that the word “acquiring” plainly showed Roger’s intent, and that Shirley’s assisted living expenses were discretionary items for the Trustees to consider, not mandatory. Id.

STATEMENT OF THE FACTS

[¶7] Roger S. Linn (“Roger”) executed a Revocable Trust Agreement on March 16, 1978, which was amended and restated on June 9, 2000 (the “Trust”). (App. at 7-22.) Two trusts were created: the Linn Family Trust (App. at 9, 12-14), and the Linn Marital Trust (App. at 9, 14-15). Roger died on September 26, 2003. (App. at 4.) Shirley is the “Donor’s spouse” provided for in the Trust. (App. at 9, 10.) Roger’s children, Deborah R. Wagner and Stephen T. Linn, and his former son-in-law Mark Wagner, are the Remainder Beneficiaries. (App. at 9, 12.)

[¶8] Article V(10)(f) of the Trust provides that “If the Donor’s spouse is in need of assisted living, the trust shall provide the funds necessary to pay any obligations the Donor’s spouse may incur in acquiring assisted living or nursing home care.” (App. at 11.) Article VI states that the Linn Family Trust may provide payments to Shirley, at the Trustees’ discretion, from both income and principal. (App. at 13.) Article VII, the Linn Marital Trust, states that the entire net income of this trust shall be paid, distributed and delivered over to Shirley, at least annually, during her lifetime. (App. at 14.) If the income is insufficient for Shirley’s “support and comfort in her accustomed manner of living,” the co-Trustees may pay to Shirley or for her benefit up to \$3,000 per month from the Linn Marital Trust principal, taking into account her other property and means of support. (Id.)

[¶9] A dispute arose as to the interpretation of the Trust and the Trustees’ refusal to pay for Shirley’s assisted living expenses. Shirley’s Petition and these proceedings followed.

LAW AND ARGUMENT

[¶10] Shirley appeals from the district court's Order that the Trust is unambiguous, and that the Trustees are not required to pay her assisted living expenses, including rent, under the terms of the Trust. Whether a trust is ambiguous is a question of law and is fully reviewable by the Court on appeal. Langer v. Pender, 2009 ND 51, ¶ 13, 764 N.W.2d 159. The primary objective of the Court in construing a trust instrument is to ascertain the intent of the settlor. Id. The settlor's intent is ascertained from the language of the trust document itself if the trust instrument is deemed unambiguous. Id.

[¶11] Trust instruments are subject to the general rules of construction of written documents. Langer, 2009 ND 51, ¶ 14, 764 N.W.2d 159. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." Id. (quoting N.D.C.C. § 09-07-06). "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Id. at ¶ 15 (quoting N.D.C.C. § 09-07-08). "Particular clauses of a contract are subordinate to its general intent." Id. (quoting N.D.C.C. § 09-07-15). Repugnancy in a contract must be reconciled by interpreting the contract in a way that makes the repugnant clause subordinate to the general intent and purpose of the whole contract. Id. (citing N.D.C.C. § 09-07-17. "Words in a contract which are inconsistent with its nature or with the main intention of the parties are to be rejected." Id. (quoting N.D.C.C. § 09-07-18).

I. THE DISTRICT COURT ERRED BY CONCLUDING THE TRUST IS UNAMBIGUOUS, BECAUSE THE TRUST CONTAINS ELEMENTS OF BOTH A DISCRETIONARY TRUST AND SUPPORT TRUST

[¶12] The dispute in this matter is over whether the Trustees were required to provide support for Shirley’s assisted living or nursing home care costs, or whether such support is discretionary. The Trust is ambiguous because it contains elements of both a discretionary trust and support trust, and therefore extrinsic evidence on Roger’s intent ought to be considered. See Bohac v. Graham, 424 N.W.2d 144, 145-46 (N.D. 1988).

A support trust essentially provides the trustee “shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary.” . . .

Conversely, a discretionary trust grants the trustee “uncontrolled discretion over payment to the beneficiary” and may reference the “general welfare” of the beneficiary.

Eckes v. Richland Cty. Soc. Servs., 2001 ND 16, ¶¶ 10-11, 621 N.W.2d 851 (citations omitted). A discretionary trust puts no standard on the trustee’s absolute discretion whether to pay income or principal to the beneficiary and accumulates the unpaid trust assets for other beneficiaries. Kryzsko v. Ramsey County Soc. Servs., 2000 ND 43, ¶ 17, 607 N.W.2d 237. An otherwise discretionary trust is not purely discretionary where it imposes on the trustee the requirement of support. Id. at ¶ 18. Where a trust contains elements of a support trust, which includes standards such as care, maintenance, support, by which discretion is to be employed, a trust is neither purely discretionary or purely for support. Id. at ¶¶ 17-18. Further, provisions for “comfort” and “general welfare” may take the trust language outside that of a general support trust. Bohac, at 146. When a trust contains both discretionary and support trust elements, and further includes provisions for a beneficiary’s “comfort” and “welfare,” it is ambiguous and requires consideration of extrinsic evidence to determine the settlor’s intent. Bohac, at 146.

[¶13] In Kryzsko, the factfinder determined the trust was ambiguous and therefore required consideration of extrinsic evidence to determine the trustor's intent. 2000 ND 43, ¶ 15, 607 N.W.2d 237. In making its determination, the factfinder found that "The trustee is authorized to invade the corpus of the trust 'to provide for the proper care, maintenance, support, and education' of [the beneficiary], which is an element of a support trust," and that the trustee was "given authority to exercise 'sole discretion' as she 'thinks necessary or advisable', which is an element of a discretionary trust." Id. The Court agreed that the Trust in Kryzsko contained elements of both a discretionary trust and a support trust, because it used language such as "sole discretion," but also instructed the trustee to provide for the "proper care, maintenance, support, and education," of the beneficiary. Id. at ¶ 16. The trustee had some discretion as to the timing or number of payments, but was required to distribute income each year, and did not provide the trustee with unfettered discretion, even with use of language like "absolute" or "uncontrolled" as it related to discretion. Id. at ¶¶ 16-17. There was a standard, which was the "proper care, maintenance, support, and education" of the beneficiary, which contained elements of a support trust rather than solely a discretionary trust. Id. at ¶ 17. Truly discretionary trusts do not fix a standard or guide for the trustee to consider, and income which the trustee does not elect to use for the beneficiary may be accumulated or paid to another person. Id. (citing George G. Bogert, Trusts and Trustees § 228 (1981)).

[¶14] In Bohac, the Court determined review of extrinsic evidence on the settlor's intent was necessary because the trust language included elements of both a discretionary and a support trust. 424 N.W.2d at 145-46. The trust language included provisions for the "comfort" and "general welfare" of the beneficiary, which "may take the trust language

outside that of a general support trust.” *Id.* (citing Restatement (Second) of Trusts § 154 (1959), and comments thereto; Abravanel, Discretionary Support Trusts, 68 Iowa L.Rev. 273, 293 n. 88 (1983)).

[¶15] Here, as in Kryzsko and Bohac, the Trust contains both discretionary and support trust elements. The Trust provides that the Trustees *shall* provide funds necessary to pay *any obligations* Shirley may incur in acquiring assisted living or nursing home care. (App. at 11, Art. V(10)(F)). Under the provision for the Linn Family Trust, the Trustees shall pay the remainder of net income that is necessary for the *support, comfort, and welfare* of Shirley, to maintain her in her accustomed manner of living, but if the income is insufficient for her *reasonable support and comfort* and considering her other income and support, then the Trustees *may* use their discretion to pay from the principal as is *required* for Shirley’s *support, comfort, and welfare*. (App. at 13, Art. VI(2)(D)). Under the provision for the Linn Marital Trust, the entire net income shall be paid to Shirley, and in the event the income is insufficient for her *support and comfort* in her accustomed manner of living, and taking into consideration her other means of support, then in the Trustees’ discretion the principal *may* be paid for Shirley’s benefit from the Linn Marital Trust, up to \$3,000 per month. (App. at 14, Art. VII(1) and (2)). The language of the Linn Marital Trust is discretionary but contains elements of a support trust. Therefore, under the rule in Kryzsko and Bohac, extrinsic evidence ought to be considered to ascertain Roger’s intent because elements of both a discretionary trust and a support trust make the Trust ambiguous regarding Roger’s intent with respect to the Trustees’ discretion and the requirements regarding maintaining support for Shirley. Extrinsic evidence on Roger’s intent ought to be considered to resolve these ambiguities.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE TRUST PROVIDES FOR ONLY NET INCOME TO BE USED FOR SHIRLEY'S ASSISTED LIVING AND NURSING HOME COSTS.

[¶16] It is clear from the whole of the Trust that Roger's intent was to provide for all of Shirley's housing, including her assisted living and nursing home costs. Article V(10)(F) makes a specific bequest to Shirley, that if she "is in need of assisted living, the trust shall provide the funds necessary to pay any obligations [Shirley] may incur in acquiring assisted living or nursing home care." Article V is on "Division of Trust Property After Donor's Death," and provides for this specific bequest without directing whether the costs are paid for from the Linn Family Trust (Article VI) or Linn Marital Trust (Article VII).

[¶17] Article VII, the Linn Marital Trust, provides a residual gift of net income and principal. The entire net income of the Linn Marital Trust shall be paid to Shirley. (App. at 14, Art. VII(1)). Should income from the Linn Marital Trust be insufficient for Shirley's support and comfort in her accustomed manner of living, taking into consideration her other means of support, then the Trustee may pay principal from the Linn Marital Trust for her support and comfort in her accustomed manner of living, in an amount not to exceed \$3,000 per month. (*Id.*, Art. VII(2)).

[¶18] Under the Linn Family Trust, the remainder net income that the Trustees may determine is necessary for Shirley's support, comfort, and welfare, to maintain her in her accustomed manner of living, shall be paid for Shirley's benefit. (App. at 13, Art. VI(2)(D)). If Shirley's income is insufficient to maintain her reasonable support and comfort, then the Trustee may pay or use for Shirley's benefit principal from the Linn Family Trust for those purposes. (*Id.*)

[¶19] Reading the Trust as a whole, as is required under N.D.C.C. § 09-07-06, Roger's intent was for Shirley's assisted living or nursing home care obligations to be paid by either the Linn Marital Trust or the Linn Family Trust, and the Trustees were required to pay income, and principal as necessary, to maintain Shirley's support, comfort, and welfare to maintain her accustomed manner of living. Roger's intent was for principal, not net income already being paid to Shirley under other provisions, to be used to pay for Shirley's assisted living and nursing home costs. The inclusion of Article V(10)(f) in the Trust as a specific bequest, that the Trustees *must* pay for Shirley's assisted living and nursing home care, is alone an indication that Roger did not intend for income to be used for these costs. It is redundant and illogical to include a provision that requires the Trustees pay for Shirley's assisted living costs in one Article and then, as the Appellees have argued, require the beneficiary to pay for those costs out of the income she is already entitled to pursuant to another Article.

[¶20] The limit on access to the Linn Marital Trust principal in Article VII(2) was not intended to apply to Article V(10)(f). First, the Trust states the Trustees "*shall*" pay for Shirley's assisted living and nursing home costs (Article V(10)(f)). Then, the Trust states the Trustees in their discretion "*may*" access the principal for Shirley's comfort and support, but only up to \$3,000 (Article VII(2)). Finally, the Trustees contend Article VII(2) restricts their access to the Trust principal for purposes of paying for Shirley's assisted living and nursing home costs, however there is no language in the Trust that imposes the restriction to principal in Article VII to the provisions in Article V.

[¶21] When reading the Trust as a whole and using each clause to help interpret the others, the Articles should be read as three separate bequests: (1) the mandatory payment

of Shirley's assisted living and nursing home costs; (2) the distribution to Shirley of the entire net income from the Linn Marital Trust; and (3) if there are additional costs related to Shirley's comfort and support, the Trustees in their discretion may access the principal of the Linn Marital Trust up to \$3,000, or the net income and principal of the Linn Family Trust.

III. THE COURT ERRED BY FINDING THAT USE OF THE WORD "ACQUIRING" CLEARLY SHOWED ROGER'S INTENT WAS NOT TO PAY FOR SHIRLEY'S CONTINUED ASSISTED LIVING OR NURSING HOME CARE COSTS

[¶22] Appellees argued to the district court that the word "acquiring" in Article V(10)(F) showed Roger's intent was only to provide for Shirley's initial costs. From the district court's Order, it appears the district court adopted Appellees' interpretation of the word "acquiring." Such an interpretation is erroneous. At the very least, the word "acquiring" is ambiguous. Black's Law Dictionary defines "acquire" as "to gain possession or control of; to get or obtain." Article V(10)(F) must include as Shirley's obligations not only initial costs, but costs such as monthly rent which Shirley must pay in order get or obtain assisted living each month. "Acquiring" includes obligations such as rent that Shirley must pay to obtain assisted living each month. If such obligations are not met, then Shirley will lose her assisted living.

[¶23] Moreover, even with the district court's interpretation of the word "acquiring," the district court erred by relying on its interpretation of that one word rather than of the Trust as a whole. The provision mandating the Trustees pay for Shirley's assisted living or nursing home costs is entirely unnecessary if Roger's intent was for Shirley to pay the nursing home and assisted living costs out of the Trust income she receives. Under the Trustees' interpretation, the entire Trust provision in Article V(10)(F) requiring the Trust

pay for the assisted living and nursing home costs could be deleted, and the result would be the same as the Trustee's interpretation. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. *Each clause is to help interpret the others.*" N.D.C.C. § 09-07-06 (emphasis added). When reading the Trust as a whole and using each clause to help interpret the others, there is no logical argument that Roger would put in a provision mandating the Trustees, not Shirley, to pay the assisted living and nursing home costs, but then also put in a provision mandating the Trustees to distribute all income to Shirley and have Shirley pay for the assisted living and nursing home costs herself.

IV. THE COURT OUGHT TO REVERSE AND REMAND FOR THE DISTRICT COURT TO CONSIDER EXTRINSIC EVIDENCE ON ROGER'S INTENT

[¶24] When looking to extrinsic evidence in a trust case, the court looks at the language of the trust, the circumstances surrounding its creation, and testimony of the draftsman, to determine the settlor's primary intent was to provide for the beneficiary's future care. Bohac, 424 N.W.2d at 146. Here, the language of the Trust, the circumstances surrounding its creation, and testimony of attorney Greg Selbo as the Trust's draftsman are available for the district court to consider in determining Roger's intent.

[¶25] Roger obviously considered the possibility Shirley may need assisted living or nursing home care in the future, based upon the provision for such costs in the Trust. Shirley's son and attorney-in-fact Scott Ottum testified that he and Roger had discussions in which Roger indicated Shirley would be taken care of after Roger's death. (Tr. 17.) Attorney Greg Selbo could not recall Roger's specific intent with respect to the issues raised in this matter, but he had sent a letter to Roger in May 2000 which shows that Roger's intent was to pay for all assisted living and nursing home costs. (Ex. 5, Index

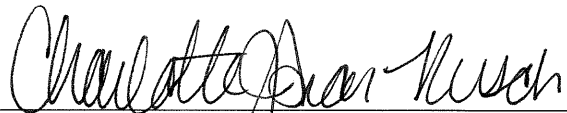
#24.) That letter states in plain language to Roger that the Trust “would pay all of Shirley’s expenses associated with that assisted living situation.” (Id.) Appellants contend that the Trust’s language, the circumstances surrounding its drafting, and the testimony of the drafter all support the conclusion that Roger intended for the Trust to provide for Shirley’s assisted living and nursing home costs from the principal of the Trust for the duration of her stay, and the district court ought to consider this evidence in determining Roger’s intent.

CONCLUSION

[¶26] For the foregoing reasons, the Court ought to reverse the dismissal of Shirley’s Petition because the Trust is ambiguous, and remand this matter to the district court for consideration of extrinsic evidence on Roger’s intent. Appellant contends that the Trust and extrinsic evidence clearly demonstrates that Roger intended for the Trust to pay Shirley’s assisted living and nursing home costs from the principal in addition to her receiving all Marital Trust income at least annually.

Respectfully submitted September 4, 2018.

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SUPREME COURT NO. 20180206
Civil No. 09-2017-CV-02936

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on September 4, 2018 the following document(s):

Appellant's Brief

Appendix to Appellant's Brief

were filed electronically filed and served on the following:

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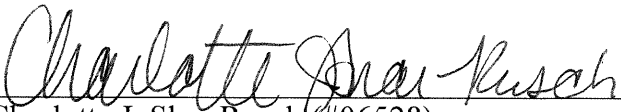
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Civil No. 09-2017-CV-02936

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on September 10, 2018 the following document(s):

Corrected title page to Appellant's Brief

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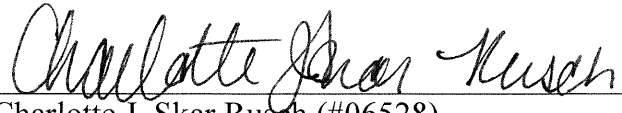
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