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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Agnes M. Gassmann Revocable Living Trust --- Wells Fargo Bank, N.A., Petitioner and Appellee, v. Mary Reichert, Jo Anne Dalhoff, and James Gassmann, Respondents and Appellants. and John T. Gassmann, Respondent.	Supreme Court No. 20100275
John A. Gassmann Revocable Living Trust --- Wells Fargo Bank, N.A., Petitioner and Appellee. v. Mary Reichert, Jo Anne Dalhoff, and James Gassmann, Respondents and Appellants. and John T. Gassmann, Respondent.	Supreme Court No. 20100276

APPEAL FROM MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT DATED JUNE 29, 2010, AND FROM THE JUDGMENT ENTERED ON AUGUST 23, 2010, IN THE DISTRICT COURT OF CASS COUNTY, STATE OF NORTH DAKOTA, THE HONORABLE STEVEN L. MARQUART, PRESIDING

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUE

[¶1] Whether the District Court erred in reforming the Trusts of John A. Gassmann ("John A.") and Agnes M. Gassmann ("Agnes"), husband and wife, under N.D.C.C. §59-12-15 "Reformation to Correct Mistakes" in derogation of the District Court's own finding that the terms of each trust instrument were unambiguous and in the absence of clear and convincing evidence that the trust instruments were "affected by a mistake" which caused the trust instruments to fail to conform to the Settlors' intention.

STATEMENT OF THE CASE

[¶2] The heart of this case involves the construction and subsequent reformation of the dispositive terms of two (2) trust instruments: the John A. Gassmann Revocable Living Trust ("John A. Trust") and the Agnes M. Gassmann Revocable Living Trust ("Agnes Trust") (collectively referred to herein as the "Trusts"). The two (2) dispositive provisions at issue in this case are (1) Article Five, Paragraph 6 which purports to transfer each Trust's 49.5% ownership interest in the John Thomas Gassmann LLLP ("LLLP") to "be handled pursuant to Paragraph 2 of Article Ten;" and (2) Article Ten which creates a generation skipping transfer ("GST") Trust for each of the Settlors' four (4) children, namely, Mary Gassmann Reichert ("Mary"), JoAnne Dalhoff ("JoAnne"), James Gassmann, ("James") and John T. Gassmann ("John T.").

[¶3] These matters were consolidated on February 2, 2010.

[¶4] The District Court found (1) that each Trust was unambiguous, and that as written the Trusts required the LLLP be divided equally among the four children; and (2) that no "clear and convincing evidence" was presented regarding whether the LLLP interests passed to John T. "as a part of" or "in addition to" his one-quarter share of all

other Trust assets; nevertheless, in reliance on N.D.C.C. §59-12-15, Reformation to Correct a Mistake, the District Court reformed each Trust so that the LLLP passed solely to John T., outright and free of trust (Judgment #3) in addition to a one-fourth (1/4) share of all other residual Trust assets passing under Article Ten (Judgment #4). (App. 243.) Accordingly, John T. received each Trust's 49.5% interest in the LLLP ("LLLP Interest") as two specific bequests, and in addition, received a one-quarter (1/4) interest in all other residual assets passing under Article Ten of the Trusts.

STATEMENT OF THE FACTS

[¶5] John A. and Agnes (each a "Settlor"), as Settlors, initially created their respective Trusts on March 30, 1993. (Docket #65, #66.) These Trusts were subsequently amended and restated on February 5, 2001. (App. 82-199.) The Settlors finally amended their respective Trusts on December 28, 2001. (App. 200-221.) The dispositive provisions of both Trusts are identical. (Tr. 56.) Following the restatement and amendments, one of the operative provisions of the Trusts which is before this Court is Article Five, Paragraph 6 which provides as follows:

> 6. *Specific Allocation.* My Trustee shall distribute all of my ownership interests in the John Thomas Gassmann LLLP and in the North Half (N1/2) of Section Thirty-six (36), Range One Hundred Forty (140) North, Range Fifty-eight (58) West of the Fifth Principal Meridian, in Barnes County, North Dakota, as follows:
>
> a. If my son, John T. Gassmann, survives me, **then to my Trustee, and successors in trust, to be handled pursuant to Paragraph 2 of Article Ten**.

(Emphasis added.) (App. 94, 153.)

[¶6] The nationally recognized corporate trustee, Wells Fargo Trust Company, was named as the trustee of both Trusts ("Trustee" or "Wells Fargo"). (App. 83, 138,

142, 197, 200, 209, 211, 220.) Both the John A. Trust and the Agnes Trust, as amended, were prepared by attorney William T. Guy III ("Guy"). (App. 139, 198, 210, 221.) Guy was a partner at the law firm of Gunhus, Grinnell, Klinger, Swenson & Guy, Ltd. ("Gunhus Firm") which later merged into the Vogel Law Firm ("Vogel Firm"). (Tr. 23.) Susan Johnson Drenth ("Johnson Drenth") was an attorney who practiced law with Guy during the period February 5, 2001 through the date of the trial and worked with Guy on the Gassmanns' estate matters. (Tr. 76, 86.)

[¶7] At the time the restated Trusts were being drafted, Guy sent a questionnaire and a letter to John A. and Agnes requesting they determine whether to pass the LLLP interest to John T. as part of his one-quarter (1/4) share of the estate or "off the top." (App. 74-77; Tr. 31-32.) Guy had no independent recollection or documentary evidence regarding the Settlors' response; however, Agnes did send a letter to Guy indicating her desire for an equal distribution. (App. 78-81; Tr. 103-104.)

[¶8] In early 2002, pursuant to voluntary petitions filed by John A. and Agnes, Wells Fargo was appointed as Conservator of John A. Gassmann (Docket #83) and Agnes M. Gassmann. (Docket #84.)

[¶9] On November 1, 1991, John A. named the children of James A. as beneficiaries of a Lincoln Financial Group annuity contract which had a value of approximately forty-seven thousand dollars ($47,000.00) ("Annuity Amount"). (Docket #53, #100 at A-1, A-2.)

[¶10] In 2003, after John A.'s death, Wells Fargo as Conservator for Agnes filed a Petition For Authorization of Lifetime Gifting or for Amendment of Trust ("Petition to Equalize Transfers") in the Cass County District Court ("2003 Court"). (Docket #100.)

The Petition to Equalize Transfers advised the 2003 Court that Agnes wanted to make transfers equal to the Annuity Amount to her other three (3) children, and per the terms of the order creating the Conservatorship she needed court approval to change a dispositive provision of her Trust. (Docket #100 at pages 1-3; Tr. 85.) The Petition to Equalize Transfers requested that the 2003 Court either (i) approve Agnes making three (3) intervivos gifts to her other three (3) children, JoAnne, Mary and John T., in an amount equal to the Annuity Amount, or (ii) alternatively, approve the Proposed Third Amendment to the Agnes Trust which would have provided for three specific testamentary bequests to JoAnne, Mary and John T. in an amount equal to the Annuity Amount. (Docket #100 at pages 3-4.)

[¶11] The Petition to Equalize Transfers was filed by the Gunhus Firm and made two (2) averments relative here: first, Section 8(b)(1) stated that if the 2003 Court ordered the equalizing transfers to occur at Agnes' death, then the proposed Third Amendment to the Agnes Trust ("Proposed Third Amendment") would implement those transfers via three (3) testamentary specific bequests to JoAnne, Mary and John T. (Docket #100 at pages 2-3.) Second, Section 8(b)(2) stated that **there were no other material changes in the Proposed Third Amendment, other than to eliminate references to Agnes' deceased spouse**. (Docket #100 at page 3.) The Proposed Third Amendment was attached as Exhibit A to the Petition to Equalize Transfers. Contrary to the averment in Section 8(b)(2), the Proposed Third Amendment actually included new language in Article Five, Paragraph 6 which materially altered the dispositive provision of Article Five, Paragraph 6, the reformation of which is before this Court. (Docket #100 at Attachment "A," page 7; Tr. 86.) Because the 2003 Court authorized Agnes to make

intervivos gifts, the Proposed Third Amendment was never executed by Agnes. (Docket #101; Tr. 87.)

[¶12] On April 15, 2004, approximately two years after John A.'s death, Guy, pursuant to John T.'s request, prepared the trust document pursuant to which John T. removed Wells Fargo as Trustee of the John T. GST Trust ("John T. GSTT") and appointed himself as trustee. (Docket #107; Tr. 93, 115.)

[¶13] On April 15, 2004, Wells Fargo, as Trustee of the John A. Trust, executed an Assignment and Transfer Agreement transferring its 49.5% interest in the LLLP to John T.'s GSTT without notice to the Respondents and also in contravention of the findings of the District Court in its Findings of Facts #4. (Docket #108; Tr. 92; App. 238.)

[¶14] In 2005, 2006 and 2007 Wells Fargo, as Trustee, made equal gifts from Agnes' Trust to each of Mary, JoAnne, James and John T. based upon Agnes' desire to gift equally to her children. (Docket #47 at page 30; Tr. 192-193.)

[¶15] In the fall of 2009, Mary raised the issue whether Guy's representation of John T. and Wells Fargo created a conflict of interest. (Docket #110, #113.)

[¶16] On December 1, 2009, on behalf of Wells Fargo, Robert Manly of the Vogel Firm filed a Petition for Order Clarifying Two Special Allocations in the John A. and Agnes Trust documents and directing distributions pursuant to the special allocations based on the Scrivener's Affidavits. (App. 7-12, 13-18.) An Affidavit of Scrivener's Error prepared by Guy In the Matter of the Agnes M. Gassmann Revocable Living Trust and In The Matter of the John A. Gassmann Revocable Living Trust were filed on December 3, 2009 in the District Court for Cass County ("2009 Court"). (App. 19-23,

24-28.) In both Affidavits he averred that Article 5, Paragraph 6 of the John A. Trust and the Agnes Trust should have read as follows:

> 6. *Specific Allocation.* My Trustee shall distribute all of my ownership interest in the John Thomas Gassmann LLLP…as follows:
>
> a. If my son, John T. Gassmann , survives me, then to **the Trustee of the John T. Gassmann Generation Skipping Trust**, and successors in trust, to be handled pursuant to Paragraph 2 of Article Ten.

(Emphasis added.) (App. 21, 26.)

[¶17] Pursuant to Article Seven, Paragraph 1.e., and Article Nine, Paragraph 3, of the Settlors' Trusts, the John T. GSTT and the GST Trusts for Settlors' other three (3) children could only be created at the death of the last spouse to die because the surviving spouse, Agnes, was given a special power of appointment over the property allocated to Article Ten which established the GST Trusts for the Settlors' children. (App. 205, 216.)

[¶18] On December 23, 2009, the Appellants ("Respondents") filed an Objection to Wells Fargo's requested Clarification asserting that the LLLP per the terms of the Trusts unambiguously allocated the LLLP interests to Article Ten to be divided equally among the four (4) separate GST Trusts established for each of the four (4) children. (App. 30-31.)

[¶19] On April 28, 2010, Respondents filed an Amended Brief stating their position that the Trusts, as drafted, required the LLLP to pass equally to the four (4) GST Trusts created under Article Ten; however, that if the LLLP could be construed as passing solely to John T.'s GSTT, then such allocation must pass to John T. as part of this one-fourth (1/4) share of Article Ten assets. (App. 48-51.)

[¶20] On April 30, 2010, the Appellee ("Petitioner") submitted a Pre-Hearing Brief setting forth Petitioner's "Off the Top" argument. (App. 60-73.)

[¶21] On May 3, 2010, Judge Marquart held a trial and heard evidence on the construction of Article 5, Paragraph 6 of both Trust instruments.

[¶22] On June 18, 2010, Respondent filed a Motion for Leave to Amend Pleadings to Conform to the Evidence and Brief in Support thereof. (App. 222-229.)

[¶23] On June 29, 2010, Judge Marquart issued his Memorandum Opinion Findings of Fact, Conclusions of Law and Order for Judgment in favor of Petitioner Wells Fargo ("2010 Order"). (App. 230-240.)

[¶24] On August 4, 2010, Judge Marquart issued an Order Denying Respondents' Motion for Leave to Amend Pleadings. (App. 241.)

ARGUMENT

I. Standard of Review.

[¶25] The issue presented to this Court on appeal is whether the District Court misapplied N.D.C.C. §59-12-15 (the "Reformation Statute") by (A) basing reformation on Findings of Fact ("Findings") which are internally inconsistent on their face; (B) misapplying the Reformation Statute by reforming the Trusts despite Petitioner's failure to satisfy its burden of proof to present clear and convincing evidence as required and without giving effect to all Trust provisions as required under the canons of construction; and (C) reforming the Trusts in the absence of any evidence that the Trusts' terms were affected by mistake.

[¶26] Both trust construction and reformation issues are matters of law and, as such, the applicable standard of review is *de novo*. Matter of Estate of Eggl, 2010 ND 104, ¶10, 783 N.W.2d 36. Likewise, the misapplication of the Reformation Statute is

entitled to *de novo* review. E.g. Biteler's Tower Serv., Inc. v. Guderian, 466 N.W.2d 141, 143 (N.D. 1991) (finding that reformation is an equitable remedy); Kolb v. Kolb, 26 N.W.2d 484, 487 (N.D. 1947) (stating that equitable actions receive *de novo* review); Grinnell Mutual Reinsurance Co. v. Thompson, 2010 ND 22, ¶9, 778 N.W.2d 526 (interpretation of a statute is a question of law fully reviewable on appeal). With respect to the District Court's Findings, the applicable standard of review is whether such Findings are "clearly erroneous." N.D. R. Civ. P. 52(a).

II. Contextual Background

[¶27] Trust construction and trust reformation are not mutually exclusive. The reformation of a trust depends upon the construction of the trust instrument read as an integrated whole.

A. The law of trust construction in North Dakota

[¶28] The law of trust construction in North Dakota is well settled. The primary rule of trust construction is that a court must, if possible, glean the trustor's intent based upon the four corners of the trust instrument itself. See N.D.C.C. §30.1-09-03 (2009); see also Duemeland v. Norback, 2003 ND 1, ¶12, 655 N.W.2d 76 ("our primary goal in construing a will is to ascertain the testator's intent from the will as a whole"). In construing such intent, the courts of North Dakota are called upon to apply the general rules of construction set forth under N.D.C.C. Chapter 9-07. Langer v. Pender, 2009 ND 51, ¶14, 764 N.W.2d 159 (quoting Alerus, 2008 ND 104 ¶18-19, 750 N.W.2d 412). Among these general rules of construction are: (1) the familiar maxim that when construing a trust, a court must consider the trust instrument as a whole and the intention of the trustor must be determined, if possible, by giving effect to all provisions within the

trust so that no provision is rendered meaningless; (2) repugnancies within a trust must be reconciled, if possible, by an interpretation that will give some effect to the repugnant clause subordinate to the general intent and purposes of the whole; and (3) the court should attach significance to differences within a trust instrument. See, e.g., N.D.C.C., §9-07-06; N.D.C.C. §9-07-17; 76 Am. Jur. 2d Trusts §34 (2009).

B. Relevant trust provisions

[¶29] The Trust provisions relevant to the District Court's construction of the Trusts are summarized as follows:

Article Five: Upon the respective death of John A. and Agnes, Article Five of each Trust makes certain distributions of Trust property in Paragraphs 1 through 7 (App. 90-95, 149-154.) Article Five, Paragraph 6, the provision in controversy, specifically provides:

> 6. *Specific Allocation.* My Trustee shall distribute all of my ownership interests in the John Thomas Gassmann LLLP and in the North Half (N1/2) of Section Thirty-six (36), Range One Hundred Forty (140) North, Range Fifty-eight (58) West of the Fifth Principal Meridian, in Barnes County, North Dakota, as follows:
>
> a. If my son, John T. Gassmann, survives me, **then to my Trustee, and successors in trust, to be handled pursuant to Paragraph 2 of Article Ten**.

(Emphasis added.) (App. 94, 153.)

Article Six: Article Six of each Trust provides that the remainder of the trust estate **not effectively disposed** of under Article Five of this Agreement is to be handled so that at the death of the first spouse to die (i.e., John A.) the amount of the available unified credit (i.e., $1,000,000 at John A.'s death) passes to the Article Nine GST Trust (via Article Eight) and the balance is to be held in a Marital Trust under Article Seven.

(App. 100, 159, 201-203, 212-214; Tr. 53-54, 68-69.) At the death of the surviving spouse (i.e., Agnes), all assets held in such survivor's Trust **will be handled pursuant to the Article Ten GST Trust** *(*via Article Eight). (App. 100, 159, 203-204, 214-215.)

Article Seven: Article Seven provides for the administration and distribution of the Marital Trust at the death of John A. (App. 98.) The value of John A.'s estate was less than his available unified credit amount, and therefore the Article Seven Marital Trust was never funded. (Tr. 69.) All assets passing at John A.'s death passed directly to the Article Nine GST Trust. (Tr. 69.)

Article Nine: Article Nine provides that during Agnes' life all income and principal from the assets held in the Article Nine GST Trust shall be distributed to Agnes as is necessary for her health, education, support, and maintenance. These assets remain subject to Agnes' special power of appointment which she may exercise in a valid testamentary instrument. (App. 204.) If Agnes fails to exercise such power of appointment, such assets pass to the Article Ten GST Trust and are to be "divided into equal shares so as to provide one (1) share for each of my children who survive…" (App. 204.)

Article Ten: Article Ten provides that all assets funded into such trust shall be divided into equal shares so as to provide one share for each of the Settlors' children (i.e. Mary, JoAnne, James, and John T.) and, subject to the surviving spouse's special power of appointment, the share for each child remained in further trust until that child's death:

> 1. *Creation of Separate Shares.* My Trustee shall divide the trust estate into equal shares so as to provide one (1) share for each of my children then living…
>
> 2. *Shares for Children.* **Subject to the special power of appointment given to my wife** in Paragraph 1.e(3) of Article

> Seven and in Paragraph 3.a of Article Nine, the separate share of each of my children shall be handled as follows:

(Emphasis added.) (App. 205-206, 216-217.) This Article was particularly relevant in construing Article Five, Paragraph 6 which clearly designated that the LLLP should be "handled" pursuant to Article Ten. (App. 94, 153.)

[¶30] The Petitioner argued that the above-stated provisions unambiguously allocated the LLLP to John T.'s GSTT "off the top of" or "in addition to" a one-fourth (1/4) share of all other assets passing under Article Ten ("Off the Top Interpretation"). (App. 69.) The Respondents argued that the aforesaid language unambiguously allocated the LLLP equally to the four (4) children, and did not create a specific bequest to John T.'s GSTT. (App. 30-31.) Respondents further argued that if such language could be construed to allocate the LLLP to John T.'s GSTT, then such allocation only made sense when reading the Trust "as a whole" **if** the LLLP was allocated to John T.'s GSTT "as a part of" his one-fourth (1/4) share ("Earmarked Interpretation"). (App. 48-51.)

III. The District Court Erred in Determining that N.D.C.C. §59-12-15 "Reformation to Correct Mistakes" Applied in this Case.

[¶31] After first finding that the Trusts in question unambiguously allocated the LLLP (i.e. farmland) equally to the GST Trusts established for each of the four (4) children under Article Ten (Finding #4), the District Court held that Article Five, Paragraph 6 could be reformed so as to give John T. the LLLP outright (Judgment #3) plus one-fourth (1/4) of the remaining estate (Judgment #4). (App. 238, 243.) The Respondents are at a loss to explain how the District Court found that the LLLP should be allocated to the GST Trusts under the four corners of the Trust instrument but reformed the Trust so that the LLLP now passes outright and free of trust to John T.

[¶32] Instead of attempting to puzzle out the District Court's Order, particularly in conjunction with the Court's Memorandum Opinion and Findings of Fact, the salient question is whether the Trusts should have been reformed in the first place. Assuming arguendo that the District Court was attempting to reform Article Five, Paragraph 6 so as to allocate the LLLP interests to John T.'s GSTT under the Off the Top Interpretation, the Respondents contend the District Court could not have reformed the Trusts and, as such, the District Court's reformation must be overturned because (A) such reformation was based upon Findings which were internally inconsistent on their face; (B) the District Court misapplied the Reformation Statute by (i) reforming the Trusts despite Petitioner's failure to present clear and convincing evidence of Settlors' intent; and (ii) without taking into account the need to give effect to all Trust provisions; and (C) no evidence was presented that the Trusts' terms were affected by a mistake.

A. The District Court's own Findings of Fact, which the Court used to reform the Trusts, were internally inconsistent and therefore, "clearly erroneous."

[¶33] The standard for determining when a finding of fact is clearly erroneous is if the finding of fact was induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. Blotske v. Leidholm, 487 N.W.2d 607, 610 (N.D. 1992).

[¶34] The Findings promulgated by the District Court in reforming the Trusts are undeniably "clearly erroneous" because these Findings are internally inconsistent on whether clear and convincing evidence was presented regarding whether the LLLP passed to John T.'s GSTT "off the top."

[¶35] Specifically, the pertinent Findings provide as follows:

> 4. The Trust Agreements, as written, would require the John T. Gassmann LLLP, upon Agnes' death, to be divided equally between the four children of John A. and Agnes.
>
> 5. Clear and convincing evidence was presented that it was both John A.'s intention and Agnes' intention that John T. would get the farm, i.e., the John T. Gassmann LLLP.
>
> 6. **No clear and convincing evidence** was presented to reform the Trust Agreements to determine whether or not John T. received the LLLP as a part of his one quarter share of the estate, or whether he receive that first, and then receive one-fourth of the balance of the estate.
>
> 7. The Trust Agreements themselves unambiguously provide, after reformation, that when the LLLP is allocated to the John T. GST, it did not become either a part of the Marital Share or the Generation Skipping Share of Agnes …

(Emphasis supplied.) (App. 238.)

[¶36] Respondents do not disagree with Finding #4. Clearly, however, a "mistake" has been made with respect to Findings #6 and #7 because the District Court found that no clear and convincing evidence was presented that John T.'s GSTT should receive the LLLP pursuant to the Off the Top Interpretation or pursuant to the Earmarked Interpretation (Finding #6). (App. 238.) Accordingly, the Trusts cannot be reformed to give the LLLP to John T. "off the top." Inexplicitly, however, Finding #7 states that the Trusts, after reformation, unambiguously allocate the LLLP to John T.'s GSTT "in addition to" his one-quarter share of all Trust assets. (App. 238.)

[¶37] Respondents are bewildered to understand the District Court's logic in finding that no clear and convincing evidence was presented that the LLLP was to pass to John T. "off the top" (Finding #6) but ordered a reformed Trust which unambiguously passes all the LLLP to John T.'s GSTT "off the top" (Finding #7). In sum, there was no

clear and convincing evidence presented to reform the Trusts so that John T. received the LLLP interests pursuant to the Off the Top Interpretation because the District Court so found in Finding #6. Accordingly, because Findings #6 and #7 are contradictory they are clearly erroneous and must be set aside by this Court. Respondents' explanation of why Finding #5 is also clearly erroneous is set forth below.

B. The District Court misapplied the Reformation Statute by reforming the Trusts (i) despite Petitioner's failure to present clear and convincing evidence of Settlors' intent and relying instead on a supposed "agreement" of the parties and (ii) by ignoring the actual provisions of the Trust when read as a whole.

[¶38] North Dakota adopted §415 of the Uniform Trust Code ("UTC") as N.D.C.C. §59-12-15 in 2007, after the Settlors executed their respective Trusts and after each Trust became irrevocable. Said Reformation Statute provides that a trust may be reformed to conform to the Settlor's intention if it is proved by clear and convincing evidence that both the Settlor's intent and the terms of the trust were affected by a mistake. Id. It is this statute upon which the District Court relied to reform the Trusts in question, and which this Court must now examine in order to determine whether the reformation was lawful or not.

(1) North Dakota's application of the Reformation Statute

[¶39] Aside from the Reformation Statute's dictate that a trust **may** be reformed upon a finding of clear and convincing evidence, there is little guidance provided by the courts of North Dakota of when this standard is met **for purposes of reforming an unambiguous trust** as the District Court found in Finding #4. In considering reformation claims under similar statutes, this Court has said that the evidence presented must be clear, satisfactory, specific and convincing. Heart River Partners v. Goetzfried,

2005 ND 149 ¶14, 703 N.W.2d 330 (stating that a court will only grant reformation upon certainty of error).

[¶40] The dictates of the statue itself allow for reformation only when the party seeking reformation provides clear and convincing evidence of both (1) the actual intent of the Settlors and (2) that a "mistake" actually thwarted such intent. The UTC's comments regarding the higher standard of proof provide as follows:

> Reformation, on the other hand, may involve the addition of language not originally in the instrument, … if necessary to conform the instrument to the settlor's intent. … **To guard against the possibility of unreliable or contrived evidence** in such circumstance, the higher standard of clear and convincing proof is required.

Unif. Trust Code §415 (2005). (Emphasis supplied.)

[¶41] Aside from this general comment regarding the Reformation Statute, the only reported North Dakota case applying the Reformation Statute indicates that **the clear and convincing standard is met when the settlor is still alive and can testify as to her intent and the beneficiaries to be "harmed" by such reformation either affirmatively agree with the proposed reformation or at least do not object to such reformation**. See In re Hirsch, 2009 ND 135, 770 N.W. 2d 225. In Hirsch, Hirsch created an **irrevocable** trust; however, Hirsch and two of her three children (who were also beneficiaries of the trust) all contended that Hirsch had not understood the meaning of an **irrevocable** trust, and that she believed that she was creating a **revocable** trust. Id. at ¶3. In fact, as noted by the North Dakota Supreme Court, the attorney who drafted the trust was disciplined for failing to explain to Hirsch that her trust was **irrevocable**. Id. at ¶4. Based upon Hirsch's misunderstanding of the law, two of Hirsch's children sought to reform the trust to a **revocable** trust, and Hirsch submitted an affidavit explaining her

intent in creating the trust and providing that she would not have executed or funded the trust had she understood it was irrevocable. Id. at ¶¶4-5.

[¶42] The lower court required Hirsch to submit a proposed reformed trust document to the court along with notice to all beneficiaries of the **irrevocable** trust so that each could have the opportunity to object on the proposed reformation of the trust. Id. at ¶8. No beneficiary legally objected, and as such the lower court entered an order reforming the **irrevocable** trust into a **revocable** trust. Id. at ¶11. Only after such order had been entered did a disgruntled beneficiary of the **irrevocable** trust appeal the lower court's reformation on the basis that no clear and convincing evidence had been presented. Id. This Court upheld the reformation because the disgruntled beneficiary had **not** objected to the reformation at the district court level and, therefore, he had not preserved such issue for purposes of the appeal, id. at ¶14, and because the affidavit of settlor along with the assertion of beneficiaries constituted clear and convincing evidence. Id. at ¶21 (Maring, J. and Vandwalle, C.J., concurring).

[¶43] In Hirsch, this Court allowed for reformation when the settlor was alive, when no evidence was presented to rebut the settlor's stated intent, and when no beneficiaries contested the reformation. Conversely, in this case the District Court allowed for reformation even though John A. and Agnes are deceased, the only undisputed documentary evidence of the Settlors' intent is that the LLLP was to be distributed equally, and the Respondents did object to the reformation. Respondents submit that if only testimonial evidence of the heir benefited by the reformation (John T.) and John T.'s lawyer, Guy, constitutes clear and convincing evidence sufficient to reform

the now deceased Settlors' unambiguous Trusts, then a sea change in the North Dakota law of wills and trusts will simply astonish the state's residents.

(2) Application of the Reformation Statute outside North Dakota law

[¶44] Because this Court has construed the Reformation Statute in only one case, it is appropriate to review the decisions of courts in other jurisdictions which have also enacted §415 of the UTC, i.e. The Reformation Statute, in order to determine how courts in these jurisdictions interpret and apply such statute. In re Opatz, 554 N.W.2d 813, 816 (N.D. 1996) ("We construe statutes and model acts in the same manner as courts in other jurisdictions to provide consistency and uniformity in the law."). The states of Nebraska and Tennessee have each adopted §415 of the UTC, and as such, these courts' application and interpretation of the Reformation Statute are persuasive authority for purposes of applying N.D.C.C. §59-12-15. See, id.

[¶45] Collective analysis of the varying jurisdictions applying the Reformation Statute establishes that, aside from meeting the standards set forth in the statue itself (i.e. clear and convincing evidence of both a settlor's intent and a "mistake" frustrating such intent), the long-standing rules of trust construction have not been rendered moot by the Reformation Statute and that a settlor's intent, as it can be gleaned from the four corners of the document itself, must be weighted in the court's analysis of whether reformation is appropriate or not. See, e.g. In re Trust Created by Isvik, 741 N.W.2d 638 (Neb. 2007); In re Estate of Shults, No. M2006 – 02013-COA-R3-CV 2008 WL 490643 *5-8 (Tenn. Ct. App. 2008). In short, the construction of the trusts, as written, should inform the reformation – the reformation should not dictate the construction of the Trust instruments as the District Court did.

[¶46] In Isvik, the settlor of a revocable trust wrote a letter ("Revocation Letter") to the bank trustee stating that she was "revoking" the trust. 741 N.W.2d at 641. Upon the settlor's death a controversy arose regarding whether the settlor had intended to "revoke" her trust or merely "remove" the bank as trustee. Id. at 642. The settlor's estate sought to reform the "revocation" under Nebraska's Reformation Statute (Neb. Rev. Stat. §30-3841) to provide only for a "removal" of the trustee. Id. Bank officers and the settlor's lawyer each testified that they had spoken with the settlor and that she had only intended to remove the trustee, and evidence was presented that the settlor had fully intended for certain assets to pass to charities which were named under the terms of the trust. Id. at 644. The lower court allowed the reformation; however, the Nebraska Supreme Court overruled the lower court emphasizing that (1) the Revocation Letter was unambiguous in the use of its term "revoke," and (2) the settlor had previously signed documents which "removed" her trustee without utilizing language indicating a "revocation" of her trust. As such, the Nebraska Supreme Court found that there was no clear and convincing evidence that reached the standard necessary to "reform" an unambiguous document.[1] Id. at 648.

[¶47] In Shults, the Tennessee Court of Appeals was faced with both a construction and a trust reformation issue. 2008 WL 490643, at *1. In Shults, the decedent's will provided in Section II that marital property was to pass to the surviving spouse; however, a dispute arose regarding whether the marital property included **all** property acquired during the marriage or was limited to property acquired during the marriage and titled in the name of both husband and wife. Id. at *7. Section III of the

[1] In Isvik the Court determined that the settlor's Revocation Letter and previous removal letters were a part of the trust itself and, thus, subject to reformation. Id. at 645.

instrument provided that the residue passed into a trust wherein the surviving spouse was the income beneficiary for a term of years. Id. at *8. The testamentary trust failed to make provision for the trust corpus, and a dispute arose regarding whether the decedent's wife or children should receive the trust corpus. Id. In resolving both issues, the court emphasized that **the most beneficial tool to determine the testator's intent was the terms of the instrument itself**, and as such the court focused on the fact that the creation of the testamentary trust in Section III of the decedent's will was rendered meaningless if **all** property acquired during the marriage was to pass to the surviving spouse under Section II (because no property would be left to fund the trust), and further that if the decedent intended for his wife to receive the trust corpus there was also no purpose served in creating the trust. Id. Based upon the court's construction, the court reformed the trust under the Reformation Statute (Tenn. Code. Ann. §35-15-415) to name the decedent's children as the beneficiaries of the trust corpus, emphasizing that such reformation made sense when reviewing the entire instrument as a whole. Id.

[¶48] As set forth below, in reforming the Trusts the District Court not only failed to give any weight to reading the Trust instruments "as a whole" so as to "give effect to all provisions" within the Trusts, but the Trusts, as reformed, actually created a document with conflicting provisions as explained hereafter. Moreover, unlike in Shults, in which the Court first construed the trust instrument as written and then based reformation on such construction, the District Court in this case actually ignored the Trusts as written, and constructed a new "unambiguous" interpretation of the Trusts based on its own faulty reformation.

(3) Petitioner presented no clear and convincing evidence that Settlors intended for John T. to receive the LLLP as a specific bequest

[¶49] The District Court's reformation of the Trusts fails on multiple levels. First and foremost, the Petitioner failed to satisfy the evidentiary standard set forth in the statute itself by (i) failing to present clear and convincing evidence that it was the Settlors' intent for the John T. GSTT to receive the LLLP; and (ii) failing to present any evidence whatsoever that it was Settlors' intent for the John T. GSTT to receive such LLLP in addition to a one-fourth (1/4) share of remaining Trust assets (a fact acknowledged by the District Court in Finding #6). (App. 238.)

[¶50] The District Court found in Finding #5 that Petitioner had supplied clear and convincing evidence that it was the Settlors' intent for John T. to receive the farm (LLLP). (App. 238.) This Court must now examine whether the evidence presented by Petitioner and relied upon by the District Court in ordering the reformation rises to the level of clear and convincing evidence. Respondents contend that it does not. What is the "clear and convincing evidence" upon which the District Court bases its reformation? Although not clear from the District Court opinion, the answer appears to be (i) the testimony of John T.; (ii) the testimony of his attorney, Guy; and (iii) the District Court's assertion that the Respondents "agreed" to John T.'s receipt of the LLLP. (App. 231-232.) All of this evidence falls far short of constituting clear and convincing evidence of Settlors' intent that John T. should "get the LLLP."

(i) Testimony of John T.

[¶51] John T. testified that beginning in 1971 and again in December 2000 John A. told John T. that he (John T.) would get the farmland:

> Q. And did you become aware at that meeting of your father's intent of what he wanted to do with that LLLP interest on your mother's and -- her death and your dad's death?
>
> A. He told me on the way home that -- he said, you're going to get it in the end, but he said, I can't tell you if it's going to take one year or ten years.

(Tr. 141-142.)

[¶52] John T. also testified that John A. said nothing about whether he (John T.) would receive the farm in addition to a one-fourth (1/4) share of all other assets:

> Q. And did he tell you it would come out of your equal share so that -- it would come out of your share so that you wouldn't get it as a set aside?
>
> A. No.
>
> Q. What did he tell you? That you would get it as a set aside and then it would be divided by four?
>
> A. He never said a word about that. He just said to me that you'll get that land and we never talked. He never gave me any impression or indication how the rest of that was going to be divided.

(Tr. 142.)

[¶53] John T.'s testimony at trial does not constitute reliable evidence that both Settlors intended to create a specific bequest of the LLLP to John T. because John T. is the very individual standing to benefit from the reformation. Moreover, John T. himself actually testified that John A. said nothing about whether he (John T.) would receive the farmland under the Off the Top Interpretation or the Earmarked Interpretation. (Tr. 142.) All of John T.'s testimony at trial is what he, John T., "understood" about John A.'s intent, which has no probative value whatsoever about what John A. and Agnes intended on the date each signed their respective Trust instruments on February 5, 2001. John T.'s self-serving testimony is not clear and convincing evidence of the Settlors' intent.

(ii) William Guy's testimony

[¶54] Guy also testified at trial that the Settlors' intent was for John T. to receive the LLLP, and further that such LLLP was to pass to John T.'s GSTT "in addition to" a one-fourth share of all remaining Trust assets. (Tr. 31-33.) Guy's testimony in relation to whether such LLLP was to pass via the Off the Top Interpretation rather than pursuant to the Earmarked Interpretation has no probative value whatsoever because, as acknowledged by the District Court, he had no independent recollection of such claim. (App. 234.) Specifically, Guy sent a letter to John A. and Agnes dated December 13, 2000 ("December 2000 Letter") requesting John A. and Agnes determine whether the LLLP interest passing to John T. should pass to John T. under the Earmarked Interpretation ("Alternative One") or as a specific bequest to John T. via the Off the Top Interpretation ("Alternative Two"). (App. 75-77; Tr. 31-33.) At trial Guy testified that the Settlors directed him to draft Trusts which reflected the Off the Top Interpretation. (Tr. 33.) However, Guy's file had no documentary evidence to support his testimony which on its face is surprising, because it would have been a material fact to the Gassmanns. (Tr. 104.) Moreover, Guy stated that he had no recollection of either John A. or Agnes directing him to draft the Trusts to reflect either Alternative One or Alternative Two. (Tr. 102-104.) Instead, Guy gave this testimony based on his current interpretation of the Trust documents, *per se* (Tr. 104) (an interpretation flatly rejected by the District Court's construction of the Trusts (Finding #4)). (App. 238.)

[¶55] Guy's testimony does not rise to the level of clear and convincing evidence regarding the Settlors' intent for John T. to receive the LLLP under either scenario, because Guy's testimony is tainted by two material facts which precludes a trier

of fact from forming a "firm conviction" that there was a mistake: (1) Guy or an attorney of the Gunhus Firm previously attempted to reform the Trusts to benefit John T. behind the back of the 2003 Court in what appears to have been a violation of Rule 3.3 of North Dakota's Rules of Professional Conduct which provides in part "…a lawyer shall not make a statement to a tribunal of fact or law that the lawyer knows to be false"; and (2) at the time of trial Guy had a conflict of interest. Both facts render the probative value of his testimony nugatory and accordingly the "clear and convincing" standard is not satisfied.

[¶56] First, in 2003 the Gunhus Firm attempted to reform the terms of Agnes' Trust by drafting the Proposed Third Amendment to said Trust as part of the Petition to Equalize Gifts. (Docket #100 at Attachment "A," page 7; Tr. 86.) The Petition to Equalize Gifts was filed at the behest of Agnes who wished to make transfers equal to the Annuity Amount previously made to James' family to each of Mary, JoAnne and John T. (Docket #100 at pages 1-2.) In order to achieve this equalization, the Petition to Equalize Gifts requested that the 2003 Court either (1) authorize the Trustee of Agnes' Trust to make one-time gifts to Mary, JoAnne, and John T. in the amount of the Annuity Amount; or (2) allow for the Trust to be amended so that at the death of Agnes a specific bequest would be made to Mary, JoAnne, and John T. in an amount equal to the Annuity Amount. (Docket #100 at pages 3-4.) In light of this stated purpose, the Gunhus Firm filed the Petition to Equalize Gifts with the 2003 Court to which the Proposed Third Amendment to the Trust was attached. (Docket #100.) Paragraph 8(b) of the Petition to Equalize Gifts specifically stated as follows:

> b. Attached hereto as Attachment "A" is the proposed Third Amendment to the Agnes M. Gassmann Revocable Living Trust

> Agreement ("Third Amendment") which, in Paragraph 4 of Article Five, provides for the pecuniary allocations of $47,000.00 to each of JoAnne, Mary and John, upon Agnes' death.
>
> (1) The Third Amendment **makes no dispositive changes to Agnes' Trust**, except for the pecuniary allocations in Paragraph 4 of Article Five.
>
> (2) **Other inconsequential changes to Agnes' Trust in the Third Amendment include the removal of spousal references, since Agnes' husband is now deceased.**

(Emphasis added.) (Docket #100 at pages 2-3.)

[¶57] Despite the Petitioner's statement to the 2003 Court that the Proposed Third Amendment did not make any dispositive changes other than the $47,000 Annuity Amount equalization gifts, a careful review of the Proposed Third Amendment actually shows that the Gunhus Firm attempted to reform Article Five, Paragraph 6 so that John T. or the John T. GSTT would receive the LLLP. Specifically, the Proposed Third Amendment provided as follows:

> 6. *Specific Allocation.* My Trustee shall distribute all of my ownership interests in the John Thomas Gassmann LLLP and in the North Half (N1/2) of Section Thirty-six (36), Range One Hundred Forty (140) North, Range Fifty-eight (58) West of the Fifth Principal Meridian, in Barnes County, North Dakota, as follows:
>
> a. If my son, John T. Gassmann, survives me, then to my Trustee, and successors in trust, to be handled **for the benefit of John T. Gassmann** pursuant to Paragraph 2 of Article Ten.

(Docket #100 at Attachment "A," page 7.) (Emphasis supplied.) Compare the language directly above with ¶29 of this Brief. They are materially different.

[¶58] Although the Proposed Third Amendment was not executed because the 2003 Court authorized Agnes' intervivos gifts, said Petition to Equalize Gifts and

Proposed Third Amendment remain relevant to this Court's consideration of the probative value of Guy's testimony because they establish that Guy (or someone in the Gunhus Firm) attempted to mislead the 2003 Court regarding the very same issue now before this Court – i.e. was John T. to receive the LLLP? It is the Respondent's contention that the Gunhus Firm's attempt to mislead the 2003 Court casts such doubt on the very integrity of Guy's testimony at trial that his testimony *per se* cannot constitute "clear and convincing evidence" with respect to the intent of John A. and Agnes. No court, including the 2003 Court, should be put to the burden of hiring a proofreader to verify the accuracy of the representations made by counsel in a pleading with respect to an attached exhibit. No one should be called upon to read the "fine print," especially when the pleading states otherwise than the exhibit.

[¶59] Secondly, the doubt cast on Guy's testimony is further exacerbated because John T. was his client with respect to the very matter now before this Court. Guy testified that he drafted the document by which John T. became Trustee of the John T. GSTT. (Docket #107; Tr. 115.) Guy represents John T. with respect to the John T. GSTT and simultaneously represented Wells Fargo, which had a fiduciary duty to all the Settlors' children, including the Respondents. A leading expert on lawyers' conflicts of interest, Geoffrey Hazard, noted as follows:

> Intent §2.7 Primary and "Derivative" Clients.
>
> * * *
>
> Where the lawyer's client is a fiduciary, however, there is a third party in the picture (namely the beneficiary) who does not stand at arm's length from the client; as a consequence, the lawyer also cannot stand at arm's length from the beneficiary. Clients with such responsibilities include trustees ... Because, in the situations posited, the lawyer is hired to represent the fiduciary, and because the fiduciary is legally required to

> serve the beneficiary, the lawyer must be deemed employed to further that service as well.
>
> It is only a small additional semantic step, and not a large analytic one, to say that in such situations the fiduciary is not the only client, but merely the "primary" client. In this view, the beneficiary is the "derivative" client. The beneficiary, strictly speaking a nonclient, may be entitled to the loyalty of the lawyer almost as if he were a client.

Geoffrey C. Hazard, Jr., et al., The Law of Lawyering, §2.7 (3d ed., 2010 Supp.) (Footnotes omitted.)

[¶60] In summary, Guy represented John T. and owed him a duty of loyalty. Further, based on Guy's continued representation of Wells Fargo after Agnes' death, Guy had a duty of loyalty to his derivative clients, the Respondents. Respondent Reichert raised this issue both with Guy and Wells Fargo. (Docket #110, #113.) The Respondents and John T. are adverse in this legal proceeding to determine which assets of the Settlors should be transferred to the John T. GSTT, and accordingly not to the Respondents' respective GST Trusts. Guy's simultaneous duty of loyalty to adverse parties arises out of a set of operative facts, all of which were before the District Court below: Guy drafted the John T. GSTT and he proffered testimony about what the Settlors intended to transfer to John T.'s GSTT **but for** his own scrivener's error.

[¶61] Guy's testimony regarding the Settlors' intent was **not** based on his recollection of particular facts regarding how the Gassmanns instructed him to draft the Trusts. Instead, his testimony is based on **his legal interpretation** of the Trust instruments:

> Q: So you don't recall what was said at the meeting on January 16th and your notes reflect what was said at the December 12th meeting, but you're basing your interpretation on how the final documents were prepared; is that correct?

A: Yes.

(Tr. 104.) And this is the salient point for the conflict of interest analysis: In Guy's act of formulating his legal interpretation of the Trust instruments *per se* and testifying based on that interpretation, the District Court could not have known which of Guy's simultaneous adverse duties of loyalty informed his legal opinion of what the Trust instruments said. Guy's legal opinion which was rendered under the influence of his concurrent adverse duties of loyalty is the very predicate for his testimony about the Settlors' intent, and "there's the rub."

[¶62] The impartiality of Guy's testimony is suspect on its face because of his dual and simultaneous duties of loyalty to his client John T. and to his derivative clients, the Respondents. Respondents assert that no one can simultaneously discharge his duty of loyalty to parties who are directly adverse to each other in a legal proceeding much less provide clear and convincing evidence about the very matter upon which the conflict of interest is predicated. That is precisely what the professional conflict of interest rules are about.

[¶63] Accordingly, a trier of fact cannot have found that Guy's testimony led to a "firm belief or conviction" simply because the District Court could not have known which duty of loyalty Guy was discharging or abiding by when he testified about Settlors' intent. The simultaneous and dual duties of loyalty to direct adversaries in the same legal proceeding in and of itself should have been a "red flag" to the District Court that there was no clear and convincing evidence of a mistake requiring reformation of the Trusts. Furthermore, the attempt of Guy (or someone in his firm) to mislead the 2003 Court regarding this exact issue now before this Court so erodes not only the credibility

but the veracity of his testimony regarding the intent of John A. and Agnes that it falls materially short of having any probative value whatsoever, much less constituting clear and convincing evidence about the intent of the Settlors.

(iii) The alleged "agreement" between the parties

[¶64] So what remains aside from the testimony of John T., the very person standing to benefit from the reformation, and the unreliable testimony of Guy, the attorney representing John T.? The District Court seems to say that reformation was permitted because all four (4) children of the Settlors agreed. Specifically, the District Court judge pointed to statements made within the Respondents' Motion to Amend the Pleadings, and stated as follows:

> By the time of trial, it seemingly was agreed that it was John A. and Agnes' intent that John T. would get the farm. This was supported by the testimony of William Guy and John T.

(App. 231.) The District Court's statement above does **not** accurately state the position of the Respondents. Respondents' precise position, as stated in its Amended Brief, is unequivocal: that if the LLLP was to be allocated to John T.'s GSTT, then the Trusts could **only** be read as a whole – giving effect to all Trust terms if the LLLP interest passed to John T.'s GSTT **as part of his one fourth (1/4) share of the Article 10 assets**, i.e. the Earmarked Interpretation applied.

[¶65] First, by omitting the emphasized language, the District Court erroneously and inaccurately misstates the position of Respondents. In fact, if Respondents intended to enrich their sibling John T. by "consenting" or "agreeing" to the reformation as the District Court "finds," there would have been no reason to contest the Petition initially filed by Wells Fargo to clarify the Trust instruments based on the Scrivener's Error.

More importantly, even if all parties had agreed, the legal evidentiary standard for reformation of a trust is not "an agreement between the stakeholders," but whether Petitioner presented the clear and convincing evidence required for reformation. Reformation is not a matter of an implied contract among the stakeholders. Finally, the District Court denied Respondents' Motion to Amend the Pleadings after the District Court entered its findings, so as a technical procedural point Respondent's Motion to Amend the Pleadings is not part of the record. (Tr. 241.)

[¶66] In conclusion, the District Court erred in relying upon the above-stated evidence as constituting the clear and convincing evidence necessary for reformation. Moreover, the District Court discounted the various evidence, apart from the Trust documents themselves, which established that the Settlors' intent was to treat the children equally. The first was Agnes' stated desire to treat her children equally by equalizing the asset received solely by James' family (the $47,000 Annuity Amount) with a corresponding gift of $47,000 to each of Mary, JoAnne, and John T. (Docket #100; Tr. 85.) The second piece of documentary evidence regarding Agnes' intent to treat all the children equally was her annual equal gifts to all the children. (Docket #47 at page 30; Tr. 157, 192-193.) Finally, and most convincing, is the letter written by Agnes to Guy regarding how the estate, and specifically the farmland, should be treated which stated as follows: "**I feel this property should have been divided equal so there would not be any lawsuits to contend with, but as usual women have no say, but I want it settled now**." (App. 78-81.) (Emphasis added.)

(4) The District Court erred by reforming the Trusts without attaching any weight to the actual language of the Trust itself, and further, by using the reformation itself to dictate the "unambiguous" construction ultimately given to the Trusts by the court.

[¶67] As set forth in both Isvik and Shults, the longstanding rules of trust construction (i.e. gleaning the intent of the trustor from the trust itself and construing the trust, if possible, so as to give effect to all trust provisions) are not changed or rendered moot by the application of the Reformation Statute. As such, in order to determine if reformation was appropriate, the District Court was required to give some weight to the Settlor's intent as it appeared in the four corners of the Trusts themselves, and to determine if the requested reformation made sense when looking at the documents as a whole.

[¶68] As reformed, the District Court fails to give effect to the special power of appointment provided to Agnes in Article Ten, Paragraph 2. Article Five, Paragraph 6 unequivocally (even if reformed) provides that the LLLP should be handled pursuant to Article Ten, Paragraph 2, and Article Ten, Paragraph 2, provides that all assets passing by such provision remain subject to the special power of appointment given to Agnes in Article Nine. (App. 94, 153, 205, 216.) This provision must necessarily be ignored, without explanation, if the LLLP can pass to John T. under the Off the Top Interpretation. In addition to this violation of the cardinal rule of trust construction – i.e. give effect to all provisions within a trust instrument if possible – the District Court's finding that the LLLP was to pass to John T.'s GSTT also fails to read the Trusts as a whole because such finding (1) does not attach significance to the fact that the Settlors demonstrated that they "knew" how to make a specific bequest when such was their intent as evidenced in

Article Five, Paragraphs 1, 2, 3, 4, 5, and 7; and (2) fails to acknowledge the impact that Article Ten, Paragraph 1 (requiring an equal division of residual assets) had on the Trust document as written by the Settlors.

[¶69] In each provision of Article Five of the Trust, the Settlors were unambiguous in (i) identifying the certain property to be transferred; (ii) identifying to what person(s) such property should be transferred; and (iii) stating how such person(s) should receive the designated property, whether outright or in further trust. (App. 90-95, 149-154.) Specifically, when the Settlor intended to make a specific bequest of a Trust asset to one (1) beneficiary, the Settlor made such bequest under no uncertain terms as demonstrated by the specific bequest of farm machinery to James Gassmann in Article Five, Paragraph 4 and the specific bequest of R & G Auto Supply Co. in Article Five, Paragraph 7 as follows:

> 7. *Specific Allocation.* My Trustee shall distribute, outright and free of trust, all of my shares in R & G Auto Supply Co., as follows:
>
> a. To my nephew, Phillip J. Gassmann…if he survives me.
>
> (1) If Phillip J. Gassmann does not survive me, then this distribution shall be allocated to the share created for my son, James A. Gassmann, to be handled pursuant to Paragraph 2 of Article Ten.

(App. 94-95, 153-154.) In short, the Settlors "knew" the difference between a bequest in trust and one free of trust.

[¶70] As the Isvik court found, if the settlor wanted merely to remove the trustee, she would have advised her trustee that she would replace them. When she used the term "revoke," that court held she in fact revoked the trust. Likewise, when John A.

and Agnes intended for an asset to pass to a specific beneficiary (as in Paragraph 4 and Paragraph 7), they used specific bequest language. In those two (2) paragraphs they did not use the language: **To my Trustee, and Successors in Trust, to be handled pursuant to Paragraph 2 of Article Ten.** The distinction between the Settlors' ability to adequately make specific distributions in Article Five, Paragraphs 4 and 7, should have weighed in the District Court's analysis of whether the Settlors' intent had actually been thwarted by a mistake within the Trust document, or rather if there was a reason behind the language of the Trust in making the allocation in Paragraph 6. Respondents contend that it is clear that John A. and Agnes did **not** intend to make a specific bequest to John T. The Settlors' language clearly indicates that Settlors intended that each one's LLLP interest be transferred to his/her trustee and that it remain subject to the surviving spouse's special power of appointment provided in Article Nine, Paragraph 3.a. Each Settlor's unequivocal intent that the property be held by his/her Trustee indicates that no specific bequest to John T. was intended by either Settlor.

[¶71] Finally, Article Ten, Paragraph 1 requires that assets funded into the Article Ten GST Trust be divided into equal shares. (App. 205, 216.) The District Court's reformation of the Trusts ignores this equalization clause. All assets that pass under Article Ten remain subject to Article Ten, Paragraph 1, which provides that all assets are to be divided into equal shares so as to provide one (1) share for each of the descendant's children. (App. 205, 216.) Article Five, Paragraph 6 provided **only** that the LLLP interests be handled pursuant to Article Ten, Paragraph 2. (App. 94, 153.) This provision does **not** allocate the LLLP to one Trust share outside of Article Ten, Paragraph 1, nor does it provide that Article Ten, Paragraph 1 is not applicable. (App.

94, 153.) As written, the express intent of the Settlors is only that the LLLP be **administered** under Article Ten, Paragraph 2. (App. 94, 153.) As such, the District Court's reformation does not comport or comply with the actual language of the Trust documents.

C. The District Court could not reform the Trusts because per the District Court's own findings of fact, the Trusts were not "affected by a mistake," and as such, an essential element necessary for reformation was not met.

[¶72] The Reformation Statute specifically requires that in order to reform a trust there must be clear and convincing evidence that the settlor's intent was actually affected by a mistake. N.D.C.C. §59-12-15. This is an essential prong of the Reformation Statute itself and cannot be disregarded. In the case at hand, the District Court not only failed to make a finding that the Settlors' intent was somehow thwarted by the terms of the Trust, but the District Court's own Findings preclude such a finding.

[¶73] The District Court found that the Trusts as drafted unambiguously required the LLLP to be distributed equally (Finding #4). (App. 238.) The District Court then found that clear and convincing evidence was presented regarding the LLLP being allocated to John T (Finding #5); however, the District Court also found that **no clear and convincing evidence was presented** regarding the LLLP being allocated to John T. pursuant to the Off The Top Interpretation or the Earmarked Interpretation (Finding #6). (App. 238.) At this point the District Court's analysis should have stopped. Even assuming arguendo that the District Court did have clear and convincing evidence of Settlors' intent for John T. to receive the LLLP, such distribution was allowed for under the terms of the Trusts themselves.

[¶74] Specifically, Article Twelve, Paragraph 2.e. of the Trusts and N.D.C.C. §59-16-16(22) both contemplate non-pro rata distributions from the Trust. (App. 114, 173.) Therefore, John T. could have received the LLLP as a part of his one-fourth (1/4) equal share absent any reformation by the District Court. Accordingly, there can be no proof that the Settlors' intent was somehow thwarted by the terms of the Trusts, and without proof of such a mistake within the Trusts, reformation is impossible.

[¶75] Finally, the non-pro rata distribution wherein John T. receives the LLLP as part of his quarter share of the Settlors' estates is synonymous with the Earmarked Interpretation initially presented by the Respondents, and as well set-forth above, this is the **only** construction of the Trusts which gives effect to all Trust provisions and allows the Settlors' documents to be read within the "four corners of the document."

CONCLUSION

[¶76] The District Court reformed the terms of the unambiguous Trusts so that John T. would receive the LLLP as a specific bequest in addition to a one-fourth (1/4) share of all other Trust assets. In ordering such reformation, the District Court misapplied the Reformation Statute and allowed for reformation despite (A) a lack of clear and convincing evidence of either (1) Settlors' intent for John T. to receive the LLLP "off the top," or (2) Settlors' intent for John T. to receive the LLLP as a specific bequest; (B) failing to give any weight to the actual Trusts' terms in such a way that the Trust provisions could be read "as a whole;" and (C) a lack of any evidence that the actual terms of the Trusts were "affected by a mistake" which somehow thwarted the Settlors' intent.

[¶77] Based upon the foregoing, the Respondents respectfully request that Findings of Fact #5, #6, and #7 be set aside; the Order for Reformation of Article Five, Paragraph 6, and the Declaration that John T. Gassmann receive the LLLP in addition to a one-fourth (1/4) share of the remaining estate be reversed; and, finally, that this Court remand this case to the District Court with instructions to enter an order providing that the LLLP should be distributed equally amongst the four (4) GST Trusts established under Article Ten; or, in the alternative, that the LLLP should be distributed to the John T. GSTT "as a part" of his one-fourth (1/4) share of Article Ten assets.

Dated: November 24, 2010.

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