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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 Reichart, 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 Reichart, 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 APPELLEE

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I. STATEMENT OF THE ISSUE

[1] Whether the District Court erred in reforming the Trust Agreements of John A. Gassmann ("John A.") and Agnes M. Gassmann ("Agnes") (collectively "Trustors"), husband and wife, under N.D.C.C. § 59-12-15, to conform to the Trustors' intent that John T. Gassmann ("John T.") receive the John T. Gassmann LLLP interests ("the LLLP"), when the District Court found clear and convincing evidence that it was the Trustors' intent that John T. receive the LLLP interests and that a mistake of fact in expression occurred.

II. STATEMENT OF THE CASE

[2] Petitioner Wells Fargo, as Trustee of the John A. and Agnes Gassmann Revocable Living Trusts, filed petitions seeking reformation of Article Five, Paragraph 6 to correct a scrivener's error and confirm that John A. and Agnes clearly intended to allocate their interests in the LLLP to John T.'s Generation Skipping Trust ("GST") created under Article Ten, Paragraph 2. The Petitions were consolidated on February 2, 2010. The Petitions were filed in response to Respondents' initial position that Article Five, Paragraph 6(a) was ambiguous and should be interpreted to allocate the LLLP interests equally among the four GSTs created for the Trustors' children under Article Ten, Paragraph 1. After the Petitions were filed, Respondents changed their position and asserted that Paragraph 6(a) was unambiguous and required the LLLP interests to be divided four ways. The final position asserted by Respondents was that the LLLP interests should be allocated to John T.'s GST, but that the allocation must be part of John T.'s one-fourth share of the residue.

[3] The District Court found that (1) the Trust Agreements, as written, would require the LLLP interests, upon Agnes's death, to be divided equally between the Trustors' four children; (2) there was clear and convincing evidence that it was Trustors' intention that John T. get the farm (the LLLP); (3) there was no clear and convincing evidence regarding whether John T. received the LLLP interests as a part of or in addition to his one quarter share of the estate; and (4) the Trust Agreements themselves unambiguously provide, after reformation, that when the LLLP is allocated to the John T. GST, it does not become part of Agnes's Marital Share or Generation Skipping Share, established under Article Six, and that all remaining assets from the Marital Share and Generation Skipping Share, upon Agnes's death, were to be divided equally between the surviving children. (App. 238 (Findings of Fact ##4-7)). The District Court then clarified in the Order for Judgment that John T. was entitled to receive the LLLP interests, consistent with the Trustors' intent. (App. 239, 243 (Judgment #3)). The District Court also clarified that John T. was entitled to receive his one-fourth share of the remaining trust assets. (App. 239, 243 (Judgment #4)).

[4] Respondents appealed the District Court's Findings of Fact, Conclusions of Law, and Order for Judgment, and the corresponding Judgment, asserting that the District Court misapplied N.D.C.C. § 59-12-15 in reforming the Trusts. Respondents contend that the Findings of Fact are clearly erroneous, and ask this Court to set aside Findings ##5-7, and the Order for reformation of Article Five, Paragraph 6. Respondents also request that this Court reverse the District Court's determination that John T. receive the LLLP interests in addition

to his one-fourth share of the remaining trust assets, and that the case be remanded with instructions to the District Court to either enter an order distributing the LLLP interests among the four GSTs created under Article Ten, Paragraph 1, or that the LLLP be distributed to John T.'s GST as part of his one-fourth share.

[5] The District Court did not err in reforming Article Five, Paragraph 6 to conform to the Trustors' intent, and the Findings of Fact are not clearly erroneous. This Court should affirm the District Court's Findings of Fact, Conclusions of Law, and Order for Judgment, and the corresponding Judgment in their entirety.

III. STATEMENT OF THE FACTS

[6] John A. and Agnes Gassmann were married in 1938. The couple lived in Valley City and had four children: Mary Gassmann Reichart ("Mary"), JoAnne Dalhoff ("JoAnne"), James Gassmann ("James") (collectively referred to as "Respondents"), and John T. John T. is an attorney in Valley City, but he primarily farms the land owned by the John T. Gassmann LLLP. Mary is an attorney practicing law at Bryan Cave in St. Louis, MO. JoAnne and James also have advanced college degree. JoAnne lives in Iowa and James in Valley City.

[7] John A. and Agnes Gassmann initially created their respective Trusts on January 18, 1993. (Docket ##65, 66). Attorney William L. Guy III ("Guy") prepared both Trusts. (App. 139, 198). John A.'s Trust was partially amended on August 26, 1994, and amended and restated in full on February 5, 2001. (App. 82-140). John A.'s Trust was again partially amended on December

28, 2001. (App. 200-210). Agnes's Trust was also amended and restated in full on February 5, 2001. (App. 141-199). Agnes's Trust was also partially amended on December 28, 2001. The December 28, 2001 partial amendments did not modify the language of Article Five, Paragraph 6 of the Trust Agreements. Wells Fargo Bank, N.A. ("Wells Fargo" or "Trustee"), was named as Trustee of both Trusts. (App. 83, 142).

[8] Prior to drafting the Trusts, Guy sent a questionnaire to John A. and Agnes requesting that they provide certain documents and other information to him as soon as possible. (App. 74). Guy also sent a follow-up letter describing two alternatives and requesting that John A. and Agnes determine how they wish to allocate their interests in the North Half of Section 36 to John T. (App. 75; T.31-32). The alternatives were to (1) provide each of their four children with an equal share and allocate the real estate to John T. as part of his equal share, or (2) allocate the real estate to John T. "off the top" and then give him an equal share of the estate. (App. 75). Guy recommended Alternative One, but ultimately learned that John A. and Agnes wanted Alternative Two—to allocate the real estate to John T. "off the top" and also give him an equal share of the balance. (App. 75; T.33).

[9] On January 3, 2001, Guy received a letter from Agnes indicating her concern about James having already received certain properties that Agnes felt should have been divided equally between the four children. (App. 79-81; T.39-40). Agnes further expressed her desire to make sure that John receive the land in order to be able to continue farming it. Guy understood the letter to

indicate Agnes' issues with the prior gifts to James but that Agnes still intended to give the North Half of Section 36 to John T. (T.40).

[10] On January 16, 2001, the John Thomas Gassmann LLLP ("the LLLP") was formed. (Docket ##73, 120). John T. was named as Registered Agent and received a 1% General Partner interest in the LLLP. (Docket #120, pg. 51). John A.'s and Agnes' Trusts were each granted a 49.5% Limited Partner interest. (Docket #120, pg. 51). On February 5, 2001, John A. and Agnes individually, and John A. as Trustee of John A.'s and Agnes's Trusts, deeded the North Half of Section 36 to the LLLP. (Docket #74; T.71).

[11] In late 2001, both John A. and Agnes filed voluntary petitions to have Wells Fargo appointed as their Conservator in order to protect themselves from James' pressure and demands to receive additional gifts. (Docket ##83, 84). On March 29, 2002, John A. passed away in Fargo. (Docket #87). On August 7, 2003, Wells Fargo, as Conservator for Agnes, petitioned the district court to authorize lifetime gifting or to amend Agnes's Trust. (Docket #100). The Petition for Authorization of Lifetime Gifting or For Amendment of Trust indicated that Agnes "wishe[d] to make lifetime gifts to three of her children, JoAnne M. Dolhoff, Mary E. Reichart and John T. Gassmann, to offset the benefit received by the family of her son, James A. Gassmann, upon the death of her husband, John A. Gassmann." (Docket #100). The Petition further indicated that John A. left the death benefit from an annuity to James's children. (Docket #100). The annuity was valued at approximately $49,000.00. (Docket #100). Attached to the Petition was a proposed Third Amendment to Agnes's Trust.

(Docket #100). On September 2, 2003, the district court ordered the authorization of lifetime gifting and denied the Petition for Amendment of Trust. (Docket #101). The proposed Third Amendment was never executed. (T.87).

[12] On April 15, 2004, John T. removed Wells Fargo as Trustee of his GST and appointed himself as Trustee, all pursuant to the terms of John A.'s Trust. (App. 206; Docket #107). On the same date, the 49.5% limited partner interest held by the John A. Trust was assigned to the John T. GST. (Appellee App. 1; Docket #108). This transfer was done according to the Trust Agreements and Guy's understanding of John A.'s and Agnes's intentions. (T.92).

[13] Agnes passed away on August 11, 2009. (Docket #109). On August 26, 2009, Mary sent a letter to Guy regarding John A.'s and Agnes's Trusts. (Docket #110). Mary raised some concerns about consolidation of the Trusts, mineral and real property interests, in-kind distributions, and income tax related issues. (Docket #110). Mary never raised any issues about the LLLP interests being transferred to John T. (Docket #110, T.95-96). Guy wrote a letter to all of the children indicating that the "real property once owned by the trust was transferred to the . . . LLLP by [John A.] as Trustee and by your parents as individuals on February 4, 2001." (Docket #111). In response to Guy's letter, Respondents, through counsel, indicated that the Trusts were ambiguous. (Docket ##112, 113).

[14] Wells Fargo, on December 1, 2009, filed the Petitions for Order Clarifying Two Special Allocations in a Revocable Living Trust Agreement and Ratifying the Distributions Pursuant to the Clarified Allocations, and attached an

Affidavit of Scrivener's Error, which prompted this litigation. (App. 7-28). The Petitions and Affidavit indicated that an error occurred in drafting Article Five, Paragraphs 6 and 7 of the Trust Agreements. (App. 7-28). The Petitions and Affidavit indicate that Article Five, Paragraph 6 should read:

> 6. ***Specific Allocation***. My Trustee shall distribute all of my ownership interest in the John Thomas Gassmann LLP 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 the Trustee ***of the John T. Gassmann Generation Skipping Trust***, and successors in trust, to be handled pursuant to Paragraph 2 of Article Ten.
>
> * * *
>
> 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 ***grandson***, Phillip J. Gassmann, of Valley City, North Dakota, if he survives me.
>
> * * *

(App. 8-10, 14-16, 20-23) (emphasis added).

[15] Pursuant to Articles Five and Six of the Trust Agreements, the LLLP interests were never subject to the allocations specified under Article Seven and Article Nine. (Appellee's App. 3-4; App. 90-98,149-157). Article Five indicates that the specific allocations are to be made prior to the final allocation of assets under Article Six. (App. 95, 154). Article Six indicates that the remainder of the trust assets not disposed of under Article Five shall become part of the Marital Share and the Generation Skipping Share created under Article Six. (App. 95-100, 154-159). The LLLP interests are effectively allocated under

Article Five, and are never subject to Articles Six, Seven, Eight, or Nine. (App. 90-101, 149-160). The LLLP interests were only subject to Paragraph 2 of Article Ten to the extent that the interests were to be administered pursuant to John T.'s GST; Article Ten, Paragraph 2 merely enumerates the administrative terms of each separate GST. (App. 101-103, 161-162).

[16] On December 23, 2009, Respondents filed an Objection to Wells Fargo's Petitions but only to the proposed clarification to Article Five, Paragraph 6. (App. 29-36). Respondents first objected on the basis that the Trusts were unambiguous. (App. 32). Respondents then Amended their Objection to assert that the Trusts clearly allocated the LLLP interests to John T.'s GST, but as part of his one-fourth share of the remaining trust assets. (App. 53). Wells Fargo then submitted a Prehearing Brief maintaining its position that the Trusts should be clarified due to the scrivener's error, but also that the terms of the Trusts, when read as a whole, unambiguously require that the LLLP interests be allocated to John T.'s GST and the remainder of the trust assets then be divided equally among the GSTs for each child. (App. 60-73). On May 3, 2010, the case was tried before the District Court. Respondents then filed a Motion for Leave to Amend Pleadings to Conform to the Evidence, which was denied on August 4, 2010. (App. 241; Docket ## 127, 131).

[17] The District Court entered its Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment on June 29, 2010. (App. 230-240). Judgment was entered on August 23, 2010. (App. 242). The District Court found that: (1) 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; (2) "[c]lear 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;" (3) "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;" and (4) 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, established under Article Six, and that all remaining assets from the Marital Share and Agnes' Generation Skipping Share, upon Agnes' death were to be divided into equal shares among the surviving children." (App. 238; Findings of Fact ##4-7). The District Court ordered that John T. receive the LLLP interests consistent with the Trustors' intent. (App. 239, 243; Judgment #3). The District Court also ordered that John T. was entitled to receive his one-fourth share of the remaining trust assets. (App. 239, 243; Judgment #4). Respondents appealed the Order and Judgment. (App. 244).

IV. STANDARD OF REVIEW

[18] Respondents argue that the court misapplied N.D.C.C. § 59-12-15, which is subject to de novo review. Appellant's Br., ¶¶ 25-26. However, § 59-12-15 provides that the "court ***may*** reform the terms of a trust . . . ." N.D.C.C. §

59-12-15 (emphasis added). "When a district court *may* do something, it is generally a matter of discretion." In re Pederson Trust, 2008 ND 210, ¶ 12, 757 N.W.2d 740 (citation omitted). "Therefore, the proper standard of review for this issue is abuse of discretion." Id. "A district court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably, or if it misinterprets or misapplies the law." Id. "An abuse of discretion is never assumed; the burden is upon the party seeking relief to affirmatively establish it." Grinaker v. Grinaker, 553 N.W.2d 200, 201 (N.D. 1996). "The party seeking relief must show more than that the district court made a 'poor' decision, but that it positively abused the discretion it has." In re Estate of Cashmore, 2010 ND 159, ¶ 21, 787 N.W.2d 261. This Court "will not overturn the district court's decision merely because it is not the decision [it] would have made . . . ." Id.

[19] Respondents also challenge the court's Findings of Fact. Appellant Br., ¶ 26. "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." N.D. R. Civ. P. 52(a). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction the trial court made a mistake." In re Estate of Egeland, 2007 ND 184, ¶ 6, 741 N.W.2d 724. This Court gives "due regard to the trial court's opportunity to assess the credibility of witnesses, and the court's choice between two permissible views of the evidence is not clearly erroneous." Id. "Rule 52(a) . . . should not be construed to encourage appeals that are based

on the hope that the appellate court will second-guess the trial court." Buzick v. Buzick, 542 N.W.2d 756, 759 (N.D. 1996) (citation omitted).

[20] "[F]indings of fact will only be clearly erroneous when, upon review of the entire evidence, [this Court] is left with a definite and firm conviction a mistake has been made." Malchose v. Kalfell, 2003 ND 75, ¶ 14, 664 N.W.2d 508. "A trial court's findings of fact are viewed in a light most favorable to the findings." Id. "It is the duty of an appellant to demonstrate to this court which findings of fact are clearly erroneous. By placing the label 'clearly erroneous' on findings of fact, he has not fulfilled that duty." C.H. Carpenter Lumber Co. v. Schauer, 321 N.W.2d 460, 462 (N.D. 1982) (on petition for rehearing).

V. ARGUMENT

A. RELEVANT TRUST PROVISIONS

[21] Recognizing that the Trust Agreements must be construed in their entirety, the most relevant provisions of the Trusts are summarized below. An illustrative schematic showing how the provisions of the Trust "flow" was presented at trial and is included in Appellee's Appendix at pages 3 and 4.

[22] 1. **Article Five**: Upon the respective deaths of John A. and Agnes, Article Five sets forth the specific allocations and disbursements which must be made from the Trusts prior to distributing the residue. (App. 90-95, 149-154). Paragraph 1 directs the Trustee to pay expenses of administering the estate, any debts and claims, and estate taxes. (App. 90, 149). Paragraphs 2-3 make certain special allocations of residential and vacation property, and non-business

related tangible personal property. (App. 90-92, 149-151). Paragraph 4 allocates certain items of farm machinery to James. (App. 92-93, 151-152). Paragraph 5 makes a charitable allocation to St. Catherine's Parish. (App. 93-94, 152-153). The provision at issue here provides:

> ARTICLE FIVE
> Trust Administration Upon My Death
>
> Upon my death, my Trustee shall handle the remaining trust estate and accrued net income, including all property that becomes distributable to my Trustee at my death, 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***.
>
> * * *
>
> (2) If none of John T. Gassmann nor any of his descendants survive me, then this allocation shall lapse and ***shall become a part of the residue*** of my trust estate.
>
> * * *
>
> All payments under the preceding Paragraphs of this Article shall be made ***prior to the final allocation of assets under Article Six of this Agreement***.

(App. 90, 94-95, 149, 153-154) (emphasis added). This last provision clearly indicates that the Article Five allocations are to be made upon the death of the Trustor "off the top," and that the property disposed of under Article Five is never subject to Articles Six, Seven, Eight, Nine, or Ten, except for the LLLP interests being subject to Paragraph 2 of Article Ten ***only***, and not Paragraph 1 of Article

Ten. (App. 95, 154). Paragraph 7 allocates all shares in R & G Auto Supply Co. to Phillip J. Gassmann, a grandson. (App. 94-95, 153-154).

[23] 2. **Article Six**: This Article disposes of the remainder of the Trusts not effectively disposed of under Article Five:

> ARTICLE SIX
> Allocation of the Remainder of the Trust Estate
>
> The ***remainder*** of the trust estate, ***not effectively disposed of under the preceding provisions of this Agreement***, shall be handled as follows:
>
> * * *

(App. 95, 154) (emphasis added). The LLLP interests are not subject to Article Six as they are effectively disposed of under Article Five. Article Six allocates the remainder of the trust assets between the Marital Share (Article Seven) and Generation Skipping Share (Article Nine) created for each spouse. (App. 95-98, 154-157).

[24] 3. **Article Seven**: This Article governs disposition of the Marital Share. (App. 98-100). Because the value of the remaining trust assets was well below the applicable estate tax exemption, the Marital Share was never funded. (T. 69). The remaining trust assets thus passed to Article Nine (via Article Eight, which provided if there was a surviving spouse the Generation Skipping Share would be handled pursuant to Article Nine). (App. 100). The LLLP interests were not subject to this Article, as they were effectively disposed of through Article Five. (App. 94, 95, 153, 154).

[25] 4. **Article Nine**: This Article governs the Generation Skipping Share created for Agnes upon John A.'s death. (App. 100-101). The

income was to be distributed in monthly installments. (App. 100). The principal was to be distributed to Agnes for her health, education, support and maintenance. (App. 101). Upon Agnes's death, the assets were to be distributed in equal shares according to Article Ten, subject to Agnes's special power of appointment. (App. 101). Again, the LLLP interests, as the Trusts were written, were never subject to Article Nine, as the LLLP interests were effectively disposed of under Article Five. (App. 94, 95, 153, 154).

[26] 5. **Article Ten**: This Article creates the GSTs for each of the Trustors' children. Paragraph 1 divided the remaining assets into equal shares for each living child. (App. 205, 216). Paragraph 2, which is the only provision of Article Ten that applied to the LLLP allocation, provides:

> 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 4 of Article Nine, the separate share of each of my children shall be handled as follows:

(App. 205, 216). In construing Article Five, Paragraph 6, which clearly indicated that the LLLP interests should be "handled" pursuant to Paragraph 2 of Article Ten, this is the only relevant portion of Article Ten. (App. 94, 153).

[27] Respondents argue that the Trusts allocated the LLLP interests equally to the four children and did not create a specific allocation to John T.'s GST. Appellant's Br., ¶ 30; (App. 30-31). Respondents further argue that if the Trust Agreements could be construed to allocate the LLLP interests to John T.'s GST, then the allocation must be as part of his one-fourth share. Appellant Br., ¶ 30; (App. 48-51). However, the only way to reach Respondents' interpretation of the Trusts is if Articles Six and Nine are omitted from the Trusts. The LLLP

interests were specifically allocated under Article Five and is never subject to the Marital Share or the Generation Skipping Share when reading the Trusts as a whole, which the District Court did.

B. THE DISTRICT COURT DID NOT ERR IN REFORMING THE TRUSTS TO CONFORM TO THE TRUSTORS' INTENT.

[28] Respondents claim they "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[s] . . . but reformed . . . so that the LLLP now passes outright and free of trust to John T." Appellant Br., ¶ 31. It is quite clear that Respondents have misinterpreted the court's determination, as the court did not determine that the LLLP interests pass to John T. "outright and free of trust." They further misinterpret the court's opinion when they state: "After first finding that the Trusts in question unambiguously allocated they LLLP . . . equally to the GST Trusts established for each of the four (4) children under Article Ten . . . , the District Court held that Article Five, Paragraph 6 could be reformed so as to give John T. the LLLP outright . . . plus one-fourth (1/4) of the remaining estate . . . ." Id. Respondents contend that the court could not have reformed the Trusts because (1) such reformation was based on inconsistent Findings of Fact; (2) the court misapplied § 59-12-15 by reforming the Trusts despite a lack of clear and convincing evidence of Trustors' intent and without taking into account the entire Trust Agreements; and (3) there was no evidence of mistake. Appellant Br., ¶ 32.

[29] However, the District Court's Memorandum Opinion, Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment must be affirmed

because (A) the Findings of Fact are consistent and not clearly erroneous; (B) the court did not abuse its discretion in applying § 59-12-15 when (1) clear and convincing evidence of the Trustors' intent that John T. receive the LLLP interests existed, and (2) the District Court read the entire Trust Agreements to determine that John T. also receives his one-fourth share of the remaining assets as a whole; and (C) evidence was presented that the terms of the Trusts were affected by a mistake.

a. <u>The District Court's Findings Of Fact Are Not Inconsistent And Are Not Clearly Erroneous.</u>

[30] Respondents challenge the court's Findings of Fact. "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." N.D. R. Civ. P. 52(a). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction the trial court made a mistake." <u>Estate of Egeland</u>, 2007 ND 184, ¶ 6. "[T]he [district] court's choice between two permissible views of the evidence is not clearly erroneous." <u>Id.</u> "A trial court's findings of fact are viewed in a light most favorable to the findings." <u>Malchose</u>, 2003 ND 75, ¶ 14.

[31] The Findings of Fact relevant here are:

> 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 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***, established under Article Six, and that all remaining assets from the Marital Share and Agnes' Generation Skipping Share, upon Agnes' death were to be divided into equal shares among the surviving children.

(App. 238) (emphasis added). There is nothing internally inconsistent with any of the court's Findings.

[32] Respondents misconstrue Findings #6 and #7 in arguing that there was no clear and convincing evidence regarding whether the LLLP interests passed to John T.'s GST "off the top," and that the District Court erred in so determining. The court did not reform the Trusts so that John T. would receive the LLLP "off the top." (App. 232-233, 238-239). Rather, the court found that the Trusts unambiguously provided, after reforming the Trusts to conform to the Trustors' intent that John T. receive the LLLP (Finding #5), that the LLLP did not become part of the Marital Share or the Generation Skipping Share (Finding #7), and thus it was not subject to division between the four children. (App. 237). This Finding is consistent with the court's conclusion that John T. is entitled to his one-fourth share of the remainder of the trust assets in addition to the LLLP interests. The District Court's Finding is not based upon the reformation alone, but is based on Articles Six, Seven, Eight, Nine, and Ten of the Trust Agreements, when read as a whole. (App. 236-237).

[33] In its Memorandum Opinion, the court recognized the issue of whether the Trust Agreement unambiguously answered this question of whether John T. gets the farm over and above his one-fourth interest in the residual estate. (App. 236). The court correctly noted the need to "look at the whole agreement" and determined that the LLLP interests passed directly to the John T. GST without any conditions. (Appellee's App. 3-4; App. 236-237). The court first recognized the last provision of Article Five which states that: "All payments under the preceding Paragraphs of this Article shall be made prior to the final allocation of assets under Article Six of this Agreement." (App. 236, 95). The court then recognized Article Six's disposition of the remainder of the estate "not effectively disposed of under the preceding provisions [Article Five] of this Agreement . . . ." (App. 236-237, 95). The remainder was to be divided between the Marital Share and Generation Skipping Share. (App. 237, 95-98). The Marital Share was never funded, and the Generation Skipping Share was governed by Article Nine. The court correctly determined that the assets of the Generation Skipping Share were to be divided into equal shares for the children, but that the LLLP interests were not subject to Article Nine. (App. 237). The Generation Skipping Share consisted of assets allocated under Article Six, which did not include Article Five assets (the LLLP). (App. 237). The court also correctly determined that the LLLP was not subject to the power of appointment, as again, the Marital Share under Article Seven was established under Article Six, and dispositions made under Article Five (the LLLP) were not subject to allocation under Article Six. (App. 237). This is how the District Court

determined that the John T. GST received the LLLP interests outright and that he was still entitled to his one-fourth share of the residue. (Appellee's App. 3-4; App. 237). The District Court correctly examined the four corners of the Trust Agreements in reaching this conclusion.

[34] Respondents assert that there was no clear and convincing evidence to reform the Trusts so that the John T. GST would receive the LLLP interests pursuant to the "off the top" interpretation. (App. 238 (Finding #6)). However, the court did find clear and convincing evidence of the Trustors' intent, which was that John T. receive the LLLP interests (Finding #5), and reformed the Trust to conform to this specific intent. (App. 232-233). The District Court then interpreted the entire Trust Agreement in concluding that John T. also receives his equal share of the remaining assets. (App. 235-237). The District Court's Findings of Fact are not inconsistent and Respondents have failed to demonstrate how the Findings are clearly erroneous. Therefore, this Court should uphold the District Court's Findings of Fact.

b. <u>The District Court Did Not Abuse Its Discretion In Applying The Reformation Statute When It Found Clear And Convincing Evidence Of The Trustors' Intent And Correctly Interpreted The Provisions Of The Trust As A Whole.</u>

[35] Respondents assert that the District Court erred in applying N.D.C.C. § 59-12-15, which provides:

> The court ***may reform*** the terms of a trust, even if unambiguous, to conform the terms 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 of fact or law, whether in expression or inducement.

(emphasis added). "When a district court *may* do something, it is generally a matter of discretion." Pederson, 2008 ND 210, ¶ 12. "Therefore, the proper standard of review for this issue is abuse of discretion." Id. "A district court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably, or if it misinterprets or misapplies the law." Id. "An abuse of discretion is never assumed; the burden is upon the party seeking relief to affirmatively establish it." Grinaker, 553 N.W.2d at 201.

[36] Respondents also challenge the court's finding of clear and convincing evidence of the Trustors' intent that John T. receive the LLLP interests. Any challenges to the sufficiency of the evidence and reasonable inferences should be viewed by this Court in a light most favorable to the Judgment. See State v. Charette, 2004 ND 187, ¶ 7, 687 N.W.2d 484 (holding that in an appeal challenging the sufficiency of evidence, this Court views the evidence most favorable to the verdict). "The trial court can better evaluate evidence because it observes the demeanor and credibility of the witnesses, and [this Court] do[es] not substitute [its] judgment for that of the trial court when reasonable record evidence supports its findings." Fenske v. Fenske, 542 N.W.2d 98, 102 (N.D. 1996). This Court does not reexamine the district court's findings of fact upon conflicting evidence, and "a choice between two permissible views of the weight of the evidence is not clearly erroneous." Buzick, 542 N.W. 2d at 758.

1. The District Court Correctly Found Clear And Convincing Evidence of Trustors' Intent And Reformed The Trust As Necessary To Conform To That Intent.

[37] Respondents contend that the District Court's reformation fails on multiple levels. Respondents' challenge amounts to an attack on the court's finding of clear and convincing evidence. Respondents first argue that Wells Fargo failed to present clear and convincing evidence that it was Trustors' intent for John T. to receive the LLLP interests. Appellant Br., ¶ 49. Respondents next argue that Wells Fargo failed to present any evidence that it was Trustors' intent for John T. to receive the LLLP interests in addition to a one-fourth share of the remaining assets. Id. The District Court was not required to find clear and convincing evidence of the Trustors' intent for the John T. GST to receive the LLLP interests in addition to a one-fourth share of the balance. The court interpreted the entire Trust Agreement to determine that John T. receives the LLLP interests in addition to his one-fourth share, based on Articles Five, Six, Seven, Nine and Ten.

[38] Respondents attack on the court's findings is subject to the clearly erroneous standard of review. N.D. R. Civ. P. 52(a). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction the trial court made a mistake." Estate of Egeland, 2007 ND 184, ¶ 6. This Court gives "due regard to the trial court's opportunity to assess the credibility of witnesses . . . ." Id.

[39] Respondents argue that in North Dakota the clear and convincing standard is met only when the settlor is alive and can testify to his or her intent, and when the beneficiaries either affirmatively agree with the reformation or at

least fail to object to reformation. Appellant Br., ¶¶ 41-43 (citing In re Hirsch, 2009 ND 135, 770 N.W.2d 225). If this were the standard contemplated by § 59-12-15, the result would be absurd. This would limit the statute's application to only reformation of irrevocable trusts while the settlor is still alive. The statute is clearly not limited to such circumstances. Further, in Hirsch, this Court did not hold that the clear and convincing standard is *only* met when the settlor is alive and the beneficiaries do not object to reformation. Rather, this Court held that the appellant failed to properly present to the district court the issues and arguments raised on appeal. Hirsch, 2009 ND 135, ¶ 14. This Court noted that the settlor provided an affidavit which supported the movants' contention, "which the district court ***could rely on to find clear and convincing evidence*** of the intent and mistake of fact or law necessary" to reform the trust. Id. ¶ 21 (Maring, J. and VandeWalle, C.J., concurring) (emphasis added).

[40] Respondents cite to Nebraska case law to support their challenge to the court's finding of clear and convincing evidence. Appellant Br., ¶ 46. In In re Trust Created by Isvik, the Nebraska Supreme Court, made an independent conclusion as to whether there was clear and convincing evidence of intent and mistake. 741 N.W.2d 638, 537-38 (Neb. 2007). The court noted that the evidence of the settlor's intent was "primarily circumstantial and supports conflicting inferences." Id. at 538. The court then determined that "the conflicting evidence of . . . intent [was] . . . evenly balanced" and reached a different conclusion that the lower court. Id. This decision was fact-intensive and factually distinguishable from this case as it involved whether the settlor intended

to revoke a trust or merely remove a trustee. Id. at 536. This case is unpersuasive and should not be followed by this Court.

[41] Respondents are correct in asserting that the clear and convincing evidence standard is a higher standard of proof. However, Respondents are mistaken in asserting that the burden is only met when the settlor is alive and can testify to his or her intent. Such a standard would be impracticable, unworkable, and absurd. The District Court found clear and convincing evidence of the Trustors' intent and this Court does not substitute its judgment for that of the trial court when the record supports the trial court's findings. Fenske, 542 N.W.2d at 102.

[42] The District Court found that Wells Fargo presented clear and convincing evidence that it was both John A.'s and Agnes's intent for John T. to receive the LLLP interests, and that the Trust, as written, did not conform to that intent. As the mistake was clear from Finding #4, the court amended the Trust accordingly. The evidence presented at the court trial, when taken as a whole, constituted clear and convincing evidence of Trustors' intent that John T. receive the LLLP. The District Court's "choice between two permissible views of the evidence is not clearly erroneous." Estate of Egeland, 2007 ND 184, ¶ 6.

(a) Testimony of John T.

[43] At the court trial, John T. testified about his parents' intent with regard to the LLLP:

> 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."

. . .

Q: . . . 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. . . .

. . .

Q: Now these instruments, K and L, these revokable [sic] living trust documents, Mr. Guy has gone through them in depth in his testimony. The specific language about the north half of Section 36 is found on page 13. But regardless of what it says there, what was your understanding of ***your parents' intent*** upon their passing of what was to happen with the north half of Section 36? . . .

. . .

A: I always understood since Jimmy got the northeast quarter of 2 that ***I would end up with the north half of 36***.

. . .

Q: Okay. And so you testified that your parents told you they ultimately wanted you to end up with the farm, the north—

A: The north half, yes.

(T. 141-142, 146, 155) (emphasis added).

[44] Respondents assert that this evidence is not probative because John T. stands to benefit from the reformation. Appellant Br., ¶ 53. This testimony alone may not constitute clear and convincing evidence of Trustors' intent, but when considered with the totality of evidence presented, it is consistent and probative. Further, this Court does "not second-guess the trial court on its credibility determinations." DeCoteau v. State, 2000 ND 44, ¶ 11, 608 N.W.2d 240. "Under the clearly erroneous standard, [this Court] defer[s] to the trial court on matters of credibility because it has had the better opportunity to assess the credibility and demeanor of witnesses." Krank v. Krank, 541 N.W.2d 714, 717 (N.D. 1996). "The trial court is in a much better position to ascertain the true

facts than an appellate court, which must rely upon a cold record." Id. John T.'s testimony alone may not constitute clear and convincing evidence, but it is probative when considered with the other evidence presented. The District Court's "choice between two permissible views of the evidence is not clearly erroneous." Estate of Egeland, 2007 ND 184, ¶ 6.

(b) William Guy's Testimony

[45] Respondents assert that William Guy's testimony is not probative or credible, and does not amount to clear and convincing evidence. Again, Respondents' challenge to the court's findings is subject to the clearly erroneous standard. N.D. R. Civ. P. 52(a). "Under the clearly erroneous standard, [this Court] defer[s] to the trial court on matters of credibility because it has had the better opportunity to assess the credibility and demeanor of witnesses." Krank, 541 N.W.2d at 717.

[46] Attorney William Guy, who drafted the Trusts, testified at the court trial regarding the Trustors' intent. Guy testified that John A. and Agnes intended for John T. to receive the LLLP interests, in addition to his one-fourth share of the balance. (T.32-33). While the District Court found no clear and convincing evidence regarding whether John T. would receive the LLLP interests in addition to his one-fourth share, this testimony is still probative of the Trustors' intent to give John T. the LLLP interests, which is in accordance with how the District Court reformed the Trusts. Again, the District Court reformed the Trusts to conform to the Trustors' specific intent that John T. receive the LLLP interests. The Trusts were not reformed to give John T. the LLLP interests in addition to his

one-fourth share, as that conclusion was reached in construing the language of Trust Agreements themselves. (App. 232-233, 238).

[47] Guy testified that the LLLP—north half of Section 36—was to be a specific allocation to the John T. GST. (T.35). Guy testified:

> Q: What was your understanding of what you were about—what your clients wanted you to do? . . .
> A: At the meeting on January 16th John and Agnes ***direct that*** . . . ***the north half of 36 and their interest in the LLLP be allocated to the trust for the benefit of John T.*** off the top and that he was to receive an equal share of the residue.
> . . .
> Q: And . . . it was a specific allocation?
> A: Yes, it was. The remainder allocation is what's left over after payment of taxes, expenses and the specific allocations.
> . . .
> Q: Okay. I just want to clarify that. . . . Now, during your testimony today, you testified on multiple occasions that the Gassmann's [sic] directed you to draft the document so that the ***interest in the LLLP would pass to John T.*** and then the residue would be divided four ways; that is correct?
> A: Correct.
> Q: And is the basis of your testimony based upon your independent recollection of those meetings or is it based upon how the document was drafted?
> A: The notes that were taken on December 12th are the basis for my recollection of that meeting. And how the documents were prepared is the—is the basis for my recollection of the December—excuse me, January 16th meeting.
> Q: So—I just want to clarify. Your interpretation of the documents as to what the Gassmann's [sic] intended is based upon how you drafted those documents; is that correct?
> A: Well, and maybe I misunderstood you previously and the ***fact that's what they told me to do***.

(T. 58-59, 102) (emphasis added). Guy's testimony was consistent throughout the proceedings and, as the drafting attorney, his testimony is highly probative of the

Trustors' intent. Further, this Court does "not second-guess the trial court on its credibility determinations." DeCoteau, 2000 ND 44, ¶ 11. "The trial court is in a much better position to ascertain the true facts than an appellate court, which must rely upon a cold record." Id. The District Court's "choice between two permissible views of the evidence is not clearly erroneous." Estate of Egeland, 2007 ND 184, ¶ 6.

[48] Respondents also assert that "Guy's testimony is tainted by two material facts which preclude a trier of fact from forming a 'firm conviction' that there was a mistake[.]" Respondents assert Guy attempted to reform the Trusts "behind the back of the 2003 Court." Respondents also assert Guy had a conflict of interest.

[49] These "facts" are immaterial to the issues presented on appeal. Nothing was presented at the court trial to demonstrate that the alleged amendment of the Trusts without the court's knowledge was done intentionally. This simply may have been a mistake by counsel. More importantly, the proposed amendment was never executed, as the 2003 Court allowed lifetime gifting rather than amending the Trust. As for the "conflict of interest," Guy conflicted-out of the matter when the issue was raised. "Under the clearly erroneous standard, [this Court] defer[s] to the trial court on matters of credibility because it has had the better opportunity to assess the credibility and demeanor of witnesses." Krank, 541 N.W.2d at 717.

[50] To the extent Respondents challenge the court's finding of clear and convincing evidence of the Trustors' intent, the clearly erroneous standard of

review applies. Respondents have not demonstrated that the finding was induced by an erroneous view of the law, or that no evidence exists to support the finding. Estate of Egeland, 2007 ND 184, ¶ 6. Further, this Court should not be "left with a definite and firm conviction the trial court made a mistake." Id.

(c) The Agreement Between the Parties

[51] Respondents assert that the District Court misstated their position regarding an agreement that the Trustors' intended for John T. to receive the LLLP interests. Appellant Br., ¶ 64. Respondents state that their position is that if the LLLP interests were to be allocated to John T.'s GST, then the Trusts could only be read as to give John T. the LLLP as part of his one-fourth share. Id. Again, the Respondents are challenging the court's finding of clear and convincing evidence, which is subject to the clearly erroneous standard.

[52] At the court trial, Respondents' counsel represented to the court that the LLLP interests were to go to the John T. GST. Counsel, in her opening remarks, stated:

> Now it is clear and we—at the time we filed our objection we didn't have much of the information from either the bank or Bill Guy and that was requested in our initial objection, but it is ***clear from the notes and we concede that the LLP interest was to go to John T. and that's clear from Bill Guy's notes***.

(T.16) (emphasis added). Counsel continued:

> Now something I would like the Court to note is when Wells Fargo filed their petition, Bill Guy's affidavit it doesn't say that this LLP interest goes first—it goes to John T. and then the balance is distributed equally. ***All it says is that the property is intended to go to John T. and we agree***. ***We believe they intended it to go to John T.*** but as part of his one-quarter share.

(T.20) (emphasis added). Respondents clearly conceded at the court trial that it was the Trustors' intent that John T. receive the LLLP interests. The District Court considered this representation made by Respondents' counsel in reaching its conclusion: "By the time of trial, it seemingly was agreed that it was John A. and Agnes' intent that John T. would get the farm upon their deaths." (App. 231). Respondents should therefore be precluded from asserting a different position on appeal.

[53] Respondents also contend that the court erred by discounting the evidence, including the Trust Agreements and a letter from Agnes to Guy indicating her "desire to treat her children equally." Appellant Br., ¶ 66. Again, the court did consider the Trust Agreements in determining whether John T. received the LLLP interests in addition to his one-fourth share. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction the trial court made a mistake." Estate of Egeland, 2007 ND 184, ¶ 6.

[54] As for the letter drafted by Agnes (App. 78-81), Respondents represent that "the letter written by Agnes to Guy regarding how the estate, and ***specifically the farmland***, should be treated" indicates her intent that the LLLP interests be divided equally. Appellant Br., ¶ 66. Respondents misconstrue the letter and the testimony regarding the letter. The letter does not address the North Half of Section 36. (App. 78-81). Further, the testimony at trial was:

Q: Did you ever understand any part of Exhibit F to mean . . . the north half of Section . . . 36 should go to John but it should be then equalized out of his share?

A: No, I don't believe there's any reference at all here to the north half of 36.

(T.40). Guy understood the letter to indicate that Agnes had issues with the property that had already been given to James, but that Agnes was never referring to the North Half of Section 36, which is at issue here. (T.40). The court found that "[t]here is no mention in that letter about the 'farm' that John T. was going to get." (App. 235).

[55] Respondents argue that Agnes wanted all of their property to be divided equally, but ignore all of the farm equipment given to James Gassmann under Article Five, including a tractor, snowblower, Model 760 combine, grain drill and Model 480 disc. (App. 92). Contrary to Respondents' position, this clearly indicates the Trustors' intent to make specific allocations to certain children and not distribute everything equally.

[56] The District Court's "choice between two permissible views of the evidence is not clearly erroneous." Estate of Egeland, 2007 ND 184, ¶ 6. "It is the duty of an appellant to demonstrate to this court which findings of fact are clearly erroneous. By placing the label 'clearly erroneous' on findings of fact, he has not fulfilled that duty." C.H. Carpenter Lumber Co. v. Schauer, 321 N.W.2d 460, 462 (N.D. 1982) (on petition for rehearing).

2. The District Court Properly Considered The Trust Agreements In Determining That The John T. GST Receive A One-Fourth Share In Addition To The LLLP Interests.

[57] The district courts may reform a trust, even if unambiguous, to conform to the settlor's intent. N.D.C.C. § 59-12-15. The District Court determined that there was clear and convincing evidence of Trustors' intent that John T. receive the LLLP interests, but that the Trusts, as written, did not accomplish that purpose. (App. 231). The court noted that, as written, upon John A.'s death the balance of the Trust, including the LLLP interests, would pass under Article Six to Agnes's Marital Share and Generation Skipping Share. (App. 231). And, as written, the LLLP interests would be passed equally to the four children upon Agnes's death, which was not the Trustors' intent. (App. 231). The court found this language to be unambiguous, and that the result did not comport with the Trustors' intent that John T. receive the LLLP interests. (App. 232). The court thus correctly reformed the Trust. Alternatively, Wells Fargo maintains that the Trust Agreements, as originally drafted, unambiguously reach the same result as the court reached by reforming the Trusts.

[58] Respondents assert that "the construction of the trusts, as written, should inform the reformation" not vice versa and that the District Court "ignored the Trusts as written." Appellant Br., ¶¶ 45, 48. It should be noted upfront that the court did construe the Trust Agreements as written. The Trusts, as a whole, informed whether John T.'s GST received the LLLP interests as part of his one-fourth share or in addition to his one-fourth share. (App. 232, 233). The court concluded that "there was no clear and convincing evidence on this issue ***outside of the four corners*** of the Trust Agreements." (App. 233) (emphasis added). The

reformation was to conform the Trusts to the Trustors' intent that John T's. GST receives the LLLP interests, not how he receives it.

[59] Respondents argue that the District Court failed to give effect to all of the provisions of the Trust Agreements, including the special power of appointment articulated in Article Ten, Paragraph 2. However, with or without the District Court's reformation of Article Five, Paragraph 6, several of the Trust provisions must be read-out of the Trust in order for Respondents' construction to be correct.

[60] For Respondents' construction to work, the court must ignore the specific allocations designated in Article Five, and the last provision of Article Five which directs the payments to be made prior to the final allocations under Article Six. (App. 149-154). Article Six's mandate that "the remainder of the trust estate, ***not effectively disposed of under the preceding provisions*** of this Agreement" must also be ignored for Respondents' construction to work. (App. 154). For the LLLP interests to be subject to Article Seven's Marital Share and Article Nine's Generation Skipping Share, as Respondents argue, the entire Trusts would need to be completly reformed. The LLLP interests are not subject to these Articles or the special power of appointment granted to Agnes in Articles Seven and Nine. Therefore, the District Court properly construed the Trust Agreements as a whole in determining that John T's GST. received the LLLP interests in addition to his equal one-fourth share of the residual estate.

[61] Respondents argue that the Trustors' did not intend to make a specific allocation of the LLLP interests because it was not done using the terms

and language as was used in Article Five, Paragraph Seven. The Paragraph Seven allocation provided that the Trustee would distribute "outright and free of trust," the Trustors' shares in R & G Auto Supply Co. (App. 153-154). However, this specific allocation was not made to one of the Trustors' four children, but rather, a grandchild. Trustors' did not set up GSTs for their grandchildren and that is precisely why the allocation is made free of trust—there was no trust for the shares to pass to. This argument by Respondents is unpersuasive.

[62] Respondents cite to Tennessee law to support their position that trust instruments must be considered in construing the terms of a trust. In doing so, Respondents cited a Tennessee Court of Appeals' discussion of will construction. In In re Estate of Shults, the court indeed noted that the most beneficial tool in determining the testator's intention is the will itself. 2008 WL 490643 *5 (Tenn. Ct. App. 2008) (unreported decision). The Tennessee court, in discussing reformation of a trust instrument, cautioned that "reformation is entirely different from resolution of an ambiguity." Id. at *6. The court also stated that "[m]istakes of expression include misstatements of settlor's intention, failure to include a term that was intended to be included, or include a term that was not intended to be included." Id. This is precisely was occurred in this case. The District Court found clear and convincing evidence that Trustors intended the LLLP interests to go to John T., and that a mistake occurred by a misstatement of the Trustors' intention. (App. 238 (Finding #4 and #5)).

[63] Respondents fail to demonstrate that the District Court abused its discretion in applying § 59-12-15, when the District Court found clear and

convincing evidence that the Trustors' intended for John T. to receive the LLLP interests. "An abuse of discretion is never assumed; the burden is upon the party seeking relief to affirmatively establish it." Grinaker, 553 N.W.2d at 201. Respondents also failed to demonstrate that the court's findings are clearly erroneous. N.D. R. Civ. P. 52(a). "[F]indings of fact will only be clearly erroneous when, upon review of the entire evidence, [this Court] is left with a definite and firm conviction a mistake has been made." Malchose, 2003 ND 75, ¶ 14. "A trial court's findings of fact are viewed in a light most favorable to the findings." Id. Therefore, this Court should affirm the District Court's Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment in their entirety.

C. THE DISTRICT COURT CORRECTLY REFORMED THE TRUSTS AS CLEAR AND CONVINCING EVIDENCE THAT A MISTAKE AFFECTING THE EXPRESSION OF TRUSTORS' INTENT EXISTED

[64] Respondents argue that the District Court failed to make a specific finding on mistake. Respondents also contend that because the court found there was no clear and convincing evidence regarding the LLLP interests being allocated to John T. in addition to his one-fourth share, the analysis should have stopped. However, the mistake is clear on the face of the Trusts. The scrivener mistakenly failed to draft the Trusts in such a way to conform to the Trustors' intent. Clear and convincing evidence of a mistake in expression existed here.

A "mistake in fact" is defined under North Dakota law as:

> Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in:
>
> 1. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or

2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed.

N.D.C.C. § 9-03-13. In a case cited by Respondents, a mistake in expression is defined as "misstatements of settlor's intention, ***failure to include a term that was intended to be included***, or include a term that was not intended to be included." Estate of Shults, 2008 WL 490643 *6. The scrivener, Attorney William Guy, testified:

Q: . . . was it your understanding that they wanted it to go to the . . . John T. Gassmann Generation Skipping Trust?
A: Yes.
Q: . . . if it was truly to go to all 4 of them, this north half of 36, what would you have done?
A: Well, first of all the partnership would have been called something other than the John Thomas Gassmann, LLLP. Typically where it's to go to children as a group it would be something like the Gassmann real estate LLLP.
Q: If it was going to go to all four would you have talked in 6 A pursuant to paragraph 2 of Article Ten?
A: No. If it was to go to all four there wouldn't have been a 6 A or 6 B. Paragraph 6 would have simply said that the interest in the LLLP would have been allocated to the trustee to be handled pursuant to Article Ten with no reference to any paragraph.
Q: If it was to go to all four, would this thing have read much differently?
A: Completely differently. . . . There would not have been reference to any individuals at all.

(T. 59-60). It is quite clear from the Trust Agreements and testimony that a mistake of fact in expression occurred while drafting the Trusts. Wells Fargo therefore demonstrated by clear and convincing evidence the Trustors' intent, that the Trusts did not conform to that intent, and that the terms of the Trusts were affected by a mistake of fact in expression. Even if this Court were to determine there was no clear and convincing evidence

of a mistake of fact, the result must be the same. The Trusts, as unambiguously written prior to the court's reformation, dictate the John T. GST receive the LLLP interests and his one-fourth share.

VI. CONCLUSION

[65] Based on the foregoing, this Court should affirm the District Court's Judgment entered on August 23, 2010 in its entirety.

Respectfully submitted,

Dated: December 23, 2010

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief 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, signature block, certificate of service and this certificate of compliance, totals 10,197.

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AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS

In the Trust of Agnes M. Gassmann Revocable Living Trust
Cass Co. Case No. 09-2009-CV-04694
Supreme Court No. 20100275

In the Trust of John A. Gassmann Revocable Living Trust
Cass Co. Case No. 09-2009-CV-04695
Supreme Court No. 20100276

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:

BRIEF OF APPELLEE; AND
APPENDIX OF APPELLEE

on December 23, 2010, by sending a true and correct copy thereof by electronic means to the following e-mail addresses, to-wit:

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To the best of affiant's knowledge, the e-mail addresses above given are the actual addresses of the parties intended to be so served as published in the North Dakota Supreme Court's online directory. This document is filed in accordance with N.D. Sup. Ct. Admin. Order 14.

Dated this 23rd day of December, 2010.

/s/ Theresa A. Luehring
Theresa A. Luehring

Subscribed and sworn to before me this 23rd day of December, 2010.

/s/ Sarah D. Klava
SEAL) Notary Public