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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, JoAnne 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, JoAnne 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

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

[¶1] The Petitioner seems unfazed by the fact the District Court's Findings of Fact were internally inconsistent. Petitioner argues for a "game changing rule" that the applicable standard of review is "abuse of discretion" even though the issues before this Court are testamentary trust construction and the statutory construction of N.D.C.C. §59-12-15 ("Reformation Statute"). The Petitioner ignores that its entire case for reformation is predicated exclusively on the testimony of two (2) people: John T. Gassmann ("John T."), the beneficiary who would directly benefit from the reformation, and John T.'s lawyer, William T. Guy III ("Guy"), who has a direct conflict of interest with respect to the very issue before this Court. Finally, Petitioner just plainly gets the District Court's Order for Judgment #3 wrong. Petitioner states that the LLLP interest is to be allocated to John T.'s Generation Skipping Trust ("John T.'s GSTT") but that is not what the Order says. Order for Judgment #3 specifically orders an outright bequest to John T. which is clearly inconsistent with the Settlors' overall federal estate tax planning strategy and their intent to minimize the federal estate taxes due at their demise and at the demise of their children. Based on the entire record, this Court should decline Petitioner's invitation to reform the unambiguous trusts of John A. and Agnes.

II. LAW AND ARGUMENT

A. Standard of Review

[¶2] The Petitioner's argument that the proper standard of review is abuse of discretion is patently wrong. The issues before the District Court were: (i) trust construction and (ii) trust reformation pursuant to the Reformation Statute.

[¶3] Trust construction issues are reviewed *de novo*. Matter of Estate of Eggl, 2010 ND 104, ¶10, 783 N.W.2d 36. Although Petitioner argues in ¶32 of its Brief that the District Court re-construed the Trusts after reformation, Petitioner fails to acknowledge such construction receives *de novo* review.

[¶4] With respect to the standard of review for trust reformation, Petitioner relies on In Re Pederson, 2008 ND 210, 757 N.W.2d 740, which involved the interpretation of a different statute. This Court held in Pederson that the appropriate standard of review was abuse of discretion because N.D.C.C. §59-04-02 was permissive in nature. 2008 ND 210 at ¶12. The fact a court **may** do something does not define the appropriate standard of review. Moreover, the Reformation Statute, unlike the statute analyzed in Pederson, demands a standard for trust reformation, i.e. when there is ". . . clear and convincing evidence of a mistake," and is not at all permissive in nature. This Court must interpret the Reformation Statute in order to determine if the District Court misapplied the statute when it re-construed the Trusts after reformation and to determine what constitutes clear and convincing evidence necessary to reform an unambiguous instrument. The reformation issue is one of statutory interpretation and is entitled to *de novo* review. Grinnell Mutual Reinsurance Co. v. Thompson, 2010 ND 22, ¶9, 778 N.W.2d 526, and other cases cited at ¶28 of Respondent's Brief. Petitioner's position that a trust construction and reformation case is subject only to an abuse of discretion standard of review dilutes the sanctity of wills and testamentary trusts and dramatically alters the traditional reluctance of courts to reform testamentary instruments.

B. Reformation versus Construction

[¶5] The Petitioner's Brief attempts to explain the inconsistent Findings of Fact ("Findings") within the District Court's Order by asserting that the Order did **not** reform the Trusts to give John T.'s GSTT the LLLP "off the top." (Petitioner's Brief ¶32.) Rather, Petitioner explains that the District Court engaged in a Construction--Reformation--Construction analysis by which the court only "reformed" the Trusts to direct the LLLP pass to John T.'s GSTT, and then re-construed the reformed Trusts to find that the LLLP no longer became "either a part of the Marital Share or the Generation Skipping Share" – each created under Article Six. (Petitioner's Brief ¶32-¶34.) In sum, by bypassing Article Six, the LLLP would pass to John T.'s GSTT "off the top."

[¶6] The foregoing analysis is irreparably flawed because after the District Court initially construed the Trusts, the only possible way for John T. to receive the LLLP "off the top" was for the District Court to reform the Trusts to allow for an "off the top" distribution. (App. 231.) The District Court determined that the Trusts, as written, passed the LLLP from Article Five, Paragraph 6, into Article Six. (App. 231.) All of the Article Six assets then passed into the GST Trust administered under Article Nine for the benefit of the surviving spouse (i.e., Agnes) [1] which, at her death, passed equally to the four GST Trusts created under Article Ten. (Finding #4; App. 231.) After reformation, however, the District Court claimed inexplicably that the LLLP now bypassed Article Six and could thus pass to John T.'s GSTT "off the top." (Finding #7; App. 237.)

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[1] The above "flow" of assets is exactly how Petitioner administered the LLLP interests with Agnes getting all income from the LLLP which she was only entitled to **if** said interest passed into the Article Nine GST Trust. (Tr. 163.)

[¶7] The District Court's reformation, as set forth on Page 4 and/or Page 10 of the Order, in no way changed the Trusts' provisions regarding the flow of Trust assets. (App. 233; App. 237.) Thus, if the LLLP passed into Article Six before reformation, it must also pass into Article Six after reformation unless the District Court found clear and convincing evidence that John T.'s GSTT was to receive the LLLP outside of Article Six (i.e., "off the top"). The District Court specifically acknowledged in Finding #6 that this evidence did not exist. (App. 238.) Therefore, the District Court's Findings #6 and #7 (i.e. that the Trusts provide, after reformation, that the LLLP does not become a part of the GST Trust established under Article Six) are irreconcilable. Because Findings #6 and #7 cannot both be true, those Findings are clearly erroneous and must be overturned.

[¶8] Even assuming that the District Court appropriately found clear and convincing evidence that Article Five, Paragraph 6, should be reformed to designate the LLLP interest to John T.'s GSTT, the LLLP would still pass into Article Six, and once in Article Six the only possible construction of the reformed trust was that the LLLP was earmarked to pass "as a part of" the one-fourth (1/4) share of assets passing to John T.'s GSTT.

[¶9] The Respondents' construction does not ignore the last paragraph of Article Five. The Respondents reassert that Paragraph 6 was never subject to this last paragraph of Article Five. Paragraph 6 did not direct a **payment (**like the payments for debts, expenses, and taxes directed to be made under Paragraph 1), nor did Paragraph 6 provide for a direct distribution to be made **after the death of the surviving spouse** (like the distributions directed to be made under Paragraphs 4 or 5). Rather, as set forth in ¶69-¶70 of Respondents' brief, Paragraph 6 was an **allocation** to John A.'s Trustee which

was not "effectively **disposed** of" [emphasis added] under Article Five. Accordingly, the LLLP interest passes to Article Six.

C. Clear and Convincing Evidence

[¶10] In order to reform a trust, North Dakota law requires clear and convincing evidence more persuasive and encompassing than the testimony of a self-interested witness or his attorney who has a conflict of interest in this case. The testimony of both John T. and Guy lack any probative value and should not be considered.

[¶11] John T.'s testimony lacks any probative value because it is not only self-serving but, as pointed out in ¶51, *et seq.*, of Respondents' Brief, John T. never testified that either Settlor said he would receive the farmland under the Off the Top Interpretation. Petitioner's citation to the testimony of John T. in ¶43 of its Brief adds no new evidence on the issue. It is simply more of John T.'s *ipse dixit* testimony which does not measure up to the requisite standard of proof required by the Reformation Statute.

[¶12] The Petitioner asserts Guy's attempt to amend the Trust in 2003 and his conflict of interest are immaterial. (Petitioner's Brief ¶49.) To the contrary, Guy's conduct in this matter casts such doubt on the credibility and probative value of his testimony that it cannot constitute clear and convincing evidence for the reasons set forth in ¶55-¶63 of Respondents' Brief. Regarding the attempted amendment in 2003, Petitioner's Brief states at ¶49 that "[n]othing was presented at the court trial to demonstrate that the alleged amendment of the Trusts without the court's knowledge was done intentionally" and "[t]his simply **may** have been a mistake of counsel." [Emphasis added.] Guy testified that he prepared the Third Amendment in question to "clarify the issue of Paragraph 6 . . .," and this testimony establishes that the attempted revision was

not "a mistake." (Tr. 86.) Further, Respondents need not present anything more than the Proposed Third Amendment and the Petition to which it was attached because both documents speak for themselves: Guy drafted the Third Amendment which revised the Trust, and the Petition to which said Amendment was attached states that "the Amendment makes no dispositive changes to Agnes' Trust . . ." (Tr. 86; Docket #100.) Guy's 2003 attempt to modify the very provision in the Trust which is now before this Court without ensuring such modification was brought to the attention of the lower court impugns the credibility of his testimony.

[¶13] Such lack of credibility is further exacerbated by Guy's conflict of interest. There is no need to reiterate here the arguments of ¶¶59-63 of Respondents' Brief except to point out that Petitioner acknowledges that Guy had a conflict and asserts in ¶49 of its own Brief that Guy conflicted-out of the matter when the issue was raised. This statement is false. Respondent Reichert advised both Guy and Petitioner in writings dated August 26, 2009 and November 23, 2009, that Guy had a conflict of interest. (Docket #110, #113.) Nevertheless, in complete derogation of the conflict rules, on December 1, 2009, the Vogel Law Firm filed a Petition for Clarifying Two Special Allocations in both John A.'s Trust and Agnes' Trust. (App. 7-18.) It was not until February 4, 2010, that a Notice of Substitution of Counsel was filed with the District Court. (Docket #12.) Five months later is hardly "when the issue was raised." Respondents should not have to guess about whether John T. and his lawyer, Guy, strategized about the matter during those five months and whether their interest was prejudiced as a result thereof.

[¶14] Finally, Petitioner trivializes the existence of Guy's conflict of interest citing Krank v. Krank, 541 N.W.2d 714, 717 (N.D. 1996), to note that "[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." (Petitioner's Brief ¶44.) Guy's conflict, however, is not a matter of the District Court assessing his demeanor at trial. His conflict of interest and simultaneous duties of loyalty to adversaries on the precise issue which is before this Court (whether Article Five, Paragraph 6, as drafted, met the intent of the Settlors) is a direct conflict of interest and is a *per se* impediment to the credibility of his testimony. Guy's conflict of interest so infects his actions that it corrupts the veracity of the Scrivener's Affidavits and renders his testimony at trial nugatory. When a lawyer simultaneously represents clients whose interests are directly adverse, as in this case, a presumption exists that said lawyer's interpretation of a trust instrument in favor of one adverse party follows from a desire to favor that client over the other, rather than from a disinterested judgment call. In sum, there is no credible evidence that the Settlors' Trust instruments failed to conform to each Settlor's intent and, as such, the District Court could not find clear and convincing evidence necessary to reform.

[¶15] Respondents apprised the District Court of Guy's conflict of interest in its Objection to the Petitions but the District Court apparently disregarded it. (App. 33-35; App. 231.) Due to Guy's conflict of interest, the Respondents were prejudiced and, accordingly, there was a mistake when reviewing the record in its entirety and, accordingly, Findings #5-#7 are clearly erroneous.

D. Estate Tax Implications

[¶16] The District Court's Judgment declares that "John T. Gassmann is entitled to receive the John T. Gassmann LLLP (farm)." (App. 239.) The court's Declaration causes the Settlors' LLLP interests to pass to John T. outright and, thus, **outside** the federal estate tax protection of the GST Trusts which each Settlor obviously put in place so that the Settlors' property passing to each of their children would not be subject to federal estate taxes in their children's estates. The Order is inconsistent with the clear intent of John A. and Agnes to minimize both the federal estate taxes to be paid by the Settlors and the federal estate taxes to be paid by their children and flies directly in the face of what is the most clear and convincing evidence of what John A. and Agnes actually intended.

III. CONCLUSION

[¶17] The District Court found that each Trust was unambiguous and that, as written, the Trusts required the Settlors' assets be divided equally among the four children. N.D.C.C. §59-12-15 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. The District Court found no clear and convincing evidence was presented to reform the Trusts whereby John T. receives the LLLP first, and then receives one-fourth (1/4) of the balance of the estate (i.e. "off the top"). Thus, the Declaration that John T. receive the LLLP in addition to a one-fourth (1/4) share of the remaining estate must be reversed, and the District Court's claim that it re-construed the Trusts after reformation must be exposed for what it really was – a reformation allowing for an "off the top" distribution without the necessary clear

and convincing evidence to support such reformation. In addition, the evidence presented that the Settlors intended John T. to get the LLLP (farm) did not rise to clear and convincing. Thus, Respondents respectfully request 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 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 the 6th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2011, I caused the Reply Brief of Appellants to be filed electronically with the Clerk of the Supreme Court by e-mailing a true and correct copy to supclerkofcourt@ndcourts.com and to be served upon the attorney for Appellee, Ronald McLean, and John T. Gassmann, by e-mailing a true and correct copy to rmclean@serklandlaw.com and jtga1919mann@msn.com, respectively, and mailing a true and correct copy to John T. Gassmann at 832 – 12th Avenue SE, Valley City, ND 58072.

The originals of the foregoing are being held in my office.

Dated this 6th day of January, 2011.

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