20120319
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 6, 2012
STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20120319

In Re: Matthew Larson Trust Agreement Dated May 1, 1996 and
In Re: Matthew Larson Irrevocable Retirement Trust II Agreement
Dated December 1, 2009

William E. and Patricia A. Clairmont,
Petitioners/Appellants

vs.

Greg Larson, parent and guardian of N.J.L. and L.M.L.,
Respondent/Appellee

and

Sean Smith as Trustee of the Elizabeth H. Larson Trust Agreement Dated May 1, 1996; Jared D. Larson Trust Agreement Dated May 1, 1996; and Samuel G. Larson Trust Agreement Dated May 1, 1996,
Respondents/Appellees

Appeal from Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment entered on May, 24 2012, and Judgment dismissing with prejudice Petitioners' Petition entered on July 3, 2012,
Civil No. 09-2011-CV-00922
Cass County Courthouse, East Central Judicial District
The Honorable Steven L. Marquart, Presiding

BRIEF OF APPELLEES

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STATEMENT OF THE ISSUE

[¶1] Whether the district court properly concluded the Clairmonts failed to prove by clear and convincing evidence their intent and the terms of the trust were affected by a mistake of fact or law which existed at the time of the creation of the Matthew Larson Trust Agreement and the Matthew J. Larson Retirement Trust II Agreement when the Clairmonts never held or expressed an intent that only lineal descendants of the Clairmonts benefit under Matthew's Trusts.

STATEMENT OF THE CASE

[¶2] The Petitioners-Appellants, William and Patricia Clairmont ("Clairmonts") appeal from a judgment, dismissing with prejudice the Clairmonts' petition to reform the Matthew Larson Trust Agreement ("Trust I") and the Matthew J. Larson Retirement Trust II Agreement ("Trust II")[1] on grounds of mistake of fact or law and declaring Matthew's half-siblings, N.J.L. and L.M.L., as residuary beneficiaries of Matthew's Trusts. App. 31-32. On March 16, 2011, the Clairmonts petitioned the District Court for interpretation or reformation of Matthew's Trusts to include only the lineal descendants of the Clairmonts as residuary beneficiaries of Matthew's Trusts. Respondent-Appellee, Greg Larson, was summoned as parent and guardian of N.J.L. and L.M.L. App. 6-9. Following a bench trial on April 4, 2012, the district court dismissed the Clairmonts' Petition and declared N.J.L. and L.M.L. beneficiaries of Matthew's Trusts. App. 31-32.

[¶3] In a Memorandum Opinion, the district court concluded the provisions of N.D.C.C. § 30.1-04-07, requiring relatives of the half-blood to inherent the same share they would inherit if they were of the whole-blood, through N.D.C.C. § 30.1-02-01(5) are

[1] Trust I and Trust II collectively will be referred to as "Matthew's Trusts."

part of and read into Matthew's Trusts as if those provisions were included therein. App. 23. Further, the district court found the Clairmonts' ignorance of the law cannot be the basis for reforming Matthew's Trusts. App. 24. The Clairmonts failed to establish by clear and convincing evidence a mistake of law or fact sufficient to reform Matthew's Trusts to exclude his half-siblings as residuary beneficiaries because the testimony of the Clairmonts demonstrated the possibility of Matthew's half-siblings as residuary beneficiaries never entered their minds. App. 24-27. This appeal followed.

[¶4] On appeal, the Clairmonts have abandoned their request for interpretation of Matthew's Trusts to find N.D.C.C. § 30.1-04-07 inapplicable. The Clairmonts instead appeal the judgment of the District court dismissing with prejudice their petition for reformation of Matthew's Trusts.

STATEMENT OF THE FACTS

Background

[¶5] Matthew J. Larson was born in 1985, to Cindy and Greg Larson. Tr. 169:10. While married, Greg and Cindy had three other children: Sam, Elizabeth, and Jared. Tr. 169:9-12. In 2001, Cindy and Greg divorced, after which Greg remarried. Tr. 20:22-25. In 2004, Greg had two more children, N.J.L. and L.M.L. Tr. 169:11-12. Unfortunately, Matthew died unexpectedly on March 4, 2011, leaving behind his five siblings and parents. See Tr. 22:1.

[¶6] On March 16, 2011, Matthew's grandparents, William and Patricia Clairmont, filed a petition in the district court for interpretation or reformation of two trusts they had established for the benefit of Matthew. See App. 6-9. These trusts established by the Clairmonts for the benefit of Matthew, include the Clairmont GC

Trust, the Matthew Larson Trust Agreement ("Trust I"), the Matthew J. Larson Irrevocable Retirement Trust Agreement, and the Matthew J. Larson Irrevocable Retirement Trust II Agreement ("Trust II").

Matthew's Trusts

[¶7] The Clairmont GC Trust was created in 1991 to benefit the Clairmonts' then born grandchildren. App. 35-36. In 1996, the Clairmonts formed individual trusts for each of their grandchildren, resulting in the creation of Trust I. Tr. 105:17-19. This trust provides for distribution of trust assets to Matthew, beginning at forty (40) years old and continuing until he attains an age of fifty (50) years old. App. 53. Article XIII of Trust I characterizes the trust as irrevocable: "This trust and all interests in it are irrevocable and the Grantors have no power to alter, amend, revoke or terminate any trust provision or interest, whether under this trust or any statute or other rule of law." App. 50. At trial, William Clairmont testified he understood Trust I was an irrevocable trust and he gave up certain rights because the trust was irrevocable. Tr. 79:2-4, 80:21-23.

[¶8] Greg, then son-in-law of the Clairmonts and Matthew's father, drafted Trust I. Tr. 169:25-170:2. At trial, Greg specifically testified he did not make a mistake in drafting the language of Trust I:

> Q: In drafting this document, did you make any mistakes?
> A: No, I did not.
> Q: And does this document reflect the intent of the grantors, Mr. and Mrs. Clairmont, as expressed to you?
> A: Yes, it does.

Tr. 170:10-15. Other testimony at trial indicated the purpose of Trust I was to avoid a generating skipping tax, which was present in the Clairmont GC Trust. Tr. 105:5-8. To prevent the attachment of the generation skipping tax, a general power of appointment

was included in Trust I. Tr. 105:9-16, 172:15-173:2. Under this general power of appointment, Matthew could create a will under which he could designate anyone or any organization as a beneficiary of the trust assets upon his death. Tr. 172: 21-24.

[¶9] Trust I included other residual provisions in addition to the general power of appointment, which are now at issue. Section C of Article VI describes how the trust assets are to be distributed by the Trustee if Matthew died before receiving complete distribution of the trust. This section specifically provides:

> If the Beneficiary shall die before receiving complete distribution of the trust, the Trustee shall distribute the balance of the trust as the Beneficiary designates under his or her Last Will and Testament or under any other instrument exercising this general power of appointment. In the event that the Beneficiary does not exercise this general power of appointment, the Trustee shall distribute the balance of the trust to the Beneficiary's surviving issue by right of representation and any share distributable to the issue of the Beneficiary shall be held in trust until such issue attains the age of 21 . . . . If such issue should die before complete distribution of the trust share held for his or her benefit, the Trustee shall distribute the balance of such share to his or her surviving issue by right of representation; and if Beneficiary leaves no surviving issue, then equally to Beneficiary's *brothers and sisters* and the issue of a deceased brother of sister by right of representation.

App. 54. (emphasis added).

[¶10] In 1998, the Clairmonts created another trust for Matthew's benefit, the Matthew J. Larson Irrevocable Retirement Trust Agreement. See App. 213-252. The purpose of this trust was to provide for Matthew when he reached the age of sixty-five. Tr. 44:8-10. This trust contained a defective grantor power provision which allowed the Clairmonts to pay the income tax on the trust. Tr. 115:18-116-7. These powers were set to expire on December 31, 2009. Tr. 115:20. Therefore, in 2009, the Clairmonts drafted Trust II as a replacement of the original 1998 Retirement Trust with the purpose of extending these powers. Tr. 9-11.

[¶11] The language of Trust II was drafted to be almost identical to the language contained in Matthew's original 1998 Retirement Trust. Tr. 116:9-12. Article I of Trust II specifically declares the Clairmonts' intention to establish the trust as irrevocable, as they had likewise done in the original. App. 213, 285. The Clairmonts understood this Trust to be irrevocable. Tr. 84:7-25. Besides extending the defective grantor power provision, Trust II contained other clauses which were identical to those in the original 1998 Retirement Trust, including the residual provisions. Both the 1998 and 2009 versions of Matthew's Retirement Trust provided for distribution of the trust estate upon Matthew's death. See App. 221-22, 293. The language of Article V.1.b of Trust II provides:

> b. Upon the death of Matthew, the then remaining trust estate shall be handled as follows:
>
> (1) As Matthew may direct in his valid testamentary instrument expressly referring to this general power of appointment.
>
> (a) Matthew may appoint to the creditors of his estate.
>
> (b) The power of appointment shall be exercised by Matthew alone and in all events.
>
> (2) To the extent that Matthew shall not have exercised the foregoing power of appointment, then as follows:
>
> (a) if Matthew is survived by descendant, then to, or for the benefit of, those descendants . . . .
>
> (b) if Matthew is not survived by descendants, then:
>
> i. if Matthew is survived by a wife and his wife has attained age sixty (60) as of the date of Matthew's death, then for the benefit of his wife . . . .
>
> ii. if Matthew is not survived by a wife or if he is survived by a wife who has not attained age sixty (60) as of the date of Matthew's death, then (1) collective share for the *brothers and sisters* of Matthew then living . . . .
>
> iii. if Matthew is not survived by a wife or if he is survived by a wife who has not attained age sixty (60) as of the date of Matthew's death, and if none of Matthew's brothers and

> sisters are then living, then to such individuals as would be determined to be Matthew's lineal heirs-at-law had Matthew died intestate under the statutes of descent of the State of North Dakota in force at the execution of this Agreement and in the shares prescribed by said statutes.

App. 293. (emphasis added).

[¶12] Matthew's death triggered the above quoted residual provisions of Matthew's Trusts. At the time of his death, Matthew had five then-living siblings: Sam, Elizabeth, Jared, N.J.L., and L.M.L. See Tr. 22:1. Matthew never married and had no children at the time of his death. Tr. 22:3-7. There is no evidence Matthew executed a testamentary instrument before his death. Tr. 32:20-22. Therefore, under both section C of Article VI of Trust I and section 1.b(2)(b)(ii) of Article V within Trust II, upon Matthew's death, any remaining trust assets are to be distributed by the trustee to Matthew's "brothers and sisters." See App. 54, 293.

[¶13] After Matthew's death, the Clairmonts petitioned the district court for interpretation or reformation of section C of Article VI of Trust I and section 1.b(2)(b)(ii) of Article V of Trust II so as to exclude N.J.L., and L.M.L. as "brothers and sisters" of Matthew. App. 6-9. The district court declared the term "brothers and sisters" includes N.J.L. and L.M.L. and dismissed the Clairmonts' request to reform Matthew's Trusts. App. 31-32.

Trusts & the North Dakota Uniform Probate Code

[¶14] Pursuant to section 30.1-04-07 of the North Dakota Century Code, "[r]elatives of the half blood inherit the same share they would inherit if they were of the whole blood." N.D.C.C. § 30.1-04-07. This section, although contained within the North

Dakota Uniform Probate Code, is applicable to trusts subject to administration in the State of North Dakota. N.D.C.C. § 30.1-02-01(5). Both of Matthew's Trusts are subject to administration in the State of North Dakota. App. 22. Therefore, the district court concluded the term "brothers and sisters," as used in the residual provisions of Matthew's Trusts, includes all five of Matthew's siblings, regardless of whether a sibling is a relative of half blood or a relative of whole blood.

[¶15] Section 59-12-15 of the North Dakota Century Code allows for reformation of a trust agreement "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." N.D.C.C. § 59-12-15. The district court found the Clairmonts did not satisfy the evidentiary burden of section 59-12-15 for reformation, and dismissed the Clairmonts' request to reform Matthew's Trusts. App. 31-32.

STANDARD OF REVIEW

[¶16] Findings of facts must not be set aside by this Court unless clearly erroneous. N.D.R.Civ.P. 52(a). This Court also must give due regard to the district court's opportunity to judge the evidence and witnesses' credibility. Id. When this Court reviews the district court's findings of fact, the findings of facts are presumed to be correct, and the complaining party has the burden of demonstrating the findings are clearly erroneous. City of Fargo v. Salsman, 2009 ND 15, ¶ 9, 760 N.W.2d 123. 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, this Court is left with a definite and firm conviction a mistake has been made." Id. While findings of facts are

reviewed for clear error, conclusions of law are reviewed de novo. State v. Cain, 2011 ND 213, ¶ 25, 806 N.W.2d 597.

[¶17] In this Court's most recent trust reformation decision, both the district court judge and counsel for appellant were the same as in the present case. See generally Gassman Revocable Living Trust v. Riechert, 2011 ND 169, 802 N.W.2d 889. In Gassman Revocable Living Trust, the Court applied the clearly erroneous standard to determine whether the petitioner presented clear and convincing evidence of a mistake of law or fact. 2011 ND 169, ¶¶ 8-9, 802 N.W.2d 889. As the only issue presented on appeal is whether the Clairmonts met the evidentiary burden required to reform Matthew's Trusts, this Court should similarly review the district court's findings of fact for clear error. The issue presented on appeal will not ultimately be resolved by interpretation of N.D.C.C. § 59-12-15, as advocated by the Clairmonts. Whether the Clairmonts met the evidentiary burden required to reform a trust is the dispositive issue of this appeal. As this determination is based on the evidence presented at trial, including the credibility of the witnesses, this Court should review the district court's findings of fact for clear error and review de novo any conclusions of law made by the district court.

[¶18] Notably, there may be both a question of law and a question of fact presented by this appeal. However, the de novo standard of review for a mixed question of law and fact articulated by this Court in Earth Builders, Inc. v. State ex rel. State Highway Department does not apply. In Earth Builders, Inc., this Court determined "[w]hen the ultimate conclusion can be arrived at only by applying rules of law the result is a conclusion of law" and the question is one of law and fact fully viewable on appeal. 325 N.W.2d 258, 259 (N.D. 1982). However, the Earth Builders Court determined

findings of fact "are realities disclosed by the evidence. . . ." Id. Here, the issue on appeal is whether the realities disclosed by the evidence at trial were sufficient to prove, by clear and convincing evidence, the Clairmonts' intent and the terms of the trust were affected by a mistake of fact or law. The ultimate conclusion is not one to be arrived at only by applying the rule of law, but by examination of the realities disclosed at trial. See id. Therefore, application of the Earth Builders standard of review, as advocated by the Clairmonts, is inappropriate.

ARGUMENT

[¶19] The district court did not err in finding the Clairmonts failed to prove by clear and convincing evidence their intent in drafting Trust I and Trust II was affected by a mistake of law or fact. Therefore, the district court properly dismissed the Clairmonts' petition to reform Matthew's Trusts to include only lineal descendants of the Clairmonts as beneficiaries under the residual provisions of the Trusts.

[¶20] Section 59-12-15 of the North Dakota Century Code allows a court to reform the terms of a trust agreement 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 of fact or law, whether in expression or inducement." N.D.C.C. § 59-12-15. The Comment to section 415 of the Uniform Trust Code ("U.T.C."), after which section 59-12-15 is modeled, describes a "mistake of expression" to occur "when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included." U.T.C. § 415, cmt. (2010). This Comment further describes a "mistake of inducement"

to occur "when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law." Id.

[¶21] Therefore, for a court to grant a remedy of reformation pursuant to section 59-12-15, clear and convincing evidence must establish:

> (1) a mistake of fact or law affected the expression, inclusion, or omission of specific terms of the document, and
> (2) what the donor's actual intention was in a case of mistake in expression or what the donor's actual intention would have been in a case of mistake in the inducement.

Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 (2003). Here, the evidence at trial failed to establish, by clear and convincing evidence, at the time of the creation of Matthew's Trusts, the Clairmonts intended the residual provisions of these trusts to benefit only the lineal descendants of the Clairmonts. Further, the Clairmonts failed to establish by clear and convincing evidence a mistake of law or fact affected the inclusion of the term "brothers and sisters" as the Clairmonts were unaware half-siblings inherit under trust agreements the same share they would inherit as whole siblings. The district court correctly found the Clairmonts never contemplated the consequence of their use of the term "brothers and sisters" in Matthew's Trusts and therefore did not act under a mistake of fact or law.

I. THE DISTRICT COURT CORRECTLY FOUND THE CLAIRMONTS FAILED TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THEIR ACTUAL INTENTION AT THE TIME OF THE CREATION OF MATTHEW'S TRUSTS WAS TO LIMIT THE DISPOSITION OF THE TRUST ASSETS UPON MATTHEW'S DEATH TO ONLY LINEAL DESCENDANTS OF THE CLAIRMONTS.

[¶22] Pursuant to section 59-12-15 of the North Dakota Century Code, a court may reform the terms of a trust 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 of fact or law. . . ." N.D.C.C. § 59-12-15. Determining the intent of the settlor presents a question of fact. Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 229 (N.D. 1994). When a trust is unambiguous, the settlor's intention is first ascertained from the "language of the trust document itself." Id. However, because reformation of a trust agreement may involve the addition or deletion of language that is unambiguous on its face, a court may look to extrinsic evidence to determine a settlor's intent. U.T.C. § 415, cmt. (2010). The district court correctly concluded, after evaluating both the language of Matthew's Trusts and extrinsic evidence, clear and convincing evidence of the Clairmonts' intention at the creation of Matthew's Trusts to exclude Matthew's half-siblings under the residual provisions of the Trusts did not exist.

A. The language of Matthew's Trusts does not evince clear and convincing evidence of the Clairmonts' intention to limit the disposition of the trust assets upon Matthew's death to only lineal descendants of the Clairmonts.

[¶23] When reading a trust agreement, a court's primary objective is to determine the settlor's intent. Langer v. Pender, 2009 ND 51, ¶ 14, 764 N.W.2d 159. This Court has long-applied the general rules of construction for written documents to evaluate trust agreements. Id. See also Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶¶ 18-19, 750 N.W.2d 412. For example, in Langer, the Court applied chapter 9-07 of the North Dakota Century Code, which governs the interpretation of contracts, to interpret and enforce the language of a revocable trust agreement. See Langer, 2009 ND 51, ¶ 14, 764 N.W.2d 159. In light of the application of the general rules of construction for contracts to trust agreements, this Court has found the trust agreement must be read as a whole so as to give effect to every part. Gassman Revocable Living Trust, 2011 ND 169, ¶ 12, 802 N.W.2d 889; Langer, 2009 ND 51, ¶ 14, 764 N.W.2d 159. See N.D.C.C. § 9-

07-06. Further, the intention of the settlor that exists at the inception of the trust governs the construction of the trust and so should be the intention which governs whether the trust may be reformed. See N.D.C.C. § 9-07-03; Hovden v. Lind, 301 N.W.2d 374, 379 (N.D. 1981); Willis v. Willis, 714 S.E.2d 857, 860 (N.C. Ct. App. 2011), *aff'd*, 722 S.E.2d 5505 (N.C. 2012).

[¶24] Determining the intent of the settlor presents a question of fact. Hecker, 527 N.W.2d 226, 229 (N.D. 1994). The Court must first look to the language of Matthew's Trusts to ascertain the Clairmonts' intent as the trust agreement is unambiguous. See id. The plain language of Matthew's Trusts does not demonstrate an intention by the Clairmonts to limit the disposition of the trust assets under the residual provisions of the Trusts to only lineal descendants of the Clairmonts, thereby excluding Matthew's half-siblings.

[¶25] Article VI of Trust I first provides for distribution, if Matthew dies without issue, as he would designate under a testamentary instrument: "If the Beneficiary shall die before receiving complete distribution of the trust, the Trustee shall distribute the balance of the trust as the Beneficiary designates under his or her Last Will and Testament or under any other instrument exercising this general power of appointment." App. 54. If Matthew does not exercise this power to designate distribution of the trust assets under a testamentary instrument and Matthew dies without issue, the plain language of Article VI provides for distribution to Matthew's brothers and sisters:

> In the event that the Beneficiary does not exercise this general power of appointment, the Trustee shall distribute the balance of the trust to the Beneficiary's surviving issue by right of representation . . . [I]f Beneficiary leaves no surviving issue, then equally to Beneficiary's *brothers and sisters* and the issue of a deceased brother of sister by right of representation.

Id. (emphasis added).

[¶26] Similar to Article VI of Trust I, Article V.1.b of Trust II provides, upon the death of Matthew, assets are to be distributed as Matthew directs in a testamentary instrument; however, this power of appointment is limited to only creditors of his estate. App. 290. Further, Trust II provides if Matthew is survived by descendants, trust assets are to be distributed to those descendants. App. 293. If Matthew is not survived by descendants, then the assets are to be distributed to Matthew's wife, if she has attained the age of sixty (60) years old when Matthew dies. Id. If Matthew is not survived by a wife or his wife has not attained the age of sixty (60) years old, then trust assets are to be distributed to Matthew's brothers and sisters. Id. Last, if Matthew is not survived by wife or he is survived by a wife who has not attained the age of sixty (60) years old and none of Matthew's brothers and sisters are living, trust assets are to be distributed to Matthew's heirs under the intestate succession laws of North Dakota. Id.

[¶27] Pursuant to the plain language of Article VI and Article V.1.b of Trusts I and II, respectively, several individuals outside the lineage of the Clairmonts can be residuary beneficiaries. Article VI of Trust I allows Matthew to designate any person as a beneficiary to the Trust through a testamentary instrument. See App. 54. Although limited to creditors, Matthew could also exercise the power of appointment to distribute assets to his creditors under the provisions of Trust II. See App. 293. Further, if Matthew had married his wife a few months before he died, and his wife had attained the age of sixty, under Article V.1.b of Trust II, Matthew's wife, as a non-lineal descendent of the Clairmonts, would have been entitled to trust assets. See App. 293. This provision would apply regardless of the duration of Matthew's marriage. Last, if Matthew is not

survived by either his wife or his brothers and sisters, under Article V.1.b of Trust II, the trust assets would be distributed to Matthew's heirs-at-law. See App. 293. Therefore, pursuant to N.D.C.C. § 30.1-04-03, Matthew's parents, including Greg as a non-lineal descendant of the Clairmonts, would be entitled to trust assets. The potential beneficiaries under the residual provisions in Matthew's Trusts include any person he designates as a beneficiary under a testamentary instrument, including creditors; any wife of Matthew, regardless of the duration of the marriage; and Greg as Matthew's heir-at-law. None of these beneficiaries are lineal descendants of the Clairmonts.

[¶28] Under the rules of construction applied by this Court, a trust should be read as a whole so as to give effect to every part. Gassman Revocable Living Trust, 2011 ND 169, ¶ 12, 802 N.W.2d 889. Therefore, the above residual provisions of each of Matthew's Trusts should be read together to ascertain the intent of the Clairmonts. Had the Clairmonts intended for these residual provisions to benefit only lineal descendants of the Clairmonts, they could have included language to effectuate this intent by including a clause limiting the residual provisions to benefit only "lineal descendants of the Clairmonts." The Clairmonts used such limiting language in the Clairmont GC Trust. See App. 35-49. The language of Article VI.B(3) of the Clairmont GC Trust specifically limited beneficiaries of the trust to the grandchildren of the Clairmonts:

> If such grandchild shall die before receiving complete distribution of his or her trust share, the Trustee shall distribute the balance of his or her share to his or her surviving issue by right of representation; or, if such grandchild should die without issue, then to the other living grandchildren *named above* and to the issue of any deceased grandchild *of mine named above* by right of representation.

App. 42. (emphasis added). The Clairmonts did not use any such limiting language in the residual provisions of Matthew's Trusts.

[¶29] Each clause of a trust is to help interpret the others. See Langer, 2009 ND 51, ¶ 14, 764 N.W.2d 159. A trust should not be interpreted to make provisions inoperative, but should be interpreted to give effect to all provisions. Id. See N.D.C.C. § 9-07-17. Only a strained construction of the plain language of Matthew's Trusts evinces an intent by the Clairmonts at the time of the Trusts' creation to limit residuary beneficiaries to only their lineal descendants. Therefore, the plain language of Matthew's Trusts does not demonstrate clear and convincing evidence of an intent by the Clairmonts at the time of the creation of Matthew's Trusts to limit the residuary beneficiaries to only their lineal descendants. See Hecker, 527 N.W.2d at 229.

B. Extrinsic evidence at trial does not evince clear and convincing evidence of the Clairmonts' intention to limit the disposition of the trust assets upon Matthew's death to only lineal descendants of the Clairmonts.

[¶30] In determining the intention of a settlor, a court may also look to extrinsic evidence. U.T.C. § 415, cmt. (2010). Extrinsic evidence may be considered by a court regardless of whether the terms of the trust are unambiguous. Id. The district court properly found extrinsic evidence presented at trial did not establish by clear and convincing evidence the Clairmonts intended to limit the beneficiaries under the residual provisions of Matthew's Trusts only to lineal descendants of the Clairmonts. Instead, there is abundant trial testimony that demonstrates the Clairmonts never anticipated or thought about Matthew's half- siblings as beneficiaries of Matthew's Trusts.

[¶31] William Clairmont's ("William") testimony at trial well-established the Clairmonts did not consider the term "brothers and sisters" to exclude Matthew's half-siblings as the thought never entered his mind. See App. 26. While discussing Trust I

drafted in 1996, William specifically testified he never thought about whether the term "brothers and sisters" could include half-siblings:

> Q: Did you ever think that the term 'brothers and sisters' could include half-siblings that were not your grandchildren, but were born of an in-law who has a subsequent marriage after divorcing one of your daughters?
> A: Never.

Tr. 34:24-35:3. In discussing the original Matthew Larson Irrevocable Retirement Trust, William similarly testified he never thought about Matthew's half-siblings:

> Q: Did you ever think that the term 'brothers and sisters' would include half-siblings that were not your own grandchildren but were born to – born by – to Greg by a subsequent marriage after divorcing your daughter?
> A: It never entered my mind.

Tr. 49:23-50:1. Later, during discussions regarding a 2009 Amendment to the Matthew Larson 40 Year Trust, William again testified he never considered he never thought about Matthew's half-siblings:

> Q: I think that's all the questions I have about that document. And when you made this amendment – I'm not going to talk about the document. When you made this amendment, was there any thought in your mind that there were any instruments out there that children both to Greg by another wife after divorcing Cynthia would become subject to money that you were trying to give to your grandchildren?
>
> A: No, it never entered my mind.

Tr. 58:20-59:3. Finally, while discussing Trust II drafted in 2009, William testified he never thought about whether Matthew's then-born half-siblings would be included in the term "brothers and sisters":

> Q: Did you ever think that the term 'brothers and sisters' could include half-siblings that were not your own grandchildren that Greg had with a second wife after divorcing Cynthia?
>
> A: No. I never considered any but my descendants as such.

Tr. 63:4-9.

[¶32] This Court has had a limited opportunity to address the evidence that is necessary to establish a settlor's intention by clear and convincing evidence. In Gassmann Revocable Living Trust, the Court addressed whether clear and convincing evidence established a mistake in the drafting of a trust. 2011 ND 169, ¶ 4, 802 N.W.2d 889. The Court considered the testimony of the drafting attorney and the settlors to determine the language of the trust did not conform to the settlors' intent which they expressed to their attorney. Id. The present case does not raise a question of whether the language of Matthew's Trusts conforms to the intention of the Clairmonts as expressed to the drafters of the trusts. Instead, the question is whether the Clairmonts had an intention to limit the disposition of the trust assets to their lineal descendants and to exclude Matthew's half-siblings.

[¶33] The North Carolina Court of Appeals had an opportunity to address the evidence necessary to establish a grantor's intent by clear and convincing evidence to reform a deed. In Willis v. Willis, a grantor, Ms. Willis, sought reformation of warranty deed she executed to her son, Eddie, transferring her home. 714 S.E.2d 857, 859 (N.C. Ct. App. 2011), *aff'd*, 722 S.E.2d 5505 (N.C. 2012). In the deed, Ms. Willis reversed a life estate. Id. Shortly after the deed was executed, the son died. Id. at 858. Ms. Willis was displeased with the legal ramification of the deed because, under intestate succession, the home passed to her son's two children. Id. at 858-59. The Willis Court determined if a unilateral mistake by Ms. Willis existed, the deed could be reformed. Id. at 859. Ultimately, the Court determined at the time the deed was drafted, Ms. Willis intended her home to be conveyed to her son. Id. at 860. The court stated

> [T]he evidence established that Ms. Willis had no idea that Eddie was going to die before her and that she was angry when she discovered the legal effect of the Deed after Eddie's death. These facts do not negate the validity of the original understanding of the parties at the time that the property was devised but, rather, show only that Ms. Willis simply had not expected Eddie's untimely death and never anticipated that his children would be entitled to inherit the property.

Id.

[¶34] Although the instrument in Willis was a deed, the court's analysis is similarly appropriate here. Just as Ms. Willis did not anticipate her son was going to die, the Clairmonts did not anticipated Matthew would die at a young age, without children or a wife, and he would have two half-siblings. Such a misjudgment as to the legal consequence of an instrument does not support a claim for reformation. See Mims v. Mims, 268 S.E.2d 544, 546 (N.C. Ct. App. 1980), *rev'd on other grounds*, 286 S.E.2d 779 (N.C. 1982). In the same way the Willis Court concluded misjudgment does not establish a grantor's intent, the Clairmonts' failure to anticipate Matthew would die at a young age, without children or a wife, and have two half-siblings does not create an affirmative intention to thwart the resulting consequence – disposition of trust assets to Matthew's half-siblings. Therefore, the district court properly concluded there was not clear and convincing evidence of the Clairmonts' intention to limit the disposition of trust assets to only lineal descendants.

II. THE DISTRICT COURT CORRECTLY CONCLUDED A MISTAKE OF FACT OR LAW DID NOT AFFECT THE CLAIRMONTS' EXPRESSION OR INCLUSION OF THE TERM "BROTHERS AND SISTERS" IN MATTHEW'S TRUSTS AS THE CLAIRMONTS WERE UNAWARE OF N.D.C.C. § 30.1-04-07.

[¶35] Pursuant to section 59-12-15, a court may reform the terms of a trust 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 of fact or law. . . ." N.D.C.C. § 59-12-15. Therefore, for a court to grant a remedy of reformation, clear and convincing evidence must establish: (1) a mistake of fact or law and (2) such mistake affected the expression, inclusion, or omission of specific terms of the trust agreement. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 (2003). "Whether there has been a mistake sufficient to support a reformation claim is generally a question of fact." Anderson v. Selby, 2005 ND 126, ¶ 11, 700 N.W.2d 696.

[¶36] In their Brief, the Clairmonts allege they were mistaken as to the legal effect of Matthew's Trusts, and therefore a "mistake of inducement" occurred. Br. for Appellant ¶¶ 39-42. The Comment to section 415 of the Uniform Trust Code defines a "mistake of inducement" to occur "when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law." U.T.C. § 415, cmt. (2010). The Clairmonts' alleged mistaken belief as to the legal effect of Matthew's Trusts was because they were unware of N.D.C.C. § 30.1-04-07 and its requirement that relatives of half blood inherit under trust agreements the same share they would inherit if they were of the whole blood. See Br. for Appellant ¶ 39. These circumstances are insufficient to warrant reformation of Matthew's Trusts due to a mistake of inducement because neither the intention of the Clairmonts nor the terms of Matthew's Trusts were affected by a mistake of fact or law.

A. The Clairmonts failed to establish by clear and convincing evidence the existence of a mistake of law as the inclusion of the term "brothers and sisters" was not affected by a misunderstanding of the law.

[¶37] In Hovden, this Court noted not all mistakes of law justify reformation. 301 N.W.2d 374, 379 n.2. Instead, "[i]gnorance of law must be distinguished from

misapprehension of law with which both parties are familiar." Id. Although the facts of Hovden involved reformation of the terms of a land sale contract, the principles noted by the Hovden Court are applicable to any reformation claim. Here, the Clairmonts did not misapprehend the law when they used the term "brothers and sisters" in Matthew's Trusts, and, therefore, the Clairmonts failed to prove by clear and convincing evidence a mistake of law sufficient to reform the language of Matthew's Trusts.

[¶38] The Clairmonts spend considerable space in their Brief providing the Court with a definition of a "mistake of law." See Br. for Appellant ¶¶ 40-43. The Clairmonts suggest the definition of "mistake of law" from Black's Law Dictionary is appropriate to define "mistake of law" to reform a trust. See Br. for Appellant ¶¶ 40. Further, the Clairmonts discounted the definition of mistake of law cited by this Court in Hovden and contained within N.D.C.C. § 9-03-14 to not apply to reformation of trusts because "§ 9-03-14 defines a mistake of law exclusively for the purpose of Title 9 of the North Dakota Century Code." Br. for Appellant ¶ 43. The Clairmonts rationalize the exclusivity of the application of section 9-03-14 to Title 9 because "§ 9-03-14 states its definition of mistake of law 'constitutes a mistake within the meaning of this title *only*.'" Id. (emphasis added). However, such an incomplete quote of section 9-03-14 is inappropriate and overtly miscalculates the applicability of section 9-03-14. This section provides, in full:

> Mistake of law constitutes a mistake within the meaning of this title only when it arises from:
> 1. A misapprehension of the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake as to the law; or
> 2. A misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify.

N.D.C.C. § 9-03-14.

[¶39] Reading section 9-03-14 in full clarifies its applicability to the reformation of Matthew's Trusts. The term "only" in section 9-03-14 qualifies those two instances which mistake of law is to be considered a "mistake" for the purposes of Title 9. It does not limit the application of section 9-03-14 to only contracts. Instead, in light of this Court's long application of the general rules of construction for written instruments, including contracts, to evaluate trust agreements, Langer, 2009 ND 51, ¶ 14, 764 N.W.2d 159, it is appropriate to look to the contours of the definition of "mistake of law" in section 9-03-14 as guidance here.

[¶40] The district court concluded the Clairmonts failed to prove by clear and convincing evidence a mistake of law sufficient to reform Matthew's Trusts. App. 7. The standard underlying that which constitutes a mistake of law in section 9-03-14 and North Dakota case law is unquestionably "misapprehension of the law." See N.D.C.C. § 9-03-14; Anderson, 2005 ND 126, ¶ 11-12, 700 N.W.2d 696. Rather, the Clairmonts did not misconstrue the law of North Dakota allowing half-siblings to inherit as whole-siblings under a trust agreement. The Clairmonts did not know the law. In Willis, the court found ignorance of the law cannot be a ground for relief "to avoid the legal effect of acts which have been done." 714 S.E.2d at 860. This rationale supports the district court's conclusion that the Clairmonts are precluded from claiming their ignorance of the law justifies reformation to avoid distribution of the assets in Matthew's Trusts to his half-siblings. See App. 23-25.

[¶41] In addition to proving a mistake of law existed, the Clairmonts must prove such mistake affected the expression, inclusion, or omission of specific terms of the trust

agreement. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 (2003). Mistake is a question of fact, Anderson, 2005 ND 126, ¶ 11, 700 N.W.2d 696, and the Clairmonts must prove mistake by clear and convincing evidence. N.D.C.C. § 59-12-15. At trial, the Clairmonts offered no testimony they were aware of section 30.1-04-07 or its application to Matthew's Trusts. App. 25. The Clairmonts offered no testimony at trial they misunderstood section 30.1-04-07. There is also no evidence from the plain language of Matthew's Trusts to indicate the Clairmonts misunderstood section 30.1-04-07. Therefore, not only did the Clairmonts fail to establish by clear and convincing evidence there was a mistake of law, the Clairmonts failed to establish by clear and convincing evidence the inclusion of the term "brothers and sisters" was affected by a mistake of law because the Clairmonts did not misapprehend the law, but were ignorant of it.

[¶42] The Clairmonts cite only In re O'Donnell, 815 N.W.2d 640 (Neb. 2012) as support for their argument a mistake of law in the inducement occurred. See Br. for Appellant ¶¶ 52-53. Reliance on this case, however, is misplaced. In O'Donnell, the Nebraska court extensively discusses In re Trust by Isvik, 741 N.W.2d 638. In In re Trust by Isvik, the Nebraska Supreme Court specifically addressed whether there was clear and convincing evidence of a settlor's intent. 741 N.W.2d at 647. Isvik, the settlor of a revocable trust, wrote a letter to the trustee stating she is revoking the trust and requesting all holdings of the trust conveyed to her. Id. at 641. The Isvik Court first determined the Nebraska Uniform Trust Code (N.U.T.C.), modeled after the U.T.C., applied to the letter and was subject to the reformation provisions of the N.U.T.C. Id. at 644-45. The court then proceeded to determine whether the letter should be reformed to

conform to the intent of the settlor when she wrote the letter. Id. at 645. The court concluded Isvik had not "*mistakenly expressed* her intent" in the letter to the trustee. Id. at 648 (emphasis added).

[¶43] The Isvik Court was not presented with a question of whether a mistake of inducement occurred, as in the present case, but whether a mistake of expression occurred. See id. Similarly, in O'Donnell, the Nebraska Supreme Court was presented with a question of whether a mistake of expression occurred as the court concluded it was "left with a firm belief or conviction that O'Donnell *mistakenly expressed* her true intent in the trust provisions of the will." O'Donnell, 815 N.W.2d at 647 (emphasis added). Here, at issue is whether the terms of Matthew's Trusts were affected by or induced by a mistake of fact or law. Br. for Appellant ¶ 38. See U.T.C. § 415, cmt. (2010). The Clairmonts did not misapprehend the law, but were ignorant of it, and thereby the inclusion of the term "brothers and sisters" was not affected by a mistake of law. Therefore, the district court properly concluded the Clairmonts failed to establish by clear and convincing evidence a mistake of law sufficient to reform the residual provisions of Matthew's Trusts to exclude his half-siblings as "brothers and sisters."

B. The Clairmonts failed to establish by clear and convincing evidence the existence of a mistake of fact because the inclusion of the term "brothers and sisters" was not affected by mistake of a fact.

[¶44] Although the Clairmonts did not specifically address whether this appeal concerns a mistake of fact in the inducement, they claim the "dispute concerns a mistake of inducement." Br. for Appellant ¶ 38. This blanket statement encompasses all mistakes of inducement, either of law or fact. Therefore, it is necessary to briefly address the Clairmonts' failure to establish by clear and convincing evidence there was a mistake

of fact. The district court looked to N.D.C.C. § 09-03-13 for the definition of mistake of fact:

> Mistake of fact is a mistake not caused by the neglect of a 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 the same way it is fitting to look to section 9-03-14 as guidance for a mistake of law sufficient for reformation of Matthew's Trusts, it is appropriate to look to section 9-03-13 as guidance in determining whether the Clairmonts established a mistake of fact existed. See Langer, 2009 ND 51, ¶ 14, 764 N.W.2d 159 (concluding the general rules of construction for written documents are to be used to evaluate trust agreements).

[¶45] There was no testimony at trial the Clairmonts were ignorant of any fact or forgot any fact at the time of the execution of the trusts. App. 26. Instead, the Clairmonts testified the possibility that Matthew's half-siblings could be beneficiaries under the residual provisions of Matthew's Trusts never entered their minds at the time both of these instruments were executed. See Tr. 34:24-35:3, 49:23-50:1, 58:20-59:3, 63:4-9. The failure of the Clairmonts to consider Matthew's half-siblings as "brothers and sisters" did not arise due to a mistake of fact and the district court properly concluded the Clairmonts failed to establish by clear and convincing evidence a mistake of fact occurred. Therefore, district court did not err in finding the Clairmonts failed to prove by clear and convincing evidence their intention, at the time Matthew's Trusts were drafted, was to limit the disposition of trust assets to only lineal descendants and failed to prove

by clear and convincing evidence the language of Matthew's Trusts was affected by a mistake of law or fact.

CONCLUSION

[¶46] For the foregoing reasons, the Petitioner-Appellee respectfully requests this Court affirm the district court's judgment dismissing with prejudice the Clairmonts' petition to reform the Matthew Trusts on grounds of mistake of fact or law and declaring Matthew's half-siblings, N.J.L. and L.M.L., as residuary beneficiaries of Matthew's Trusts.

Dated this 7th day of December, 2012.

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CERTIFICATE OF COMPLIANCE

[47] The undersigned, as attorneys for the Appellee Greg Larson, parent and guardian of N.J.L. and L.M.L., in the above matter, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that 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 certificate of compliance totals 7572.

Dated this 7th day of December, 2012.

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AFFIDAVIT OF SERVICE BY EMAIL

In Re: Matthew Larson Trust Agreement Dated May 1, 1996 and In Re: Matthew Larson Irrevocable Retirement Trust II Agreement Dated December 1, 2009

William E. and Patricia A. Clairmont
vs.
Greg Larson, parent and guardian of N.J.L. and L.M.L., et al.
District Court Civil No. 09-2011-CV-00922
Supreme Court No. 20120319

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

The undersigned, being first duly sworn, deposes and says that she served the attached:

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Subscribed and sworn to before me this 7th day of December, 2012.

/s/ Gail Deschamp
Notary Public, Gail Deschamp
Burleigh County, North Dakota
My Commission Expires: 7-10-14

(SEAL)