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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

REPLY BRIEF OF APPELLANTS

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I. STATEMENT OF ADDITIONAL FACTS

[1] The facts of this case were thoroughly briefed in Appellant's principal brief. Any additional facts will be discussed in the Law and Argument Section below.

II. LAW AND ARGUMENT

A. This case presents a mixed question of law and fact which is reviewed de novo.

[2] This Court reviews mixed questions of law and fact under the de novo standard of review. In re Pederson Trust, 2008 ND 210, ¶ 17, 757 N.W.2d 740. This appeal presents a mixed question of law and fact, as the Court must interpret and apply N.D.C.C. § 59-12-15 to a specific set of facts. See Johnson v. Taliafero, 2011 ND 34, ¶ 9, 792 NW.2d 804 (stating the question of how to interpret and apply a statute is a question of law).

[3] In his brief, Greg Larson ("Larson") seemingly admits this appeal presents a mixed question of law and fact but argues the de novo standard does not apply. See Br. For Appellee ¶ 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 stated "[w]hen the ultimate conclusion can be arrived at only by applying the rules of law the result is a conclusion of law." Earth Builders, Inc. v. State ex rel. State Highway Department, 325 N.W.2d 258, 259 (N.D. 1982). Here, the ultimate conclusion is whether the William and Patricia Clairmont ("Clairmonts") proved by clear and convincing evidence that their intent and the terms of the trust were affected by a mistake of law in the inducement. As the Court can only reach this ultimate conclusion by interpreting and applying N.D.C.C.

§ 59-12-15 to the facts, this appeal presents a mixed question of law and fact, which is reviewed de novo by this Court.

B. The Clairmonts established by clear and convincing evidence that their actual intention at the time of the creation of the trusts was for only their grandchildren to benefit from the term "brothers and sisters."

1. The testimony at trial established by clear and convincing evidence that the Clairmonts intended only their grandchildren to benefit from the term "brothers and sisters."

[4] This case presents the rare situation in which living settlors are able provide undisputed testimony on their intent at the time of the creation of the trusts.[1] In determining the intention of settlors, a court may look at 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. Here, the Clairmonts testified it has always been their intent that the term "brothers and sisters" would encompass only their grandchildren (i.e, not the children of an ex-son-in-law from a subsequent marriage). (Tr. at 35, 74, 82). The Clairmonts undisputed testimony is corroborated by the testimony of their attorneys and advisors. (Tr. at 103, 115, 124, 126, 128, 137-38, 152, 154, 166).

[5] Tellingly, attorney William Guy ("Guy"), who drafted the original Retirement Trust in 1998 (which the 2009 Retirement Trust is nearly identical to), testified that he never saw any intent from the Clairmonts to benefit anyone other than their grandchildren, and his understanding of the term "brothers and sisters" was that it only included the actual grandchildren of the Clairmonts. (Tr. at 137-138). Had the Clairmonts intended "brothers and sisters" to include people who were not the Clairmonts

[1] The Clairmonts are requesting the Court allow them to reform two trusts: the "40-Year Trust" of Matthew Larson (labeled Trust I by the district court), and the "Retirement Trust" of Matthew Larson (labeled Trust II by the district court).

grandchildren, Guy testified that he would have used different language for such an unusual request. (Tr. at 137-38). In short, all of the evidence presented at trial indicates that the Clairmonts original intent was for the term "brothers and sisters" to include only the Clairmonts grandchildren.

[6] Despite the fact the Clairmonts have provided undisputed testimony that their intent at the time of drafting the trusts was that the term "brothers and sisters" only include full-blood brothers and sisters (i.e, the Clairmonts actual grandchildren), Larson argues the Clairmonts have not demonstrated by clear and convincing evidence that the Clairmonts original intent was for the term "brothers and sisters" to not include the children from an ex-son-law from a subsequent marriage. Larson spends an ample amount of his brief citing testimony from trial to demonstrate that the Clairmonts did not contemplate whether the hypothetical children of an ex-in-law from a subsequent marriage who are of no blood relation to the Clairmonts could benefit from the term "brothers and sisters." See Br. for Appellee ¶ 31.

[7] The Clairmonts created the trusts in order to benefit their grandchildren. The Clairmonts undisputed testimony at trial was that their original intent was for the term "brothers and sisters" to only include full-blood brothers and sisters (i.e, their grandchildren). (Tr. at 35, 74, 82). The fact that the Clairmonts intended only their grandchildren to benefit from the term "brothers and sisters" means that the Clairmonts also intended for no one else (i.e, including the children of an ex-son-in-law from a subsequent marriage) to benefit from the term "brothers and sisters." It is unrealistic to require the Clairmonts to contemplate every possible person they do not want to benefit, when they have determined exactly who they do want to benefit. The Clairmonts

intended for only their grandchildren to benefit from the term "brothers and sisters," which also means they intended that the children of their ex-son-in-law from a subsequent marriage would not benefit. (Tr. at 35, 74, 82).

[8] Larson's reliance on Willis v. Willis is misplaced. Willis v. Willis, 714 S.E.2d 857 (N.C. Ct. App. 2011). First, Willis deals with a warranty deed, not a trust, and therefore does not involve the interpretation or application of an identical or similar statute to N.D.C.C. § 59-12-15. Id. at 858. Second, the court found that there was not a "scintilla of evidence" to support the settlors claim that her original intent was to only give her son a life estate. Id. at 859. Here, there is undisputed testimony that the Clairmonts' original intent was only for their grandchildren to benefit from the term "brothers and sisters." (Tr. at 35, 82). Third, the court held the settlor fully understood that the deed conveyed a fee simple title to her son and left her with only a life estate. Id. at 860. Willis deals with a "settlor" who had a change of mind after the fact. Here, the Clairmonts intent has always been that only their grandchildren benefit from the term "brothers and sisters."

2. The fact that non-lineal descendants could potentially benefit from the residual provisions of the trusts has no bearing on what the Clairmonts intended by the term "brothers and sisters."

[9] Larson also argues the Clairmonts have not provided clear and convincing evidence that their original intent was for the term "brothers and sisters" to only include their grandchildren because it is possible for non-lineal descendents to benefit from the residual provisions of the trusts. For example, under the residual provisions in the trusts, a wife who is of the age of sixty years old (applicable in the Retirement Trust), Matthew Larson's ("Matthew") lineal heirs-at-law (applicable in the Retirement Trust), any person

Matthew designates as a beneficiary under a testamentary instrument (applicable in the 40-Year Trust), or a creditor (applicable in the Retirement Trust) could potentially benefit. (App. at 54, 293).

[10] The Clairmonts decided to allow a spouse who reached the age of sixty to potentially benefit because the Clairmonts believed that once a spouse reaches the age of sixty, the marriage is likely long-term and unlikely to end in a divorce. (Tr. at 88). Essentially, the Clairmonts believed a long-term spouse was "part of the family" at the age of sixty. It is also possible that Matthew's heirs-at-law could benefit if Matthew had no issue, did not have a wife of sixty-years old, all of his siblings were deceased, and he had not used his limited power of appointment to distribute his assets to a creditor. (App at 293).

[11] The 40-Year Trust was created to resolve a GST tax issue, to make the administration of giving gifts more manageable, and to keep the trusts in family units (i.e, Matthew's share would only go to his "brothers and sisters", not his cousins). (Tr. at 80, 105, 140). Ironically, Larson was the drafter of the 40-Year Trust. (Tr. at 31). Larson included a broad power of appointment which allowed Matthew to distribute the trust assets to whomever he liked through a testamentary instrument. (App. at 53-54; Tr. at 143). Larson failed to provide any testimony as to why he included the broad power of appointment instead of a limited power of appointment as William Guy included in the 1998 Retirement Trust (and still in effect in the 2009 Retirement Trust). (App. at 293; Tr. at 144). Tellingly, Patricia Clairmont testified that she did not understand that Matthew had the ability to distribute his assets to whomever he liked through a testamentary instrument before being entitled to the assets under the terms of the trust. (Doc. #95, Dep.

of Patricia Clairmont page 34, lines 13-14). Finally, as mentioned above, the Retirement Trust contains a limited power of appointment which allows Matthew to distribute trust assets to "creditors of his estate" through a testamentary instrument. (App. at 293; Tr. at 144). Common sense dictates that it is extremely unlikely Matthew would ever exercise this limited power of appointment.

[12] Most importantly, the mere fact that it is possible for non-lineal descendants to benefit from the trusts has no bearing on what the Clairmonts intended by the term "brothers and sisters." The fact that a wife who is at least sixty years old or lineal heirs-at-law could benefit from the trusts does not demonstrate that the Clairmonts intended the term "brothers and sisters" to include the children of an ex-son-in-law from a subsequent marriage. As the Clairmonts provided undisputed testimony that their original intent was for the term "brothers and sisters" to only encompass their actual grandchildren, the Clairmonts respectfully request the Court find the Clairmonts demonstrated by clear and convincing evidence that their original intent was for the term brothers and sisters to include only their grandchildren.

C. The Clairmonts established by clear and convincing evidence a mistake of law at the time of the creation of the trusts.

[13] A mistake of law is not defined in the North Dakota Century Code. The plain meaning of a word may be determined through reliance on the dictionary definition. See Wanner v. N.D. Worker's Comp. Bureau, 2002 ND 201, ¶ 25, 654 N.W.2d 760. Black's Law Dictionary defines a mistake of law as "a mistake about the legal effect of a known fact or situation." Black's Law Dictionary, 1092 (9th ed. 2009).

[14] Furthermore, other jurisdictions in interpreting and applying statutes which are identical to N.D.C.C. § 59-12-15 have found that being mistaken to the legal

effects of a trust constitute a mistake of law. In re Luin Gyle Atterberry Revocable Trust, 2012 WL 4839866, *2 (defining a mistake of law as "a mistake by one side or the other regarding the legal effect of an agreement" in interpreting a Michigan statute identical to N.D.C.C. § 59-12-15); Holdren v.Garrett, 2011 WL 825637, *7 (defining a mistake of law as a mistake that "occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect" in interpreting an Ohio statute identical to N.D.C.C. § 59-12-15). Tellingly, the Restatement (Third) of Property, which N.D.C.C. § 59-12-15 is based on, states that a mistake as to the legal effect of a trust constitutes a mistake of law regardless of whether the settlor was ignorant of the law. See Restatement (Third) of Property: Donative Transfers § 12.1, cmt. i, illustration 7; Br. for Appellant ¶¶ 49-51.

[15] Larson relies on N.D.C.C. § 9-03-14 for his argument that the Clairmonts did not make a mistake of law at the time they created the trusts. N.D.C.C. § 9-03-14 does not provide a definition for a mistake of law. Instead, N.D.C.C. § 9-03-14 provides the two circumstances in which a party can use a mistake of law in order to nullify a contract under Article 9 of the North Dakota Century Code. As N.D.C.C. § 9-03-14 does not provide a definition of a mistake of law and only provides the two circumstances a party can claim a mistake of law under Article 9 of the North Dakota Century Code, it has no applicability to other provisions of the North Dakota Century Code.

[16] N.D.C.C. § 9-03-14 is the legislatures attempt to limit the circumstances in which a party can attempt to nullify a contract based on an alleged mistake of law. The Clairmonts are not requesting the Court nullify the trusts. The Clairmonts are only requesting the Court reform the trusts in order to match the Clairmonts original intent that

the term "brothers and sisters" only encompass their grandchildren and not the children of their ex-son-in-law from a subsequent marriage.

III. CONCLUSION

[17] The Clairmonts respectfully request this Court find the district court erred in determining that the Clairmonts did not make a mistake of law and reverse and remand this case back to the district court so that the Clairmonts can reform the trusts in order to conform with their original intent of having only grandchildren benefit from the term "brothers and sisters."

Dated this 20th day of December, 2012.

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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 2,309.

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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 20th day of December, 2012.

/s/ Lacey A. Hallsten
Notary Public, Lacey A. Hallsten
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My Commission Expires: 9-21-16

(SEAL)