20160045
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 10, 2016
STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20160045

In the Matter of Bradley K. Brakke
Trust dated November 11, 2013

Timothy A. Brakke,

Petitioner-Appellee

v.

Bell State Bank & Trust, Trustee of the Bradley K. Brakke Trust; Vicki Brakke; Kari Headington,

Respondents

Bell State Bank & Trust, Trustee of the Bradley K. Brakke Trust,

Appellant.

Appeal from the Judgment entered on December 17, 2015, and the Order issued on December 1, 2015, Cass County District Court, Case No. 09-2014-CV-02400

BRIEF OF APPELLANT

Berly D. Nelson (#05903)
Ian R. McLean (#07320)
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
bnelson@serklandlaw.com
imclean@serklandlaw.com
Attorneys for Respondent-Appellant
Bell State Bank & Trust

TABLE OF CONTENTS

Paragraph No.

TABLE OF AUTHORITIES

Paragraph No.

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. STATEMENT OF ISSUES

[¶1] Whether the district court erred in denying Bell State Bank & Trust's Motion for Summary Judgment on the basis of the district court finding that Timothy Brakke had standing to bring the Petition.

[¶2] Whether the district court erred in denying Bell State Bank & Trust's Motion for Summary Judgment on the basis of the district court finding that Timothy Brakke's Petition was not barred by the statute of limitations.

[¶3] Whether the district court erred in granting Timothy Brakke's Motion to Amend the Petition to add a challenge to Bradley Brakke's trust dated March 12, 2014, despite the statute of limitations having run on such challenge.

[¶4] Whether the district court erred in granting Timothy Brakke's Motion to Approve Settlement despite the purported settlement agreement violating a material purpose of Bradley Brakke's trust.

[¶5] Whether the district court erred in granting Petitioner's Motion to Approve Settlement despite necessary parties refusing and/or failing to execute the purported settlement agreement.

II. STATEMENT OF CASE AND COURSE OF PROCEEDINGS

[¶6] In 2009, Bradley K. Brakke ("Bradley") created a Last Will and Testament. (App. 87). In 2013, Bradley revoked the 2009 Will and executed a 2013 Last Will and Testament, a 2013 Trust, and a 2013 General Durable Power of Attorney which appointed Bell State Bank & Trust ("Bell") as his attorney-in-fact. (App. 32; 87). In 2014, Bell, as allowed by the General Durable Power of Attorney, and with direct knowledge of Bradley's intentions, executed a 2014 Trust on behalf of Bradley. (App. 32-33; 87). None of these instruments, including the 2009 Will, leave any property or

other interest to Bradley's brother, Timothy A. Brakke ("Timothy"). (App. 8-23; 34-47; 48-56; 57-72).

[¶7] Bradley passed away on April 5, 2014. (App. 87). On May 6, 2014, Bell sent notification letters to potential interested parties, including Timothy, which had the effect of commencing a one hundred twenty day (120) statute of limitations period to challenge the 2014 Trust. (App. 73-74). On August 26, 2014, Timothy brought a Petition challenging the 2013 Trust ("Petition"). (App. 5-7). The Petition does not challenge or reference the 2014 Trust. Id. Bell answered and objected to the Petition by raising, among other affirmative defenses, standing and statute of limitations. (App. 25-28).

[¶8] Accordingly, after Timothy failed to seek leave to amend his Petition before the deadline in the district court's scheduling order had expired, Bell brought a Motion for Summary Judgment seeking to dismiss the Petition on the grounds that Timothy lacked standing, the Petition challenged an inoperative Trust, and the statute of limitations barred any challenge to the 2014 Trust. (App. 88; Docs. #22-31). Timothy then brought a Motion to Amend Petition seeking to add a challenge to the 2014 Trust. (App. 88; Docs. #45-48). Timothy also brought a Motion to Approve Settlement which sought judicial approval of a settlement agreement. (App. 88-89; Docs. #49-51). Bell opposed both of Timothy's motions. (App. 88-89; Docs. #57-59).

[¶9] On October 1, 2015, the district court heard oral argument on all of the motions. (App. 3). On December 1, 2015, the district court issued its Order denying Bell's Motion for Summary Judgment and granting Timothy's Motion to Amend and Motion to Approve Settlement ("Order"). (App. 86-97). Judgment was entered on

December 17, 2015. (App. 98-105). On February 2, 2016, Bell timely filed its notice of appeal of the district court's Order and Judgment. (App. 106-07).

III. STATEMENT OF THE FACTS

A. Introduction to the Brakke Family.

[¶10] Bradley and Timothy were brothers; they have one sister, Kari Headington ("Kari"). (App. 86). At the time of his death, Bradley was survived by his wife, Vicki Brakke ("Vicki"), Timothy, and Kari. Id. Timothy has one adult child, Alanna Rerick ("Alanna"); Kari has two minor children, T.H. and P.H. Id.

B. Bradley's and Timothy's Relationship.

[¶11] Timothy and Bradley ran a family farm together. (App. 86). Timothy and Bradley received equal shares despite Timothy claiming he contributed greater time and effort. Id. Timothy alleges that in 2005, Bradley was placed on medical leave due to chronic alcoholism. Id. Timothy alleges he allowed Bradley to receive equal profits because Bradley assured Timothy he would leave one-half his property to Timothy and one-half to Kari when he died. (App. 6). In 2009, Timothy alleges that Bradley, with Timothy's blessing, decided to leave one-half of his property to Alanna and one-half to Kari. (App. 6).

C. Bradley's 2009 Estate Plan and Sale of Bradley's Share in Farming Operation.

[¶12] On September 8, 2009, Bradley executed a Last Will and Testament ("2009 Will"). (App. 34-43; 87). The 2009 Will provides Vicki with a lifetime interest in the residue of Bradley's Estate and upon Vicki's death, the residue of the estate was to be split equally between Kari and Alanna. Id. Timothy does not receive any property or other interest in the 2009 Will, nor is there any reference to any alleged oral

understanding between Timothy and Bradley. (App. 34-43). The 2009 Will also contains a spendthrift provision which prohibits a beneficiary, such as Alanna, from transferring or assigning any part of her interest. (App. 38). No one has alleged that the 2009 Will was not validly executed. (App. 7).

[¶13] After executing the 2009 Will, Bradley sold his share of the family farming operation to Timothy and Timothy's business partner in 2011. (App. 32). Bradley believed he sold his shares at favorable terms to the buyers. Id.

D. Bradley Revises Estate Plan in 2013.

[¶14] On November 11, 2013, Bradley executed the Bradley K. Brakke Declaration of Trust ("2013 Trust"). (App. 87). The 2013 Trust provides that following the last to die of Bradley and Vicki, the Trust distributes the entire residue of the trust to Kari, and if Kari did not survive Bradley and Vicki, to Kari's children, T.H. and P.H. (App. 8-23). In the 2013 Trust, Timothy again receives no property or other interest. Id. The 2013 Trust contains a spendthrift provision which prohibits voluntary or involuntary transfers of a beneficiary's interest. (App. 16, 87).

[¶15] On the same day, Bradley also executed a Last Will and Testament ("2013 Will") and a General Durable Power of Attorney ("Power of Attorney"), which designated Bell as Bradley's attorney-in-fact. (App. 32, 48-56). The 2013 Will provides that the residue of Bradley's estate is to be left to Bell as the successor trustee of the 2013 Trust and is to be administered pursuant to the terms and provisions of the 2013 Trust. (App. 48-51). The Power of Attorney specifically provides that Bell has the power to amend or revoke any trust agreement established by Bradley. (App. 53).

[¶16] Bradley expressed concerns to Bell that Timothy wanted and expected to dictate how Bradley distributed assets in Bradley's estate planning instruments. (App.

79). Bradley expressed to Bell that he did not want Timothy to interfere with or have any role in his estate planning and that Bradley believed Timothy had interfered with his 2009 estate planning. Id.

E. Bradley Informs Bell He Wants to Amend Trust in 2014.

[¶17] On January 24, 2014, Bradley informed Bell that he wished to amend the 2013 Trust to provide that upon Vicki's death, approximately fifteen acres of farmstead should be distributed to Kari and Alanna in equal shares. (App. 32, 82-83). Outside of this single change, Bradley wished for the other provisions provided for in the 2013 Trust to remain the same. Id.

[¶18] On March 12, 2014, Bell, acting as Bradley's attorney-in-fact with direct knowledge of Bradley's intentions, executed the Amendment and Restatement of the Bradley Brakke Trust ("2014 Trust"). (App. 32-33, 57-72, 87). The 2014 Trust was prepared by Bradley's independent counsel. (App. 83-84). The 2014 Trust supersedes the 2013 Trust in its entirety. (App. 57). The 2014 Trust also includes a spendthrift provision which prohibits voluntary or involuntary transfers of a beneficiary's interest. (App. 65, 87). Bradley informed Bell that a material purpose of the 2014 Trust was to provide Kari or Kari's children with a significant portion of his assets and that he did not want Timothy to receive any of his assets and intended Alanna to receive only a small amount. (App. 87). The 2014 Trust is consistent with this stated purpose. (App. 57-72).

F. Bradley Dies and Bell Sends Letters Triggering Statute of Limitations to Challenge 2014 Trust.

[¶19] Bradley passed away on April 5, 2014. (App. 87). On May 6, 2014, Bell, acting as trustee of the 2014 Trust, sent notification letters to Vicki, Kari, Alanna, and Timothy. Id. There is no dispute that each received the letter. (App. 76-77). The letter

informed the recipients of the existence of the 2013 Will, 2013 Trust, Power of Attorney, and 2014 Trust with attached copies of each. (App. 73, 87). The letter in bold terms advised the recipients that the 2014 Trust superseded, in its entirety, the 2013 Trust and governed the administration and distribution of the Trust. (App. 73). The letter also quoted in bold N.D.C.C. § 59-14-04(1) and provided that "[b]y this letter, each of you are notified that you have one hundred twenty days (120) days after your receipt of this letter to contest the validity of the Trust as created on November 11, 2013, and as restated on March 12, 2014." (App. 74, 87-88).

G. Timothy Commences a Challenge Limited to the 2013 Trust.

[¶20] After Bradley passed away, Sheri Schrock, Senior Vice President and Fiduciary Legal Counsel in the Wealth Management Division at Bell, ("Sheri") had a telephone call with Timothy's counsel at Ohnstad Twichell. (App. 79). On this call, Sheri expressed her belief that no good faith claim could be brought against the 2014 Trust on lack of capacity grounds because Bell had executed the 2014 Trust. Id. On August 19, 2014, Alanna executed an assignment of interest ("Assignment") in which she purported to transfer and assign all "her right, title, and interest in and to" Bradley's estate, including the 2013 Trust and 2009 Will, to Timothy. (App. 24, 88).

[¶21] On August 26, 2014, Timothy filed the Petition. (App. 5-7, 88). The Petition states it is a challenge to the capacity of Bradley to execute the trust in November 2013, omitting any reference to the 2014 Trust. (App. 5-7). Timothy specifically requested that the Court set aside the 2013 Trust and direct the trust property be distributed pursuant to the 2009 Will. (App. 7). The Petition also attaches only a copy of the 2013 Trust. (App. 6-23).

H. Bell Brings Motion for Summary Judgment.

[¶22] The Rule 16 scheduling order, to which the parties agreed, provides that the filing deadline for motions to amend pleadings was June 1, 2015. (App. 29-30). Timothy never brought any motion to amend his Petition by the June 1, 2015, deadline. (App. 1-4).

[¶23] On June 30, 2015, Bell brought a motion for summary judgment seeking to dismiss the Petition on the grounds that (1) Timothy lacked standing to bring the Petition; and (2) the Petition challenges the 2013 Trust which is not in operation and any challenge to the 2014 Trust is barred by the applicable statute of limitations. (App. 88; Doc. #22). On August 17, 2015, more than two months after the deadline to file a motion to amend, Timothy filed a Motion to Amend the Petition seeking to add a challenge to the 2014 Trust. (App. 88; Doc. #46). Also on August 17, 2015, Timothy filed a Motion to Approve Settlement between Timothy and Kari, despite the purported agreement not having been executed yet. (App. 88; Doc. ##43, 50).

I. The District Court Denies Bell's Motion for Summary Judgment and Grants Timothy's Motions.

[¶24] On October 1, 2015, the district court heard oral argument from the parties on the respective motions. (App. 3). On December 1, 2015, the district court submitted its Order. (App. 86-97). On December 17, 2015, the Judgment was entered. (App. 98-105). On February 2, 2016, Bell timely filed its notice of appeal. (App. 106-07).

IV. STANDARD OF REVIEW

[¶25] Whether the district court erred in denying summary judgment is a question of law which is reviewed de novo on the entire record. Green v. Mid Dakota Clinic, 2004 ND 12, ¶ 5, 673 N.W.2d 257. This Court has outlined the relevant standards

governing summary judgment in Hasper v. Center Mut. Ins. Co., noting that "[a] party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." 2006 ND 220, ¶ 5, 723 N.W.2d 409.

[¶26] A party opposing summary judgment cannot "merely rely on the pleadings, briefs, or unsupported and conclusory allegations." Beckler v. Bismarck Public School Dist., 2006 ND 58, ¶ 7, 711 N.W.2d 172. "Factual assertions in a brief do not raise an issue of material fact" sufficient to satisfy the burden of the opposing party. Zuger v. State, 2004 ND 16, ¶ 8, 673 N.W.2d 615. This Court has stated that the resisting party must present competent admissible evidence by affidavit which raises an issue of material fact. Schmitt v. MeritCare Health System, 2013 ND 136, ¶ 8, 834 N.W.2d 627 (citation omitted).

[¶27] Although North Dakota has not indicated the standard of review for settlement approval, this Court should find that it is a mixed question of law and fact which is reviewed de novo. See Burlington Northern R. Co. v. Fail, 2008 ND 114, ¶ 5, 751 N.W.2d 188. The Second Circuit has noted, that "[w]hether to approve a settlement normally rests in the discretion of a district judge. However, [the Court] may review the district court's decision de novo where an appellant's challenge to the authority of the district court to approve the settlement raises novel issues of law." Denney v. Deutsche Bank AG, 443 F.3d 253, 273 (2nd Cir. 2006) (citations omitted). Moreover, as there is no dispute regarding the facts surrounding the settlement agreement, the question of the lower court's approval is a question of law to be reviewed de novo. See In re Estate of Siaw, 2015 IL App (1st) 141070-U, ¶22-25 (Ill. App. Ct. 2015). "[T]rial judges do not

have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature," and the Court can determine under a de novo standard of review if conclusions of law are legally incorrect. In re Estate of Sorrell, 2016 WL 853899, *12 (Md. Ct. App. 2016).

V. LAW AND ARGUMENT

A. The District Court erred in Denying Bell's Motion for Summary Judgment Because Timothy Lacks Standing to Bring the Petition.

1. Timothy Lacks Standing Because He has Not Suffered Some Threatened or Actual Injury as a Result of the 2013 and 2014 Trusts.

[¶28] A litigant must have standing in order to have a court decide the merits of a dispute. State v. Carpenter, 301 N.W.2d 106, 107 (N.D. 1980). "[T]he standing requirement focuses upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to justify exercise of the court's remedial powers on his behalf." Id. (citations omitted). "A person cannot invoke the jurisdiction of the court to enforce private rights or maintain a civil action for the enforcement of those rights unless the person has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶ 8, 585 N.W.2d 811. "Litigants cannot by consent . . . dispense with the necessary parties, or confer upon a person who does not have a sufficient interest in a controversy entitlement to bring a suit." Id.

[¶29] The inquiry for standing is twofold. Id. "First, the plaintiff must have suffered some . . . injury resulting from the putatively illegal action." Id. "Second, the asserted harm must not be generalized grievance shared by all or a large class of citizens; the plaintiff generally must assert his own legal rights and interests, and *cannot rest his*

claims to relief on the legal rights and interests of third parties." Id. (emphasis added); see also Restatement (Second) of Trusts § 200 (providing a person must have an interest in the subject matter of the trust to maintain a suit).

[¶30] Furthermore, one must have standing to commence the action at the time of commencement; one cannot commence an action in hopes that standing will later materialize. See B.H. v. K.D., 506 N.W.2d 368, 375 (N.D. 1993); see also Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008)("the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."). The existence of standing is a question of law which is reviewed de novo. Nodak Mut. Ins. Co. v. Ward County Farm Bureau, 2004 ND 60, ¶ 12, 676 N.W.2d 752.

[¶31] In the present matter, Timothy lacked standing to commence a challenge to the 2013 Trust (or the 2014 Trust) (hereinafter "Trusts") at the time of commencement (i.e., service of the Petition) and still lacks standing today. Timothy cannot claim that he has suffered some threatened or actual injury as a result of the Trusts. There is no dispute that under the Trusts and 2013 Will, Timothy does not receive any property or other interest in Bradley's estate. Furthermore, even under Bradley's 2009 Will, Timothy does not receive any property or other interest in Bradley's estate.

[¶32] No one has alleged that the 2009 Will was not validly executed; in fact, Timothy's requested relief in his Petition is that the property be distributed pursuant to the 2009 Will. (App. 7). However, under the 2009 Will, Timothy does not receive any interest in Bradley's estate. As such, even assuming Timothy were successful in his challenge to the 2013 Trust, and assuming arguendo that Timothy were allowed to and

were successful in challenging the 2014 Trust, Timothy would not receive any property or other interest in Bradley's estate. In short, even if Timothy obtains his requested relief, there is no dispute that he will receive nothing, and therefore, Timothy cannot claim that he suffered some threatened or actual injury.

2. The Spendthrift Provisions in the Trusts and 2009 Will Invalidate the Assignment of Interest between Alanna and Timothy.

[¶33] Despite the fact that Timothy cannot recover any property or interest in Bradley's estate regardless of the success of his action, the district court found that Timothy had standing as a result of the Assignment. (App. 24; 90-91). In the Assignment, Alanna attempted to transfer and assign to Timothy all of her rights, titles, and interests in Bradley's estate including the November 2013 Trust and 2009 Will. (App. 24). However, Alanna's attempt to assign her interests in the Trusts and 2009 Will is prohibited from the express language of these instruments. (App. 16 & 65 at Article VII; 38 at Article V).

[¶34] North Dakota recognizes the validity of spendthrift provisions. See N.D.C.C. § 59-13-02. A spendthrift provision is valid if it restrains either, or both, the voluntary or involuntary transfer of a beneficiary's interest. Id. Here, the 2009 Will and the Trusts all contain provisions which restrain the voluntary and/or involuntary transfer of a beneficiary's interests in said instrument. As such, the spendthrift provisions in all of these instruments comply with North Dakota law. As all prohibit Alanna from transferring her interests in said instruments to Timothy, the purported Assignment is invalid and cannot be used to confer standing upon Timothy.

[¶35] The Court of Appeals in Texas noted, when a person attempted to bring suit against a trust with a spendthrift provision based on an assigned interest, "[b]eneficial

interests in trusts are generally assignable; however, assignments of such interests are invalid when they are subject to a spendthrift provision in the trust." Faulkner v. Bost, 137 S.W.3d 254, 260 (Tex. App. 2004). The Court, in that case, only recognized that the person had standing based on assignment because the trust had already terminated, which resulted in the spendthrift clause also terminating. Id. at 260-61. As this trust cannot terminate due to Vicki's life estate, any assignment is invalid and cannot confer standing to the assignee. "[A] valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer." In re Indenture of Trust Dated January 13, 1964, 326 P.3d 307, 312 (Ariz. Ct. App. 2014).

[¶36] Nevertheless, the district court found that a party can avoid the spendthrift provision in an instrument by challenging the instrument as a whole on the grounds of lack of capacity. (App. 90-91). As such, the district court found that the spendthrift clauses in the Trusts did not outright prohibit Timothy from challenging the Trusts because if Timothy was successful in his challenge then the spendthrift provisions contained therein would be void. Respectfully, the district court's reasoning leads to the absurd result that all spendthrift provisions are unenforceable in matters where the person challenges the document containing the spendthrift provision.

[¶37] However, even assuming arguendo that the spendthrift provisions in the Trusts were void or invalid, Timothy would still not have standing because the 2009 Will, which no one has alleged was invalid, prohibits the assignment of Alanna's interest. Nevertheless, the district court found that Timothy has standing because "[Timothy] only has to show he would be in a position to benefit if the Trusts were set aside." (App. 90-91). Respectfully, even under the district court's standard for standing, Timothy cannot

show that he is in a position to benefit if the Trusts are set aside; the 2009 Will provides that Alanna cannot assign her interests in the property to Timothy, so even if Timothy is successful in his present Petition, he will not be in a "position to benefit" from his present action. Moreover, Bradley's 2009 Will only takes effect if the 2013 Will is invalidated and the 2009 Will is revived. No one has challenged the 2013 Will.

3. Timothy Cannot Obtain Standing on the Basis He is Attempting to Enforce a Third-Party Beneficiary Contract.

[¶38] The district court also found that Timothy had standing because Bell "overlooks" the alleged oral agreement from 2009 between Timothy and Bradley that when Bradley died, half of Bradley's property would be left to Alanna. Respectfully, Timothy never raised this argument below. Timothy's briefing and his counsel's oral argument are void of any argument that Timothy is bringing a breach-of-contract claim against Bradley and as a result Timothy has standing to sue.

[¶39] Timothy's arguments have centered on the belief that standing exists because: (1) Bell somehow conferred standing upon Timothy by sending the May 6, 2014, letter; (2) after the statute of limitations had run, Alanna provided an affidavit stating she supports and joins Timothy in the challenge; and (3) the Assignment confers standing upon Timothy. (Doc. #41, pg4-6; Tr: 14:9-25; 17:6-19; 18:17-19:25). The Petition and briefing make clear that Timothy's Petition is a challenge to Bradley's mental capacity to make changes to his estate plan in 2013 in light of his alleged chronic alcoholism. (App. 2)(Doc. #48, pg. 3).

[¶40] It is unsurprising that Timothy did not argue he obtained standing through attempting to enforce a third-party beneficiary contract. First, the statute of frauds would bar any attempt to enforce the alleged 2009 oral understanding that Bradley was to leave

half of his property (primarily consisting of real property) to Alanna. See N.D.C.C. § 9-06-04 (a contract for the sale of real property or an interest therein is invalid unless some note or memorandum thereof is in writing and subscribed by the party to be charged); see also, 79 Am. Jur. 2d Wills § 300 (a valid contract to make a certain will or devise must either be a binding and enforceable written contract or specific provisions in the will stating the existence and material provisions of such contract). Here, there is no written contract or memorandum that references an oral understanding between Bradley and Timothy. Furthermore, the Wills are void of any reference to the alleged oral understanding.

[¶41] Second, there is no consideration for the alleged oral agreement in 2009. Bradley was an owner of the farm, and Timothy claims he agreed to provide Bradley with half of the profits from the farm prior to the alleged 2009 oral agreement. (App. 5-6). "[W]hen parties to a contract subsequently agree to modify or alter the terms of their original contract, the agreement to modify ordinarily must be supported by new or additional evidence." Farms Alliance Mut. Ins. Co. v. Hulstrand Const. Inc., 2001 ND 145, ¶ 12, 632 N.W.2d 473. Here, there is no evidence any new consideration was provided to support the alleged 2009 oral understanding.

[¶42] Furthermore, it is not clear Timothy is alleging there was an oral contract; Timothy describes it as a "longstanding understanding between brothers." (App. 6). "[C]ourts will not enforce a contract which is vague, indefinite, or uncertain, nor will they make a new contract for the parties." Tobias v. North Dakota Dep't of Human Svcs., 448 N.W.2d 175, 179 (N.D. 1989). To be valid and enforceable, a contract must be reasonably definite and certain in its terms so as to ascertain what is required of the

parties. Delzer v. United Bank, 459 N.W.2d 752, 758 (N.D. 1990); In re Estate of Hill, 492 N.W.2d 288, 293 (N.D. 1992). Here, it is not clear when this alleged understanding came into existence, when or how it was modified in 2009, and what the specific terms were.

B. The District Court Erred in Denying Bell's Motion for Summary Judgment Because the Petition Fails to Challenge the Operative 2014 Trust and the Applicable Statute of Limitations Bars any Challenge to the 2014 Trust.

1. The Statute of Limitations Bars Any Challenge to the 2014 Trust.

[¶43] On May 6, 2014, Bell sent a letter via certified mail to Timothy, Alanna, Vicki, and Kari, which provided notice and information concerning Bradley's estate plan and the timeframe available to challenge the validity of Bradley's Trust. (App. 73-75). The letter explained that Bradley executed the 2013 Trust and that Bradley, through Bell as his attorney-in-fact, executed the 2014 Amended Trust which amended and restated the 2013, stating in bold, "[t]he Amendment and Restatement supersedes, in its entirety, the original Trust Agreement of November 11, 2013, and governs the administration and distribution of the Trust." Id.

[¶44] The letter also provided notice pursuant to N.D.C.C. § 59-14-04 that any person must commence a judicial proceeding to contest the validity of the 2014 Amended Trust within 120 days after the trustee sent a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing a proceeding. Id.

[¶45] On August 26, 2014, Timothy filed his Petition which expressly challenges the Bradley K. Brakke Trust *dated November 11, 2013*. (App. 7). Tellingly, attached to Timothy's petition as Exhibit A is the 2013 Trust. (App. 6, 8-23). The Petition is void of any challenge or reference to the 2014 Trust or any of the events

surrounding the execution of the 2014 Trust. (App. 5-7). The district court even stated in its Order that "[f]or whatever reason, it looks like the Petition only challenged the 2013 Trust." (App. 92).

[¶46] Pursuant to N.D.C.C. § 59-14-04, Timothy had until approximately September 4, 2014, to challenge the 2014 Trust. However, Timothy did not bring said motion until August 17, 2015, nearly a year after the statute of limitations had run. (Doc. #46). Timothy's attempt to bring a claim against the 2014 Trust in the summer of 2015 is barred by N.D.C.C. § 59-14-04. See also Oakland v. Bowman, 2013 ND 217, ¶11, 840 N.W.2d 88 (providing that the doctrine of equitable tolling does not apply to actions barred by N.D.C.C. § 59-14-04).

2. Justice Does not Require Allowing Timothy to Amend his Petition to Assert a Challenge to the 2014 Trust more than a Year after the Statute of Limitations has Run.

[¶47] Courts grant leave to amend pleadings when justice so requires and where the adverse party will not be prejudiced thereby. Galloway v. Forum Pub. Co., 138 N.W. 798, 801 (N.D. 1965). On appeal, this Court review's a trial court's grant of a motion to amend pursuant to an abuse of discretion. Grandbois and Grandbois, Inc. v. City of Watford City, 2004 ND 162, ¶ 11, 685 N.W.2d 129. Despite the statute of limitations barring any challenge after September 4, 2014, the district court granted Timothy's Motion to Amend Petition to add a challenge to the 2014 Trust in its December 1, 2015, Order. The Court's reasoning is essentially that Bell knew or should have known that Timothy was attempting to challenge the 2014 Trust and therefore justice requires Timothy be allowed to amend the Petition to add a challenge to the 2014 Trust. (App. 91-92). Respectfully, Bell believed at the time of the Petition, and still believes, that Timothy challenged only the 2013 Trust for strategic purposes. (App. 79).

[¶48] After the filing of the Petition, Sheri from Bell had a call with Timothy's then-counsel in which Sheri stated she did not believe Timothy could in good faith bring a capacity claim against the 2014 Trust as Bell had executed it with direct knowledge of Bradley's intentions. (App. 79). This is why Bell believed that Timothy only challenged the 2013 Trust. Timothy argued that the 2014 Trust cannot stand without the 2013 Trust. In his briefing, Timothy has proclaimed "if the 2013 Trust were void, then the 2014 Trust, which restated the 2013 Trust in its entirety, would necessarily be void as well." (Doc. #62, pg. 2). Furthermore, Timothy's counsel at oral argument commented: "the '14 Trust does not survive without the '13. '13 – it's a house of cards. It's '13. If '14 goes away – or '13 goes away, '14 can't stand because there is no authority to create it without '13" (Tr. 24:1-16) and "the '14 Trust is linked to the '13 Trust, and if the '13 Trust goes away, there is no '14 because you cannot do that." (Tr. 27:2-8), among similar comments.

[¶49] As demonstrated by Timothy's counsel, Timothy believed that if he could void the 2013 Trust that the 2014 Trust would automatically fail. Bell did not believe Timothy could make any good-faith claim against the 2014 Trust, as it had executed the 2014 Trust. As such, it is, and always has been, Bell's belief that Timothy purposefully elected to only challenge the 2013 Trust.

[¶50] However, there is no legal basis for the argument that the 2014 Trust is somehow voided if the 2013 Trust is voided. The 2014 Trust was executed many months after the 2013 Trust; was executed by Bell in its capacity as attorney-in-fact; and the 2014 Trust restated the 2013 Trust in its entirety. The 2014 Trust stands on its own. Respectfully, Timothy's strategic decision is not grounds for allowing Timothy to amend his Petition almost a year after the statute of limitations had passed.

[¶51] Bell and the 2014 Trust's beneficiaries will endure prejudice if the amendment is allowed, as the statute of limitations bars such a challenge after such a significant amount of time has passed. The handling of the 2014 Trust has been impacted by the uncertainty over which Trust will operate, and both Trusts will have been prejudiced by negative consequences stemming from that uncertainty and its impact on disclaimers, distributions, and taxes. Statute of limitations are intended to provide finality, but Timothy's strategic decision to challenge only the 2013 Trust has caused continuing prejudice to the Trust's beneficiaries.

3. It is Futile to Allow Timothy to Amend the Petition to Assert a Claim Against the 2014 Petition because Such Claim Should Not Relate Back to the Original Petition.

[¶52] Finally, the district court erred in allowing the amended petition to relate back to the original petition. The district court did not provide any analysis of its reasoning, but presumably the district court believed that the requirements of N.D.R.Civ.P. 15(c)(1)(B) were met. That rule provides "[a]n amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." N.D.R.Civ.P. 15(c)(1)(B). Respectfully, the district court erred in determining that the Trusts arise out of the same conduct, transaction or occurrence.

[¶53] A challenge to the 2014 Trust does not arise out of the same conduct, transaction, or occurrence as the 2013 Trust. First, the Trusts were executed several months apart. Second, the 2013 Trust was executed by Bradley, while the 2014 Trust was executed by Bell as attorney-in-fact. Third, the challenge to the 2013 Trust is a challenge to Bradley's mental capacity at the time he executed the 2013 Trust on November 11, 2013; a challenge to the 2014 Trust would concern whether Bell had

authority to execute the 2014 Trust at the moment it did so on March 12, 2014. A challenge to the 2014 Amended Trust does not arise out of the same conduct, transaction, or occurrence as the 2013 Trust. Instead, any request to relate the proposed amendment to the date of the original pleading is an attempt to circumvent the applicable statute of limitations and should be denied by this Court.

C. The District Court Erred in Granting Timothy's Motion to Approve Settlement.

1. The District Court Erred in Failing to Follow N.D.C.C. § 59-12-11 and by Approving a Settlement Agreement which is Inconsistent with a Material Purpose of the 2014 Trust.

[¶54] The district court erred in approving and incorporating the purported settlement agreement into its judgment because the settlement agreement is inconsistent with a material purpose of the 2014 Trust. Specifically, the settlement agreement modifies the Trust by changing the beneficiary of approximately 1,060 acres of property (essentially half the 2014 Trust's property) from Kari to Alanna.

[¶55] "A noncharitable irrevocable trust may be modified upon consent of all the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. An irrevocable trust that is modified under this subsection continues to be irrevocable." N.D.C.C. § 59-12-11(1). There is no dispute that the 2014 Trust is a noncharitable trust which became irrevocable upon Bradley's death. As such, pursuant to N.D.C.C. § 59-12-11, the 2014 Trust may only be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with the material purpose of the trust.

[¶56] Other courts facing similar situations have analyzed a request to modify/terminate a noncharitable irrevocable trust under identical statutes to N.D.C.C. §

59-12-11. See In re Trust D Created Under Last Will and Testament of Darby, 234 P.3d 793, 800 (Kan. 2010)(applying an identical law to N.D.C.C. § 59-12-11 and reversing a lower court's determination to modify such a trust with the consent of all beneficiaries to increase the annual distribution to a beneficiary because it violated the material purpose of distributing assets to future generations); Vaughn v. Huntington Natl. Bank Trust Div., 2009 WL 342697, *3-4 (Ohio.App. Feb. 10, 2009)(applying identical statute to N.D.C.C. § 59-12-11 and affirming lower court determination to deny settlement agreement to terminate noncharitable irrevocable trust with the consent of all beneficiaries because doing so would violate material purpose).

[¶57] The term "material purpose" is not defined in the North Dakota Century Code or the Uniform Trust Code ("U.T.C."). However, "a [material] purpose generally requires some showing of a particular concern or objective on the part of the settlor." U.T.C. § 411 cmt. (2010). It is hard to imagine a more material purpose of a trust than the identity of the beneficiaries, especially when the settlor expressly states that a purpose of his trust is who is to receive – and not receive – property. Here, Bradley informed Sheri and Bell that a purpose of the 2014 Trust was to leave a significant portion of his assets to Kari and Kari's children, to leave Alanna a small amount of property, and to ensure that Timothy did not receive any of his property. (App. 79).

[¶58] The public policy concerns of allowing the district court's ruling to stand should not be ignored. If settlors cannot trust that the law and courts in North Dakota will carry out their intent, they will likely venue or utilize the laws of other states to ensure that their intent, particularly for a material purpose, will not be set aside by beneficiaries agreeing to terms contrary to the settlor's intent. The Iowa Appeals Court

has noted that "trusts are usually created for the purpose of withholding . . . control and disposition . . . for reasons which appear sufficient to the trustor, and they are not usually regarded with satisfaction by the persons who are deprived of the possession of the estate. This, however, furnishes no ground for disregarding the conditions . . . nor for refusing to carry out the expressed design of the party creating the trust." In re Trust Under Last Will & Testament of Weitzel, 2009 WL 4842807, *6 (Iowa Ct. App. 2009).

[¶59] The district court did not address the applicability of N.D.C.C. § 59-12-11 in its Order. Instead, the district court relied on a probate statute concerning settlement agreements of probate disputes. Nevertheless, there can be no serious dispute that the purported settlement agreement is inconsistent with a stated material purpose of the 2014 Trust. Respectfully, for this reason alone, Bell requests the Court find that the district court erred in granting the Motion to Approve Settlement.

2. The District Court Erred in Granting the Motion to Approve Settlement as not all of the Beneficiaries Provided Consent.

[¶60] Not only is the purported settlement agreement inconsistent with the material purpose of the 2014 Trust, the settlement agreement also lacks the consent of all of the Trust beneficiaries. A noncharitable irrevocable trust may be modified only upon consent of all of the beneficiaries. N.D.C.C. § 59-12-11. A trust beneficiary includes any person who has a present or future interest whether the interest is vested or contingent. N.D.C.C. § 30.1-01-06(4). The consent must be obtained "on behalf of all potential beneficiaries," including those with the life estate and contingent beneficiaries. Restatement (Third) of Trusts § 65, cmt. b to subs. 1 (2003). Here, the beneficiaries of the 2014 Trust would include, at a minimum, Vicki, Alanna, Kari, and Kari's two minor

children. The consent of all of these beneficiaries is required in order for a court to modify a noncharitable irrevocable trust.

[¶61] The purported settlement agreement in this matter is only executed by Timothy and Kari. Alanna has submitted an affidavit which states she consents and joins in the settlement agreement. (Doc. #44). However, Vicki has not provided her consent to the settlement agreement, nor have Kari's minor children consented to the settlement agreement. Kari's minor children are remainder beneficiaries of the 2014 Trust, and their consent is thereby required under N.D.C.C. § 59-12-11. Kari may only provide consent for her minor children as long as there is not a conflict of interest between Kari and her minor children. See N.D.C.C. § 59-11-03(6). Here, Kari's execution of the settlement agreement is plainly detrimental to her minor children as it effectively gives away significant property which could otherwise go to her children. At a minimum, both of the children's parents or a guardian ad litem should be required to provide consent for the minor children. As Vicki and Kari's children have failed to consent to the proposed settlement agreement, the district court erred in granting the Motion to Approve Settlement.

3. The District Court Erred In Granting the Motion to Approve Settlement by Relying on a Probate Statute with no Applicability to the Present Situation.

[¶62] The district court did not base its reasoning to grant the Motion to Approve Settlement upon N.D.C.C. § 59-12-11, but instead relied on N.D.C.C. § 30.1-22-02, which concerns procedure for securing court approval of compromises in probate, not trust, cases. Nevertheless, even under the probate statute, the court erred in granting the Motion to Approve Settlement.

[¶63] A court may approve a settlement in a probate case when it (1) is executed by all persons having a beneficial interest or having claims which will or may be affected by the settlement agreement; (2) the contest or controversy is in good faith; and (3) the agreement is just and reasonable. N.D.C.C. § 30.1-22-02. The district court believes the editorial board comment on the section is instructive for purposes of this matter; Bell agrees, but for different reasons.

[¶64] The editorial board comment to N.D.C.C. § 30.1-22-02 explains the procedure for a court to analyze whether to accept a settlement agreement in a probate matter, concluding by stating:

> Thus, the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of a good faith controversy concerning the meaning and legality of the plan.

N.D.C.C. § 30.1-22-02, cmt. The above comment makes clear that the purpose is to adopt a procedure under which courts may accept settlement agreements which concern good faith disputes about ambiguous Wills. Hence, a testator who drafts a sufficiently complete and clear Will should not face the possibility of beneficiaries attempting to deviate from his testamentary plan.

[¶65] Here, the Petition does not allege that either Trust is incomplete, unclear, or contains some ambiguous term. The 2014 Trust is an unambiguous noncharitable irrevocable trust, drafted by Bradley's independent counsel, expressly providing how Bradley desired to distribute his property upon his death.

[¶66] Even assuming arguendo that N.D.C.C. § 30.1-22-02 was somehow applicable to the present situation dealing with an unambiguous noncharitable irrevocable trust, the district court still erred in granting the Motion to Approve Settlement. As stated

above, under N.D.C.C. § 30.1-22-02, in order for the district court to approve a settlement, the contest or controversy must be in good faith, and the result must be just and reasonable.

[¶67] Here, there is no good-faith claim in front of the district court. The district court erred in determining Timothy's mere allegation that Bradley was suffering from alcoholism in 2005 resulted in a good faith claim to Bradley's capacity on a specific day years later. Timothy presented no evidence that Bradley lacked capacity on November 11, 2013 (or in regard to the 2014 Trust). Timothy presented a single affidavit in this matter, stating only, "[I]n 2005, [Bradley] was placed on medical leave because alcoholism did not allow him to operate farm machinery." (Doc. #42). This Court has found that the mere fact someone was an alcoholic did not mean he lacked testamentary capacity at the very time he signed the will. See Matter of Estate of Stanton, 472 N.W.2d 741, 746 (N.D. 1991). There is no further evidence in front of the Court demonstrating a lack of capacity on November 11, 2013, or any other later day.

[¶68] Similarly, there is no good-faith claim for an alleged breach of oral contract. Timothy has not brought a breach-of-contract claim against Bradley's estate, but even assuming arguendo he did, Timothy has produced no evidence of the alleged "longstanding understanding between brothers." Timothy's failure to produce any evidence demonstrating he has a good-faith claim prohibits the district court from accepting the purported settlement agreement. See, In re Estate of Schroeder, 441 N.W.2d 527 (Minn. 1989)(reversing trial court's approval of a settlement based on the lower court's incorrect determination that a good-faith claim existed to challenge a will when the challengers failed to bring forward any competent evidence); Wilson v. Dallas,

743 S.E.2d 746, 758-763 (S.C. 2013)(reversing lower court's determination that challengers had brought a good-faith claim due to lack of competent evidence, noting that, "[a]lthough proof of a claim is not required, we believe something more than a subjective belief or a mere allegation is necessary to avoid the potential for collusion among disinherited or disgruntled family members who wish to dispose of the testator's estate plan and substitute it with one more to their liking").

[¶69] Moreover, even if there was a good-faith claim, the district court erred in determining the settlement agreement provided a just and reasonable result. "The second part of the test for a will settlement agreement is [whether] the 'effect of the agreement . . . is just and reasonable." In re Estate of Schroeder, 441 N.W.2d 527, 532 (Minn. 1989); see also N.D.C.C. § 30.1-22-02. Courts have found it is not just and reasonable to unravel the will of a testator when the settlement agreement would be inconsistent with the intention of a testator who expressed his intention with the requisite formalities. See In re Estate of Schroeder, 441 N.W.2d at 534. "[T]o be just and reasonable, an estate plan in a settlement agreement must defer to the testator's intent unless a departure from that intent is reasonably necessary to protect the interests of the beneficiaries." Id. at 533. Here, the Trust provides that the significant portion of property is to go to Kari (or her children); the Trust also precludes Kari from conveying, prior to distribution, her interest under the spendthrift provision. No party has raised any issue with the requisite formalities of the 2014 Trust. Respectfully, it would be unjust and unreasonable to allow the beneficiaries to enter into a settlement agreement which so plainly violates a material purpose of the 2014 Trust.

VI. CONCLUSION

[¶70] For the aforementioned reasons, Bell respectfully requests the Court find that the district court erred in denying Bell's Motion for Summary Judgment and granting Timothy's Motion to Amend and Motion to Approve Settlement. As such, Bell respectfully requests that the Court reverse the district court's Order and Judgment.

Dated this *10th* day of May, 2016.

/s/ Berly D. Nelson

Berly D. Nelson (#05903), and
Ian R. McLean (#07320), of
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Phone: (701) 232-8957
Fax: (701) 237-4049
Email: bnelson@serklandlaw.com
Email: imclean@serklandlaw.com
Attorneys for Respondent-Appellant
Bell State Bank & Trust

CERTIFICATE OF COMPLIANCE

[¶71] The undersigned, as attorney for the Appellant, Bell State Bank & Trust, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and (7)(a) of the North Dakota Rules of Appellant Procedure, that the above Brief of Appellant 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, certificate of service and this certificate of compliance, totals **7,691**.

Dated this *10th* day of May, 2016.

/s/ Berly D. Nelson
Berly D. Nelson (#05903), and
Ian R. McLean (#07320), of
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Phone: (701) 232-8957
Fax: (701) 237-4049
Email: bnelson@serklandlaw.com
Email: imclean@serklandlaw.com
Attorneys for Respondent-Appellant
Bell State Bank & Trust

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

Supreme Court No. 20160045
Cass County Case No. 2014-CV-02400

In the Matter of Bradley K. Brakke
Trust dated November 11, 2013

Timothy A. Brakke,

Petitioner-Appellee

v.

Bell State Bank & Trust, Trustee of the Bradley K. Brakke Trust; Vicki Brakke; Kari Headington,

Respondents

Bell State Bank & Trust, Trustee of the Bradley K. Brakke Trust,

Appellant.

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

The undersigned certifies that he served the attached:

BRIEF OF APPELLANT BELL STATE BANK & TRUST
AND
APPENDIX OF APPELLANT BELL STATE BANK & TRUST

on May 10th, 2016, by sending a true and correct copy thereof by electronic means only to the following e-mail address, to-wit:

Sara K. Sorenson,
ssorenson@ohnstadlaw.com

Robert G. Manly
rmanly@vogellaw.com

Fred J. Williams
fjwillians@fredlaw.com

To the best of undersigned's knowledge, the email address above given is the actual email address of the party intended to be so served.

/s/ Berly D. Nelson
Berly D. Nelson #05903