

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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In the Trust of Roger S. Linn Restated Trust  
Agreement, deceased.

Scott Ottum, attorney in fact for Shirley A.  
Linn,

Petitioner, Appellant, and  
Cross-Appellee,

v.

Wells Fargo Bank, N.A. and Harris W.  
Widmer as co-Trustees of the Roger Linn  
Trust,

Respondents and Appellees,

and,

Stephen T. Linn, Deborah R. Wagner, and  
Mark Wagner,

Respondents, Appellees, and  
Cross-Appellants.

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**Supreme Court No.: 20180206**

**Civil No.: 09-2017-CV-02936**

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ON APPEAL FROM AN ORDER DISMISSING PETITION DATED MARCH 29, 2018  
CASS COUNTY DISTRICT COURT  
EAST CENTRAL JUDICIAL DISTRICT, STATE OF NORTH DAKOTA  
THE HONORABLE STEVEN E. McCULLOUGH, PRESIDING

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**CO-TRUSTEE RESPONDENTS' AND APPELLEES' BRIEF**

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## **STATEMENT OF THE ISSUES**

[1] The unambiguous terms of the Trust Agreement do not require the Co-Trustees to pay Shirley's ongoing assisted living expenses unless the express standards for invading trust principal are met.

## **STATEMENT OF THE CASE**

[2] This case centers on contested provisions of the Roger S. Linn ("Roger") Restated Trust Agreement dated June 9, 2000 ("Trust Agreement") as they benefit Shirley Linn ("Shirley"), Roger's surviving spouse. The beneficiaries of the Trust are Shirley, Roger's children, Stephen T. Linn and Deborah R. Wagner, and his former son-in-law and business associate, Mark Wagner. Shirley requests this Court to construe provisions of the Trust Agreement to require the Trust to pay her ongoing assisted living and nursing home expenses as a standalone obligation of the Trust without regard to other provisions limiting principal payments to Shirley. Shirley's interpretation is not consistent with the unambiguous terms of the Trust Agreement. The district court properly denied and dismissed Shirley's Petition for Order for Distribution of Trust Assets.

[3] On October 6, 2017, Shirley petitioned the Cass County District Court for an Order for Distribution of Assets seeking an order compelling the Co-Trustees of the Roger S. Linn Restated Trust Agreement, Wells Fargo Bank, N.A., and Harris W. Widmer (hereafter collectively referred to as "Co-Trustees") to repay Shirley all costs she had incurred related to her assisted living and nursing home care. (App. at 5). On November 22, 2017, the Co-Trustees responded to the Petition arguing that the Trust provision at issue should not be construed, and it was not Roger's intent for it to be

construed, as a separate, mandatory allowance for Shirley's assisted living or nursing home care. (App. at 28).

[4] On February 14, 2018, a hearing on the Petition was held. The district court entered its Order on March 29, 2018, denying and dismissing the Petition. (App. 35-40). The district court found that Roger intended the Trust to provide for Shirley's obligation to "acquire" assisted living care, but the Trust Agreement did not indicate an intention to directly provide for her continued assisted living expenses. (App. at 39). The district court concluded that the Co-Trustees had complied with the mandatory provisions of the Trust Agreement.

[5] Shirley filed her Notice of Appeal on May 23, 2018. (App. 41).

#### **STATEMENT OF FACTS**

[6] Upon Roger's death on September 26, 2003, Article V of the Trust Agreement directed the Co-Trustees to divide the trust corpus into two separate trusts: the Linn Family Trust (App. at 9, 12-14) and the Linn Marital Trust (App. at 9, 14-15). The specific administrative provisions of each trust are provided in Article VI and Article VII, respectively. (App. 12-15).

[7] In or about the summer of 2017, a disagreement arose between Shirley and the Co-Trustees as to whether the Trust should pay Shirley's ongoing assisted living expenses in addition to paying her the net income of the Linn Marital Trust. The parties could not agree on the interpretation of the Trust Agreement, which resulted in Shirley's Petition and this appeal.

## LAW AND ARGUMENT

### I. STANDARD OF REVIEW

[8] The district court held that the Trust Agreement was unambiguous as regards to payment of Shirley's assisted living expenses, and that the mandatory provisions of the Trust Agreement had been followed. Whether an ambiguity exists in a trust instrument is a question of law fully reviewable on appeal. Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 230 (N.D. 1994).

[9] This Court summarized the standards for interpreting a trust instrument in Langer v. Pender, 2009 ND 51, ¶¶13-15, 764 N.W.2d 159, as follows:

[The] Court's primary objective in construing a trust instrument is to ascertain the settlor's intent. Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶21, 750 N.W.2d 412; Matter of Estate of Schmidt, 1997 ND 244, ¶13, 572 N.W.2d 430. "When a trust instrument is unambiguous, the settlor's intent is ascertained from the language of the trust document itself." Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 230 (N.D. 1994). \*\*\*

General rules of construction of written documents apply to the construction of trust instruments. See Alerus, 2008 ND 104, ¶¶18-19, 750 N.W.2d 412. In North Dakota, the interpretation of a contract is governed by N.D.C.C. ch. 9-07. Under N.D.C.C. § 9-07-02, the contract language governs its interpretation "if the language is clear and explicit and does not involve an absurdity." Contracts are construed to give effect to the parties' mutual intention at the time of contracting "so far as the same is ascertainable and lawful." N.D.C.C. § 9-07-03. The rules provided in N.D.C.C. ch. 9-07 are applied "[f]or the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful . . ." N.D.C.C. § 9-07-03. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of [N.D.C.C. ch. 9-07]." N.D.C.C. § 9-07-04. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D.C.C. § 9-07-06.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." N.D.C.C. § 9-

07-08. “Particular clauses of a contract are subordinate to its general intent.” N.D.C.C. § 9-07-15. “Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purposes of the whole contract.” N.D.C.C. § 9-07-17. “Words in a contract which are inconsistent with its nature or with the main intention of the parties are to be rejected.” N.D.C.C. § 9-07-18.

## II. RELEVANT PROVISIONS OF TRUST AGREEMENT

[10] The district court found that Roger’s intent is plain and unambiguous from the language of the Trust Agreement. (App. at 39). The relevant provisions of the Trust Agreement are as follows:

### ARTICLE V. DIVISION OF TRUST PROPERTY AFTER DONOR’S DEATH

\*\*\*\*\*

10. As of the date of this Restated Trust Agreement, the Donor is the owner of a personal residence located on East County Club Drive in Fargo, North Dakota, and a personal residence located on Via Camello Del Norte, Scottsdale, Arizona. If either or both of these properties are owned by the Donor at the date of his death, they are to be used to fund either the Linn Family Trust or Linn Marital Trust described below, as the Trustee shall determine in its sole discretion. The Trustee is given the following specific instructions with regard to such properties.

(A) Provided the trusts have sufficient ability to maintain two properties described below, the Donor grants to the Donor’s spouse the right to occupy the properties for a period of up to two (2) years. At or any time prior to the expiration of the two-year period, the Donor’s spouse has a right to select from either of the two residences, which residence she would like to continue to use as a principal residence. Upon the Donor’s spouse’s selection of either of the above two residences, the Donor’s spouse shall have the right for her life, or such lesser period as long as she desires to live on the selected premises, to occupy the same and to have the trust maintain the selected property as described below.

\*\*\*\*\*

(C) The following expenses are considered to be expenses of the trust in maintaining these residences:



1. General real estate taxes and special assessments; premiums on insurance, including fire, extended coverage and homeowner's liability, necessary remodeling, redecorating, repairs, maintenance, including repairs and maintenance and replacement of appliances and utilities as the need requires.

\*\*\*\*\*

(E) Proceeds of the sale of any other residences shall be included within the trust.

(F) In the event the Donor's spouse no longer desires to reside in the selected residence or is unable to reside in the selected residence because of physical or mental infirmity, the Trustee may sell the residence with the proceeds deposited in the trust. If the Donor's spouse is in need of assisted living, the trust shall provide the funds necessary to pay any obligations the Donor's spouse may incur in acquiring assisted living or nursing home care.

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ARTICLE VI.  
LINN FAMILY TRUST

This trust shall be held, administered and disposed of as follows:

\*\*\*\*\*

(D) During the life of the Donor's spouse, or until she remarries, the Trustee shall pay to or use for the Donor's spouse's benefit so much of the remainder of the net income of this trust, in monthly or other convenience installments, as the Trustee may determine is necessary for the support, comfort, and welfare of the Donor's spouse, to maintain her in her accustomed manner of living. Whenever the Trustee determines that the income of the Donor's spouse, from all sources known to the Trustee is not sufficient for the Donor's spouse's reasonable support and comfort, the Trustee may, in the Trustee's discretion, pay to or use for her benefit so much of the principal of this trust as the Trustee determines to be required for those purposes. No such payment shall be considered as advancements. The remainder of the annual net income, if any, shall be paid to the Donor's then living children in equal shares.

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ARTICLE VII.  
LINN MARITAL TRUST

This trust shall be held, administered and disposed of as follows:

1. The entire net income of this trust shall be paid, distributed and delivered over in monthly or other convenient installments and at least annually to the Donor's spouse during her lifetime.

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2. In the event that the income from this trust is insufficient for the Donor's spouse's support and comfort in her accustomed manner of living, taking into consideration other property and means of support that she may enjoy, the Trustee, in the Trustee's discretion, may pay to the Donor's spouse or for her benefit, from the principal of this trust, such sums as the Trustee determines to be required for those purposes, not to exceed \$3,000 per month.

(App. at 10-13)

**III. THE TRUST AGREEMENT DOES NOT REQUIRE THE CO-TRUSTEES TO PAY SHIRLEY'S ONGOING ASSISTED LIVING EXPENSES UNLESS THE EXPRESS STANDARDS FOR INVADING TRUST PRINCIPAL ARE MET.**

**A. The Trust Agreement is Not Ambiguous Simply Because It Contains Elements of a Support Trust and Discretionary Trust.**

[11] In Shirley's first argument, she asserts that the Trust is ambiguous because it contains elements of both a discretionary trust and a support trust. (Appellant's Brief at ¶12). Although such elements exist in the Trust Agreement, such argument is not pertinent to the issue in dispute. A trust is not ambiguous simply because it contains elements of a discretionary trust and support trust. Rather, the cases cited by Shirley make clear that in determining whether a trust is ambiguous, the real focus is on the *trust language* itself. Eckes v. Richland Cty. Soc. Servs., 2001 ND 16, ¶¶12-14, 621 N.W.2d 851.

[12] In Eckes this Court ruled that a trust may include elements of both a support and a discretionary trust, and that the trust at issue was unambiguous even though it contained both elements. Eckes, 2001 ND 16 at ¶12. Shirley also relies on Bohac v. Graham, 424 N.W.2d 144, 146 (N.D. 1988), but Bohac does not create a bright line rule that a trust is ambiguous anytime it contains both discretionary and support trust elements. In Bohac, the Court found that the *trust language* was ambiguous because it directed the trustee to invade corpus as “she may deem necessary,” which indicates an amount of discretion on the trustee’s part. Bohac at 146 (emphasis added). However, the trust did not go as far as the typical provision in a discretionary trust that the trustee shall have “uncontrolled discretion” over the payments, so an ambiguity was found. Id. This appeal, however, does not involve the nature of the Co-Trustees discretion to make principal payments from the marital trust or family trust under the express standards of the Trust Agreement.

[13] Lastly, Shirley relies on Kryzsko v. Ramsey County Soc. Servs., 2000 ND 43, 607 N.W.2d 237. Like Eckes and Bohac, the holding in Kryzsko does not indicate a trust is ambiguous simply because it contains both support and discretionary elements. Instead, the focus in Kryzsko was on the *trust language* itself, which was found to be ambiguous. Kryzsko, 2000 ND 42 at ¶24 (emphasis added). Therefore, Shirley’s first argument is irrelevant. The Trust Agreement is not ambiguous simply because elements of a discretionary trust and support trust care incorporated.

[14] Everyone agrees that the Co-Trustees paid the necessary expenses including a \$3,500.00 reservation fee, \$9,295.32 for initial rental fees and assisted living expenses, and moving expenses of \$1,500.00, for Shirley to acquire an assisted living

unit at Touchmark Living Center in Fargo, North Dakota. (App. 36) Having done so, the question is whether Article V, Section 10(F) is a mandatory directive to pay Shirley's *ongoing* assisted living expenses. The Trust Agreement, taken as a whole, does not support such a conclusion for two significant reasons: first, the Trust Agreement neither establishes nor funds a separate trust dedicated to Shirley's assisted living expenses; second, the two express trusts have clear and unambiguous provisions for the invasion of principal depending on Shirley's needs and other means of support. Finally, Shirley's interpretation ignores that the Trust is required to assist her to *acquire* assisted living care.

**B. A Separate Trust Does Not Exist for Shirley's Assisted Living or Nursing Home Care.**

[15] Roger's Trust Agreement was set up as follows. After his death, the corpus of the trust was to be separated into the Linn Family Trust and the Linn Marital Trust. Residential housing for Shirley was provided in section 10(F) of Article V. The Trust Agreement gave Shirley a grace period to select one of Roger's homes to live in. The expenses to maintain the selected home were paid by the Trust as trust expenses. When Shirley could no longer live in the selected home, it was to be sold with the proceeds deposited into trust, thus increasing the marital trust principal. (Trust Agreement Article V, 10(F)) Section 10(F) further directed the Co-Trustees to provide the funds necessary for Shirley to *acquire* assisted living or nursing home care. Once the home was sold and Shirley was settled in assisted living, the Co-Trustees would no longer have the expenses of maintaining the home. That expense savings would significantly increase the "net income" of the marital trust available for Shirley's benefit, including her *ongoing* assisted living expenses.

[16] Neither the marital trust nor the family trust is expressly devoted to Shirley's assisted living and nursing home care. A review of Articles VI and VII clearly demonstrates this to be true. The mandatory provision that the Co-Trustees "provide the funds necessary to pay any obligations [Shirley] may incur in acquiring assisted living or nursing home care" have been complied with. The provision in Article V, 10(F) does not create a new trust or devote funds to that purpose. It follows that the Co-Trustees do not have a separate obligation to pay ongoing assisted living care expenses, but instead those considerations are subsumed into the Co-Trustee's ability to invade trust principal from either the marital or family trust.

[17] In her brief, Shirley is essentially asking the Court to create a new and separate trust for the payment of her assisted and nursing home costs. (Appellant's Brief at ¶21) Shirley claims she is "reading the Trust as a whole" when in fact she is doing the exact opposite. She is attempting to create a third trust when the Trust Agreement clearly and unambiguously creates only two.

**C. Requiring Mandatory Principal Payments from Either Trust for Ongoing Assisted Living Expenses Contravenes the Existing Terms for Invasion of Principal.**

[18] It is undisputed that Shirley is entitled to the net income from the Linn Marital Trust.<sup>1</sup> Shirley argues that "Roger's intent was for principal, not net income already being paid to Shirley under other provisions, to be used to pay for Shirley's assisted living and nursing home costs." (Appellant's Brief at ¶19). There is no support for this argument in the express provisions of the Trust Agreement. In fact, the argument contravenes the specific provisions devoted to invading principal for Shirley's benefit. To

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<sup>1</sup> Shirley is also entitled to any net income from the Linn Family Trust that exceeds the \$1,000 dedicated to Deborah Linn.

achieve Shirley's desired result would require the Court to negate and disregard those specific and express standards.

[19] The Co-Trustees have a limited ability to make principal payments to Shirley. Before doing so, the Co-Trustees must consider Shirley's other property and means of support. (Trust Agreement, Art. VII, § 2, App. at 14). If her personal resources are insufficient for her necessary support and comfort, the Trustees may invade trust principal. *Id.* A distribution of principal from the Linn Marital Trust is limited to \$3,000 per month. (App. at 14). Principal distributions from the Linn Family Trust while not capped are limited to the additional amount "required" for Shirley's support. (App. at 13). Roger gave the Co-Trustees the discretion and obligation to weigh Shirley's other property and means of support with her need for support to determine whether principal distributions were necessary and appropriate. It would be improper for the Court to disrupt the balancing of these interests by requiring mandatory principal distributions from either trust for Shirley's assisted living or nursing home expenses.

**D. Roger Intended that the Trust *Acquire* Assisted Living or Nursing Home Care for Shirley.**

[20] Furthermore, Shirley fails to consider the Trust Agreement as a whole by leaving out the word "acquiring" throughout the arguments in her brief. For example, Shirley argues that "the Trust states the Trustees "shall" pay for Shirley's assisted living and nursing home costs." (Appellant's brief at ¶20). Shirley goes on to argue that "[t]he provision mandating the Trustees pay for Shirley's assisted living or nursing home costs is entirely unnecessary if Roger's intent was for Shirley to pay the nursing home and assisted living costs out of the Trust income she receives. (Appellant's brief at ¶23). In both arguments, Shirley ignores the plain language of the Trust Agreement by leaving out

the word “acquiring.” Article V(10)(F) clearly states that “the trust shall provide the funds necessary to pay any obligations the Donor’s spouse may incur in *acquiring* assisting living or nursing home care.” (emphasis added)

[21] It is clear that Roger’s intent was for the Trust to pay for Shirley’s expenses incurred in acquiring assisted living care only. Thereafter, the marital trust’s net income, as enhanced by the sale of the home and reduction of trust expenses, may be used by Shirley to maintain her assisted living care. And, finally, if those funds are not sufficient, the discretionary principal *can* be used subject to a determination of Shirley’s needs based on all her assets and means of support. When the Court gives the word “acquiring” its usual and customary meaning, there is no ambiguity regarding Roger’s intent as expressed in the terms of the Trust Agreement.

**E. Extrinsic Evidence Cannot Be Considered to Create an Ambiguity.**

[22] In Shirley’s last argument, she asserts that the Court should reverse and remand so the district court can consider extrinsic evidence of Roger’s intent. Extrinsic evidence cannot be used to *create* an ambiguity. See Goodall v. Monson, 2017 ND 92, ¶9, 893 N.W.2d 774. (when the language of a deed is plain and unambiguous and the parties’ intentions can be ascertained from the writing alone, extrinsic evidence is inadmissible to alter, vary, explain, or change the deed); Gawryluk v. Poynter, 2002 ND 205 ¶9-10, 654 N.W.2d 400 (Parol evidence may be used to explain latent ambiguity, but may not be used to create new or different contract). Here, it would be inappropriate for the Court to direct the district court to consider extrinsic evidence because the language of the Trust Agreement is plain and unambiguous.

**CONCLUSION**

[23] Wells Fargo Bank, N.A. and Harris W. Widmer as Co-Trustees of the Roger Linn Trust respectfully request this Court to affirm the District Court's denial and dismissal of Shirley Linn's Petition for Order for Distribution of Trust Assets. Appellee and Respondents also respectfully request they be awarded their costs and disbursements on appeal.

Dated this 1<sup>st</sup> day of October, 2018.

*/s/ Shanon M. Gregor*

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**CERTIFICATE OF COMPLIANCE**

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, 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 3,409 words.

Dated this 1<sup>st</sup> day of October, 2018

/s/ Shanon M. Gregor

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