

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA****Supreme Court Case No. 20180206  
Cass County District Court No. 09-2017-CV-02936**

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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/Cross-Appellee,

v.

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

Respondents/Appellees,

and,

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

Respondents/Appellees/Cross-Appellants.

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**BRIEF OF RESPONDENTS/APPELLEES/CROSS-APPELLANTS STEPHEN T.  
LINN, DEBORAH R. WAGNER AND MARK WAGNER**

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**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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## **STATEMENT OF THE ISSUES**

1. Should the District Court's March 29, 2018 Order Dismissing Petitioner/Appellant/Cross-Appellee's Petition and Order for Distribution of Trust Assets be affirmed?
2. Did the District Court err by denying Respondents/Appellees/Cross-Appellants Stephen T. Linn, Deborah R. Wagner And Mark Wagner's request for attorney's fees and costs?

## **STATEMENT OF THE CASE**

[¶1] Respondents/Appellees/Cross-Appellants join in Respondent/Appellees' Statement of the Case.

## STATEMENT OF THE FACTS

[¶2] Stephen T. Linn and Deborah R. Wagner are brother and sister and the children of Roger S. Linn (“Roger”). Tr. 121:8-14. They are children of Roger’s first marriage. Tr. 122:1-6. Mark Wagner is Roger’s former son-in-law and business associate. Tr. 121:15-25. Stephen, Deborah and Mark are beneficiaries of the Roger S. Linn Restated Trust Agreement dated June 9, 2000 (“Trust”), and are hereinafter collectively referred to as “Remainder Beneficiaries”. Appellant’s A. at 12. Petitioner/Appellant/Cross-Appellee Shirley A. Linn (“Shirley”) was married to Roger at the time of his death, and is also a beneficiary of the Trust. Appellant’s A. at 3, 4. She was Roger’s second wife. Respondent/Appellees Wells Fargo Bank, N.A. and Harris W. Widmer are co-Trustees of the Trust (“co-Trustees”). Appellant’s A. at 25.

[¶3] Scott Ottum (“Ottum”) is Shirley’s son, but not Roger’s son, and not a beneficiary of the Trust. Indeed, none of Shirley’s children are beneficiaries of the Trust. Ottum is Shirley’s Attorney-in-fact, and commenced this action on Shirley’s behalf via Petition on October 10, 2017. The Petition alleged *inter alia* the co-Trustees breached their duties by failing to invade Trust principal to pay all costs of Shirley’s assisted living care. The Petition requested an Order compelling the co-Trustees to invade Trust principal to pay all costs related to her assisted living care going forward, and reimburse all such costs paid to date. The Petition also sought Shirley’s attorney’s fees and costs. Appellant’s A. at 3-5.

[¶4] The co-Trustees opposed Shirley’s Petition, denying there had been a breach of duties and affirmatively asserting they had in good faith interpreted and

applied the terms of the Trust; considering its purpose, terms, distributional requirements and the interests of all beneficiaries. Appellant's A. at 25-30.

[¶5] Remainder Beneficiaries interposed their own separate response in opposition to the Petition on November 27, 2017, denying the allegations in the Petition and affirmatively asserting, *inter alia*, that Shirley's proposed construction of the Trust violated North Dakota law, as it rendered a nullity to those Trust provisions which clearly and unambiguously directed the co-Trustees to take into consideration Shirley's other property and means of support before making principal distributions; and impermissibly demanded the co-Trustees violate their legal duties to administer the Trust in the interest of all beneficiaries. Appellant's A. at 31-34.

[¶6] Set forth below are material terms of the Trust, with emphases added:

**ARTICLE V.**  
**DIVISIONS OF TRUST PROPERTY AFTER DONORS DEATH**

After the Donor's Death, the Trustee shall hold and dispose of the trust property as follows:

. . . .

3. If the Donor's spouse survives the Donor, the Trustee shall divide the trust property into two separate trusts as follows:

(A) One trust called the "Linn Family Trust" shall be that part of the trust property in an amount equal to the exemption equivalent of the unified credit allowable under the federal estate tax law and available to the Donor's estate in the year of his death, reduced by all items included in the Donor's estate for federal estate tax purposes which either are disposed of in the Donor's Will or pass outside of such Will, but only if such items do not qualify for the federal estate tax marital deduction of the federal estate tax charitable deduction.

In addition to the above, all the property and the proceeds therefrom received by the Trustee which are not includable in the Donor's gross estate for federal estate tax purposes shall be added to and commingled with the



trust property of the Linn Family Trust and held, administered and disposed of in accordance with the terms thereof.

(B) One trust called the "Linn Marital Trust" shall be the remaining trust property which is intended to qualify for the marital deduction.

4. If the Donor's spouse does not survive the Donor, the Trustee shall fund the Linn Family Trust with all of the trust property.

....

10. As of the date of this Restated Trust Agreement, the Donor is the **owner** of a personal residence located on East Country 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 for 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.***

(B) ***It is the Donor's intention that this provision shall apply to any substitute personal residence that he may acquire and in which the Donor and the Donor's spouse reside at the time of the Donor's death.*** Her right to select shall include ***such residences***, however, no more than two residences shall be ***maintained*** by the Trustee.

(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.

2. The Trustee shall pay the mortgage payments on such properties as they mature or, in its discretion, may pay the mortgage in full.

(D) ***The Donor's spouse's right of occupancy shall continue as long as she desires to reside in the selected premises.*** If the Donor's spouse no longer desires to reside in the selected premises and ceases to reside therein, the Trustee is authorized to purchase, lease, or otherwise provide suitable premises for the Donor's spouse in this or another locality. However, in the event the Trustee elects to purchase a substitute residence, the Trustee shall expend no more than \$300,000 for such property. ***The Donor's spouse shall have a life estate or otherwise be entitled to the use of the premises for her life or until such time as the Trustee reasonably believes that she will no longer be residing in the premises without a reasonable expectation of returning to the same (i.e. required nursing home care).***

(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.***

11. At the time of executing this Restated Trust Agreement, the Donor is the owner of various interests in apartment building or condominium units described as follows:

- (1) Galleria II – 18 plex located at 1621 34<sup>th</sup> Street SW, Fargo, North Dakota;
- (2) Riverside Apartments – an 8 unit apartment unit located at 1111 4<sup>th</sup> Street South, Fargo, North Dakota;
- (3) Park Terrace – Two – 18 apartment complexes located at 428 8<sup>th</sup> Street South and 315 7<sup>th</sup> Street South, both in Fargo, North Dakota;
- (4) Chateau I – condominium units 201, 203 and 204 located at 1516 35<sup>th</sup> Street SW, Fargo, North Dakota;
- (5) Chateau II – condominium unit 101 located at 1530 35<sup>th</sup> Street SW, Fargo, North Dakota;
- (6) Chateau III – condominium unit 201, 203, and 204 located at 1544 35<sup>th</sup> Street SW, Fargo, North Dakota; and

- (7) Condominium Unit located at 3423 15<sup>th</sup> Avenue South, Fargo, North Dakota.

Donor acknowledges that some or all of these properties may be included in the Linn Family Trust and some or all of them may be included in the Linn Marital Trust. Whichever trust they are included in, upon the death of the Donor's spouse, SHIRLEY A. LINN, the above-described property shall be distributed 33 1/3% to the Donor's daughter, DEBORAH R. WAGNER, 33 1/3% to the Donor's former son-in-law, MARK WAGNER, and 33 1/3% to the Donor's son, STEPHEN T. LINN. It is my desire that my former son-in-law, MARK WAGNER, through his continued association with Coldwell Banker in Fargo, North Dakota, continue to manage these properties for so long as they are held in trust and upon distribution of the properties from the trust. If MARK WAGNER should predecease me or my spouse, SHIRLEY A. LINN, his share shall be distributed equally to my daughter, DEBORAH R. WAGNER, and my son, STEPHEN T. LINN.

**ARTICLE VI.**  
**LINN FAMILY TRUST**

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

1. The Trustee, in its sole judgment and discretion, may distribute to each of the Donor's children, DEBORAH R. WAGNER and STEPHEN T. LINN, cash and property of the Trust, to be selected by the Trustee, having a value of not to exceed \$100,000. The distribution to each child shall be equal. ***The Trustee, in exercising its discretion, shall take into consideration the size of the Donor's estate and this Trust, the income available therefrom, and the needs of the Donor's spouse for income from the Trust and the needs to fund the obligations of the Donor to the Donor's former spouse.***

2. All of the rest, residue and remainder of the Trust not distributed in accordance with Section I hereof, shall be held, administered and disposed of as follows:

(A) This trust shall continue until the later of the death (or earlier remarriage) of the Donor's spouse, SHIRLEY A. LINN, and the death of the Donor's former spouse, Dorothy E. Linn, at which time the trust shall terminate and the trust estate shall become distributable.

(B) If the Donor's former spouse, DOROTHY E. LINN, survives the Donor, the Trustee shall pay to her from the income of this Trust, and the principal if necessary, an amount of Five Hundred Dollars (\$500) per month. The payments shall cease upon the death or remarriage of the Donor's former spouse, DOROTHY E. LINN.

(C) The Trustee shall pay to the Donor's daughter, DEBORAH R. WAGNER, from the net income or, if that be insufficient, from the principal of this trust, the sum of One Thousand Dollars (\$1,000) per month. Such payments shall terminate when this trust shall become distributable.

(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.

....

**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.*** Until the exact amount of this trust is known, the Trustee shall advance to the Donor's spouse amounts equal to the estimated income of the trust, and the Trustee shall not have any liability for the failure of the Donor's spouse to return to this trust any portion of such advance later determined to be in excess of the actual income due the Donor's spouse from this trust.

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.***

....

(B) ***The remainder of the trust, as then constituted, shall be added to and commingled with the Linn Family Trust and held or distributed, in whole or in part, as if it had been an original part of the Linn Family Trust.***

....

**ARTICLE X.**  
**GENERAL PROVISIONS**

3. If at any time any beneficiary to whom the Trustee is directed in this instrument to pay any income or principal is under legal disability or is, in the opinion of the Trustee, incapable of managing his affairs, the Trustee may expend directly any income or principal authorized for use for the benefit of any beneficiary or may pay it over to him, or to his parent, guardian, or conservator or to any person with whom he is residing without responsibility for its expenditure.

....

9. Except as otherwise specifically provided herein, ***the Trustee may rely upon any notice, certificate, affidavit, letter, telegram or other paper or document believed by the Trustee to be genuine, or upon any evidence deemed by the Trustee to be sufficient in making any payment or distribution hereunder.***

....

16. This instrument and the dispositions hereunder shall be construed and regulated and their validity and effect shall be determined by the laws of the State of North Dakota.

Appellant's A. at 7-24.

[¶7] On February 14, 2018, **by agreement of the parties**, an evidentiary hearing was held on Shirley's Petition, wherein evidence extrinsic to the terms of the Trust was adduced. Tr. 5:18-8:3. At the outset of the hearing, the District Court indicated that although it would hear the parties' extrinsic evidence, it would not consider extrinsic evidence unless it determined an ambiguity existed in the Trust. Tr. 7:20-8:3. The District Court heard and saw the following evidence:

- In the 2014 tax year, Shirley had an adjusted gross income of \$98,382.00. Tr. 107:17:24.
- In the 2015 tax year, Shirley had an adjusted gross income of \$144,242.00. Tr. 107:17:24.
- In the 2016 tax year, Shirley had an adjusted gross income of \$108,851.00. Tr. 40:25-41:1-2.
- In 2014, Shirley received monthly income distributions totaling \$60,000.00 from the Linn Marital Trust. [Doc ID# 29].

- In 2015, Shirley received monthly income distributions totaling \$80,000.00 from the Linn Marital Trust. [Doc ID# 30].
- In 2016, Shirley received monthly income distributions totaling \$61,000.00 from the Linn Marital Trust. [Doc ID# 31].
- In 2017, Shirley received monthly income distributions totaling \$72,000.00 from the Linn Marital Trust. [Doc ID# 32].
- In years past, when the Trust owned more properties, it produced much larger income distributions for Shirley. Tr. 96:7-10.
- In October, 2016, Shirley moved into Touchmark Living Center (“Touchmark”) in Fargo. [Doc ID# 21].
- Touchmark furnishes, *inter alia*, the following basic items and services to Shirley:
  - Housing;
  - Meals;
  - Medication dispensing and monitoring;
  - Personal care and assistance. [Doc ID# 23].
- Shirley’s monthly Touchmark fees for these and several other basic services appear to range between \$5-6,000.00. [Doc ID# 21].
- The portion of the Touchmark expenses allocable to housing was not broken down in any of the Touchmark exhibits furnished to the District Court, nor was it identified by Ottum on Shirley’s behalf. [Doc ID## 21-23].
- In addition to these basic care and comfort items, Touchmark furnishes numerous optional goods and services for additional charge, such as personal training, storage, meal delivery, recreation, etc. [Doc ID# 21].
- In November 2016, the Linn Marital Trust paid \$12,795.32 to Touchmark on Shirley’s behalf for its reservation fee, and November charges and \$1,905.00 for Shirley’s moving related expenses. Thus, the Trust paid all charges associated with **acquiring** Shirley’s assisted living arrangements. [Doc ID# 25].
- Ottum’s position that the Trust should pay all of Shirley’s assisted living expenses, in addition to her monthly income distributions, was based upon his understanding that the Trust has “always” paid for Shirley’s “housing”. Tr. 42:23-43:1-2. Ottum intimated that he obtained this view from discussions with Roger, but conceded any such discussions took place after the Trust had been executed, not before. Tr. 31:2-5. He also conceded the Trust is not intended to inure to the benefit of Shirley’s children. Tr. 30:15-23. He revealed that Shirley owns a lake home on Pelican Lake. Tr. 34:25. He also revealed Shirley has investments of \$200,000-300,000. Tr. 37:15. He was vague as to which of Shirley’s needs were not being met by Touchmark; essentially listing various and sundry items such as hair care, nail care and entertainment. Tr. 51:23-52:12.
- Attorney Greg Selbo, who drafted the Trust, testified that language which appeared in a May 2000 memo which may have obligated the Trust to pay Shirley’s assisted living expenses was not included in the final version of the Trust executed on June 9, 2000. Tr. 74:17-24. Attorney Selbo also

testified Roger was very involved with and particular about the drafting of his Trust, and that Selbo was largely a “scrivener”. Tr. 80:21-24.

- Co-Trustee Harris Widmer testified that he has a great deal of experience serving as a Trustee, and at the time of the evidentiary hearing was serving as Trustee of several Trusts. Tr. 86:14-17. Moreover, he had a business relationship with Roger since the 1970’s. Tr. 86:18-22. He also served as Shirley’s accountant. Tr. 39:18-21. He testified Roger intended to provide a level of care for Shirley, and, upon Shirley’s death, ensure that the assets in his Estate went to the children of his first marriage and Mark. Tr. 91:17-22. He testified Roger knew that between the Trust income and other income—rents, Social Security, etc.—Shirley would have substantial means. Tr. 102:21-103:7. Accordingly, Roger foresaw no need to invade Trust principal. Widmer very clearly recalled that Roger never expected such invasions would come anywhere close to the \$3,000 per month limitation contained in the Trust. Tr. 102:21-103:7. As to Article V, Section 10, and its language regarding the funds necessary to pay any obligations Shirley may incur in **acquiring** assisted living or nursing home care, Widmer testified Roger’s language was very specific, and that Roger intended it to be that way. Tr. 93:4-16. The term “acquiring” means to “get”; it does not mean to “maintain”, which term notably is used in other Trust provisions specific to property the Trust owns. *Id.* Widmer relied upon the dictionary definition of the term “acquiring” in interpreting the Trust’s obligations. *Id.* Thus, Widmer determined the Trust was responsible for any costs incurred in “getting” into a nursing home, including advance fees, etc.; but not the cost of “maintaining” nursing home care. Tr. 94:16-23.
- Stephen testified that he had discussions with Roger—which predated the execution of the Trust—about concerns that Trust principal would be invaded for the benefit of Shirley’s children, who are not beneficiaries of the Trust. Tr. 125:14-21. Roger very clearly told Stephen the Trust would be set up so as not to allow this to occur. Tr. 125:25-126:11. Exemplifying Roger’s intentions, Stephen related that Roger knew that his daughter Deborah, while a very hard worker, would need some assistance. Tr. 123:25-124:6. Accordingly, he provided such assistance through his Family Trust via a \$1,000 distribution from net income, or principal if the income was insufficient. Tr. 95:1-3. This provision—unlike provisions for the benefit of Shirley—contains no requirement that the Trustee take into consideration Deborah’s other means of support. Appellant’s A. at 13.

[¶8] Shirley’s argument to the District Court relied entirely upon Article V, Section 10(F) of the Trust. Shirley argued its provision for “acquiring” assisted living or nursing home care required the co-Trustees to invade Trust principal to pay all costs associated with Shirley’s ongoing assisted living care—without regard to all

of the income from the Marital Trust Shirley receives, without regard to her other means, and without regard to the limitations upon principal invasion contained in the Trust. In response, the co-Trustees argued that Shirley's claim for breach of fiduciary duty lacked evidentiary and legal support; that Shirley's interpretation of Article V, Section 10(F) conflicts with the Trust as a whole; that a separate Trust does not exist for Shirley's assisted living or nursing home care; and that requiring mandatory principal payments from either Trust contravenes the existing terms for invasion of principal. For their parts, Remainder Beneficiaries argued the term "acquiring" in Article V, Section 10(F) is unambiguous; that this lack of ambiguity is demonstrated by language in Article V, Section 10 which requires the Trust to "maintain" certain property, and assisted living/nursing home care is excluded from this requirement; that Shirley's assisted living expenses are subject to the Trust's conditions and limitations upon the invasion of Trust principal; and that, if considered, all the extrinsic evidence adduced during the evidentiary hearing supported the denial of Shirley's Petition. Remainder Beneficiaries also sought reimbursement of their attorneys' fees and costs, arguing they were required to and did expend substantial resources in order to preserve Trust principal for the benefit of all beneficiaries.

[¶9] In its March 29, 2018 Order denying Shirley's Petition, the District Court concluded as follows:

The Court finds that Roger's intent is plain and unambiguous from the language of the Trust Agreement. Article V of the Trust Agreement plainly provides for the Trusts to provide for Shirley's obligations to "acquire" assisted living or home care. Shirley argues that the Trust Agreement must also provide directly for her assisted living expenses, as well, but there is no indication in the



unambiguous trust agreement that this is the case. Article VII states that all net income for the Linn Martial Trust is to be paid to Shirley during her lifetime. Both of these mandatory distributions have been followed.

Articles VI and VII also allow the trustees, should they feel it is necessary, to distribute from the Trusts to Shirley for her reasonable comfort and support. The Co-Trustees have considered Shirley's situation, her comfort, and her support, and do not find it necessary to distribute from these to her. Roger gave the Co-Trustees the discretion to weigh Shirley's situation, her property and income, and determine whether or not additional distributions are necessary and appropriate. The Co-Trustees continue to have discretion to decide when and if to distribute to Shirley for her comfort and support. For these reasons, the Court will deny and dismiss the Petition.

Appellant's A. at 39-40.

[¶10] Despite this clear ruling in favor of the co-Trustees and Remainder Beneficiaries, the District Court declined to order the reimbursement of Remainder Beneficiaries' attorneys' fees and costs:

The Court will also decline to award attorney's fees, costs, and expenses. It has been held that beneficiary may be entitled to attorney's fees and costs incurred in good faith litigation for the purpose of preserving the trust property or for requiring the trustees to comply with the law. Matter of Sturdevant, 340 N.W.2d 888 (N.D. 1983). However, the determination of whether to award such fees rests within the sound discretion of the trial court. Id. The Court declines to award costs to any party.

Appellant's A. at 40.

## LAW AND ARGUMENT

### I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF SHIRLEY'S PETITION

#### A. Standard of Review

[¶11] In construing a Trust the primary objective is to ascertain the Settlor's intent. Langer v. Pender, 2009 ND 51, ¶ 13, 764 N.W.2d 159; Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶ 21, 750 N.W.2d 412. When a Trust instrument is unambiguous, the Settlor's intent is ascertained from the language of the Trust document itself. Langer, 2009 ND 51, ¶ 13, 764 N.W.2d 159 (quoting Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 230 (N.D.1994)). "Whether or not a trust is ambiguous is a question of law, fully reviewable on appeal." Id. If the language of the Trust is clear and unambiguous, and the intent is apparent from its face, there is no room for further interpretation. Habeck v. MacDonald, 520 N.W.2d 808, 811 (N.D. 1994). Extrinsic evidence is not admissible to contradict the terms of an unambiguous Trust instrument. Sabo v. Keidel, 2008 ND 41, ¶ 10, 745 N.W.2d 661. A Trust is ambiguous only when reasonable arguments can be made for different positions on its meaning. Habeck, 520 N.W.2d at 811.

[¶12] 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. Thus, the interpretation of a Trust is governed by N.D. Cent. Code Chapter 9-07. "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." § 9-07-08. "Particular clauses of a contract are subordinate to its general intent." § 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.” § 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.” § 9-07-18. Under Section 9–07–02, the language governs its interpretation if the language is clear and explicit and does not involve an absurdity. Trusts are construed to give effect to the Settlor’s intention at the time of execution so far as the same is ascertainable and lawful. Section 9–07–03. The whole of a Trust is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others. Section 9–07–06; Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 9, 788 N.W.2d 312.

**B. The District Court Correctly Determined The Trust Is Unambiguous**

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

[¶13] On appeal, Shirley first asserts the Trust is ambiguous because it contains elements of both a discretionary trust and a support trust. (Shirley’s Br. at ¶12). Co-Trustees deftly address the flaws in this argument in their response brief, and Remainder Beneficiaries join in their legal analysis. (co-Trustees’ Brief at ¶¶ 11-14). A Trust is ambiguous only when reasonable arguments can be made for different positions on its **meaning**. Habeck, 520 N.W.2d at 811. That a Trust may contain elements of a support trust and a discretionary trust is inapposite to that legal inquiry.

## 2. ***The Term “Acquiring” In Article V, Section 10(F) Is Unambiguous***

[¶14] Nor is a Trust term ambiguous merely because it is undefined. Quite the contrary, when a term in a Trust instrument is undefined, North Dakota courts look to the clear ordinary meaning which a non-law-trained person would attach to the term. Eckes v. Richland Cty. Soc. Servs., 2001 ND 16, 621 N.W.2d 851. Further, if two interpretations are possible, one disregarding a word or phrase and one giving effect to the whole, the construction giving effect to the whole must be adopted. Id.

[¶15] Often, when terms in an instrument are undefined, this Court turns to *Black's Law Dictionary* and *Merriam–Webster's Collegiate Dictionary* to supply definitions of words used in a legal context. Myaer v. Nodak Mut. Ins. Co., 2012 ND 21, ¶ 32, 812 N.W.2d 345 (Sandstrom, J., dissenting). When the ordinary meaning and the legal meaning are in agreement, there is no ambiguity. Eckes, ¶ 20 (citing Martin v. Allianz Life Ins. Co. of N. Am., 1998 ND 8, ¶ 12, 573 N.W.2d 823) (holding the term “substantial” was unambiguous when *Black's Law Dictionary* and *Webster's New World Dictionary* provided the same meaning).

[¶16] The term “acquiring” is not at all ambiguous. *Black's Law Dictionary* defines the word “acquire” as “[t]o gain possession or control of; to get or obtain.” *Black's Law Dictionary* (10th ed. 2014). Likewise, *Merriam-Webster* defines “acquire” as “to get as one's own; to come into possession or control.” “*Acquired.*” *Merriam-Webster.com*. Notably, these definitions have found widespread support in Courts of various jurisdictions, and across many different contexts. See Huddleston v. United States, 415 U.S. 814 (1974), (defining “acquire” as to come into

possession, control, or power of disposal of); Amera-Seiki Corp. v. Cincinnati Ins. Co., 721 F.3d 582, 586 (8th Cir. 2013) (adopting *Black's Law Dictionary* definition of “acquire” as to gain possession or control of; to get or obtain); Direct Ins. Co. v. Brown, No. E2001-00412-COA-R3CV, 2001 WL 1268527, at \*2 (Tenn. Ct. App. Oct. 23, 2001) (holding the term “acquire” is not ambiguous and is defined by *Black's Law Dictionary* as to get as one's own); Div. of Employment Sec. v. Taney Cty. Dist. R-III, 1995 WL 550093, at \*6 (Mo. Ct. App. Sept. 19, 1995) (the meaning of “acquire” includes to gain by any means; to get as one's own and is synonymous with to obtain and to procure).

[¶17] Article V, Section 10(F) provides, “[i]f 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.” Construed in its ordinary or legal sense, the term “acquiring” means to “get” or “obtain”. It does not mean to “keep”, “preserve” or “maintain”. And Article V, Section 10(F) does **not** require the Trust to “maintain”, “keep” or “preserve” nursing home care.

[¶18] Any doubt that the foregoing construction of the term “acquiring” is correct is removed by a cursory review of the rest of Article V, Section 10. This is because Article V, Section 10 repeatedly utilizes the term “**maintain**” or “**maintaining**” when referring to the Trust's obligations with respect to specific properties it owns. Article V, Section 10 essentially allows Shirley a “right of occupancy” in Trust property “as long as she desires to reside in the selected premises.” Article V(10)(D). This right of occupancy—and the Trust's concomitant obligation to

**maintain** any property occupied—expressly terminates when “[Shirley] will no longer be residing in the premises without a reasonable expectation of returning to the same **(i.e. required nursing care)**.” Article V(10)(F). At that point, the Trustee is authorized to sell the property and deposit the proceeds back into the Trust. See Article V(10)(A), (D), (E), and (F). And, of course, Article V, Section 10(F) is very specifically limited to any obligations incurred in **acquiring** assisted living or nursing home care, not in **maintaining** such care. Also notably, the Trust employs the term “acquire” in one other instance, wherein it refers to any substitute personal residence Roger may acquire in which Roger and Shirley reside at the time of the Roger’s death. See Article V(10)(B). But that paragraph also employs the term **“maintained”** when referring to the Trust’s obligations with respect to such residences the Trust *owns*.

[¶19] The upshot of the foregoing is clear: the Trust very clearly, unambiguously and explicitly differentiates between **acquiring** and **maintaining** certain property. Accordingly, *Merriam-Webster* defines “maintain” as, *inter alia*, “to **keep** in an existing state”; and to **preserve** from failure or decline”. Had Roger intended to obligate the Trust to **maintain** assisted living care for Shirley, he would have so directed. He did not. Instead, he directed the Trust **maintain** only those properties the Trust owned and Shirley occupied. And he specifically directed that **required nursing home care** would **terminate** the Trust’s obligation to **maintain** such property. Roger’s intent could not be clearer. Hecker, 527 N.W.2d at 229.

[¶20] Shirley’s proffered interpretation would require this Court not only to excise the term **“acquiring”** from Article V, Section 10(F), but also add the term

***“maintain”*** to that clause. Such an interpretation would be anathema to North Dakota law. See Schwarz v. Gierke, 2010 ND 166, ¶ 16, 788 N.W.2d 302 (“construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense”). Because the term “acquiring” is clear and unambiguous, and because assisted living/nursing home expenses are unambiguously excluded from the Trust’s obligation to maintain property, the District Court correctly concluded the Trust is unambiguous and dismissed Shirley’s Petition.

**3. *Shirley’s Assisted Living Expenses Are Subject To The Trust’s Conditions And Limitations Upon The Invasion Of Principal***

[¶21] Because Shirley seeks to invade Trust principal for her assisted living expenses, the District Court correctly concluded the co-Trustees were required to apply the Trust’s conditions and limitations upon such invasions. Co-Trustees correctly argue that to do otherwise would be tantamount to creating a separate Trust for Shirley’s assisted living/nursing home care. This would not only be anathema to the foregoing rules of construction for Trusts, but also the co-Trustees’ duties to the Remainder Beneficiaries. Trustees must administer a Trust in the interests of all its beneficiaries. N.D. Cent. Code § 59-16-02. They must act impartially in investing, managing, and distributing Trust property, giving due regard to all the beneficiaries’ respective interests. N.D. Cent. Code § 59-16-03. And they must administer a Trust as a prudent person would by considering its purposes, terms, distributional requirements, and other circumstances. N.D. Cent. Code § 59-16-04.

[¶22] More specifically, it is well-settled that where the right of a beneficiary to demand Trust principal is qualified, the Trustee owes the other beneficiaries the duty to make some investigation to learn whether the condition precedent to the right to principal exists. Bogert's The Law Of Trusts And Trustees § 812; Hertel Ex Rel. Hertel v. Nationsbank, 37 S.W.3d 408 (Mo. Ct. App. 2001) (upholding determination that, where Trust gave Trustees discretion to invade principal on beneficiary's behalf to provide for beneficiary's "health, education, maintenance, and support," Trustees could consider beneficiary's other financial resources in making a determination as to whether in fact to do such invasion); Nationsbank, N.A. v. Tegethoff, 18 S.W.3d 22 (Mo. Ct. App. 2000) (where Trust provided for principal invasion only in cases of need, "the private income of the beneficiary must be considered in determining whether such need exists"); In re Ward's Estate, 342 Mich. 172, 182 (1955) (where Settlor's widow and Trustee was given power to withdraw principal of the trust for her support as life beneficiary, withdrawals must be limited to that purpose and cannot be justified merely for the purpose of increasing the size of the widow's estate); In re Clute's Will, 72 N.Y.S.2d 581, 582 (Sur. 1947) (Trust to pay income to widow, and to pay her as much as \$3,000 a year from principal if income is insufficient for widow's support, and widow requests payment of principal, the judgment of the Trustee as to the sufficiency of the income would be required); In re Murray, 142 Me. 24, 30 (1946) (breach of Trust for a Trustee who had discretion to pay principal for the support of a life beneficiary to accede to a request of the beneficiary for payments from principal without investigation, when in fact income was adequate).



[¶23] The Marital Trust clearly and unambiguously limits the invasion of principal to \$3,000 per month, and the co-Trustees are required to enforce this restriction. Moreover, the Family and Marital Trusts direct that Shirley's means be considered in the co-Trustees' **discretionary** determination whether principal should be invaded. The co-Trustees were duty-bound to the Remainder Beneficiaries to enforce the principal invasion limitations and consider Shirley's other means, and the District Court correctly concluded this applies to Shirley's request to invade principal for her assisted living expenses.

**II. EVEN IF AN AMBIGUITY EXISTS, ALL THE EXTRINSIC EVIDENCE SUPPORTS THE DISMISSAL OF THE PETITION**

[¶24] As indicated above, **by agreement of the parties**, an evidentiary hearing was held by the District Court, wherein extrinsic evidence was received as to the meaning of Article V, Section 10(f), and Roger's intent. While Remainder Beneficiaries maintain that the clear and unambiguous terms of the Trust compelled the dismissal of Shirley's Petition, this Court has repeatedly held that an appellee may attempt to save a favorable judgment by urging any ground asserted in the Trial Court. Tangen v. North Dakota Workers Comp. Bur., 2000 ND 135, ¶ 8 n. 1, 613 N.W.2d 490; Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp., 2002 ND 83, ¶ 26 n. 1, 643 N.W.2d 685. Here, the extrinsic evidence adduced during the February 14, 2018 evidentiary hearing overwhelmingly supported the dismissal of Shirley's Petition. Indeed, it is telling that Shirley cites virtually none of it in her submission to this Court.

[¶25] Shirley set forth no extrinsic evidence whatsoever which could have possibly aided the District Court in its interpretation of the Trust, let alone

supported its proposed construction thereof. Distilled to its essence, Shirley's "proof" consisted of 1) Ottum's apparent impression from Roger that the Trust would "always" pay for Shirley's housing (i.e., "that's the way it's always been"); and 2) a memo from Attorney Selbo a month or so prior to the final execution of the Trust. The former evidence is addressed by the colloquy above contrasting the Trust's obligation for acquiring assisted living/nursing home care versus maintaining certain properties owned by the Trust in which Shirley resided. The latter evidence supports the co-Trustees' and Remainder Beneficiaries' interpretation, because language requiring the Trust to pay for Shirley's ongoing assisted living/nursing home care undisputedly did not make its way into the final version of the Trust, and both Attorney Selbo and co-Trustee Widmer testified Roger was very, very involved in the Trust's drafting.

[¶26] Indeed, co-Trustee Widmer's testimony as to Roger's intentions for the Trust was not controverted by Shirley during the hearing. In fact, Shirley did not even try. And this testimony was bolstered by that of Stephen, who also had conversations with Roger, which predated the Trust, making clear that the Trust was not set up for the benefit of Shirley's children.

[¶27] Not only did Shirley fail to set forth any competent, extrinsic evidence as to the meaning of the Trust, she failed to set forth evidence and information as to her own request to invade Trust principal. Shirley provided no evidence why her very substantial income and means are insufficient for her care and comfort. This despite repeated attempts to gain this information from Ottum by Counsel for both Appellees and the District Court. By way of one glaring example, given that the

basis of Shirley's Petition appeared to be the Trust's purported responsibility to maintain "housing" for Shirley, Shirley could have at the very least furnished the District Court with the amount of the Touchmark bills allocable to housing expense. She did not. The upshot is Shirley presented no factual basis upon which her Petition could possibly be granted.

[¶28] Because all the extrinsic evidence submitted to the District Court supports the co-Trustees and Remainder Beneficiaries construction of the Trust, the District Court's Order denying Shirley's Petition should be affirmed.

### **III. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DENIAL OF REMAINDER BENEFICIARIES' COSTS AND ATTORNEYS FEES**

#### **A. Standard of Review**

[¶29] The North Dakota Supreme Court has long held a beneficiary is entitled to attorney fees and costs incurred in good faith litigation for the purpose of preserving Trust property. Matter of Sturdevant, 340 N.W.2d 888, 893 (N.D. 1983). In this regard, North Dakota Courts are hardly alone. Courts throughout the country universally award attorneys' fees and costs to a Trust beneficiary who engages in litigation necessarily for the benefit of a Trust. See, e.g., Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr., 385 P.3d 533 (Kan. Ct. App. 2016) (where beneficiaries of a trust incur costs in an action that benefits the trust, beneficiaries are permitted to be reimbursed for such costs out of trust funds); Bartlett v. Betlach, 146 P.3d 1235 (Wash. Ct. App. 2006)(in litigation between trust beneficiaries and trustee, attorney fees may be awarded to both parties where all of the beneficiaries are involved and where the litigation affects the rights of all the beneficiaries); Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434 (Mo. Ct. App. 2004)(beneficiary

who prevents a wrongful disposition of trust assets renders a benefit to the trust estate as much as the one who recovers back property wrongfully disposed of, and such beneficiary may, at the court's discretion, recover his reasonable counsel fees and expenses); Hughes v. Cafferty, 2004 UT 22, 89 P.3d 148 (trial court properly awarded attorney fees to beneficiary in action beneficiary brought against trustee for violation of trust; litigation resulted in recapture of substantial funds to trust estate, which benefitted all beneficiaries); Feinberg v. Adolph K. Feinberg Hotel Tr., 922 S.W.2d 21 (Mo. Ct. App. 1996)(beneficiary was entitled to attorney fees from breach of trust action, since she successfully protected trust thereby benefiting remaindermen and trust itself); Citrin v. Erikson, No. 95 CIV. 9004 (DNE), 1996 WL 112186 (S.D.N.Y. Mar. 14, 1996) (courts have both power and duty to fashion remedies in trust cases that are most advantageous to trust's participants and beneficiaries, including payment of attorney fees incurred for purpose of conferring benefit on trust's participants and beneficiaries); Adamson v. Norwest Bank Indiana, N.A., 633 N.E.2d 293 (Ind. Ct. App. 1994) (beneficiary was entitled to recover attorney fees, where she established breach of trust occurred); Wells Fargo Bank v. Marshall, 24 Cal. Rptr. 2d 507 (Cal. Ct. App. 1993) (surviving second wife of trustor's son was entitled to reimbursement by the trust of attorney fees incurred on appeal to vindicate her position as life income beneficiary); Matter of Hadleigh D. Hyde Tr., 458 N.W.2d 802 (S.D. 1990)(beneficiary was entitled to allowance for appellate attorney fees where attorney's services were beneficial to trust and were necessary because of trustee's breach of trust); Dunkley v. Peoples Bank & Tr. Co., No. CIV. 89-3021,

1989 WL 155106 (W.D. Ark. Dec. 12, 1989) (beneficiary who recovered substantial sum for the trust in litigation against trustee was entitled to be reimbursed for his reasonable expenses in attorney fees); Wadsworth v. Bank of California, 777 P.2d 975 (Or. Ct. App. 1989) (beneficiaries who successfully sued to recover damages for trustee's fiduciary breaches were entitled to award of attorney fees); Rennacker v. Rennacker, 509 N.E.2d 798 (Ill. App. Ct. 1987)(award of attorney fees to trust beneficiary, to be paid from trust principal, was proper in beneficiary's action to determine status and disposition of proceeds of sale of trust residence).

[¶30] The determination whether to award such fees rests within the sound discretion of the trial court and will not normally be overturned unless the Appellant shows an abuse of discretion. Matter of Sturdevant, *supra*. A District Court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Kopp v. Kopp, 2001 ND 41 ¶ 7, 622 N.W.2d 726. A district court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. Id. ¶ 17. In determining the appropriateness of awarding attorney fees from a Trust, a crucial factor is whether the attorneys fees sought to be reimbursed were for the common benefit of the estate, rather than the person for whom Counsel was employed. In re Estate of Hass, 2002 ND 82, ¶¶ 21-22, 643 N.W.2d 713 (citing cases). See Estate of Rohrich, 496 N.W.2d 566, 570 (N.D.1993) (attorney's action challenging personal representative's

administration added value to the estate and, consequently, the trial court did not abuse its discretion in awarding attorney fees for those legal services).

**B. Remainder Beneficiaries Are Entitled To Attorney's Fees And Costs**

[¶31] Respectfully, against this legal backdrop, the District Court's refusal to order reimbursement of Remainder Beneficiaries for their attorneys' fees and costs was an abuse of discretion. The Trust is the vehicle by which Roger intended not only to provide for Shirley during her lifetime (or, not insignificantly, until she remarried), but also to provide an inheritance to his children and Mark. Unchecked, Shirley's request to invade Trust principal—over and above all the income Shirley is receiving and well beyond the Trust's principal invasion limitations—could undoubtedly consume the corpus of the Trust to the detriment not only of the Remainder Beneficiaries, but also Roger's intentions as to his Estate and even Shirley herself. At the same time, Remainder Beneficiaries had to take steps to insure that Roger's clear intention not to benefit Shirley's children through the Trust was being carried out. While the positions taken by the co-Trustees in this matter have been in accord, their interests are clearly distinct. Remainder Beneficiaries had no choice but to employ Counsel, and resist Shirley's Petition.

[¶32] To that end, as alluded to above, the manner by which Shirley has prosecuted her Petition has resulted in far greater expense than what should have been incurred by all parties. First, Roger's Trust clearly and unambiguously contains the mechanism for the invasion of Trust principal. At the very least, litigation was premature and could well have been avoided had Shirley actually demonstrated to the co-Trustees and Remainder Beneficiaries why Shirley needed

to invade Trust principal for her support and comfort, given her other means. Moreover, Shirley's chosen course of action, including an evidentiary hearing and now an appeal, has increased the expenses for all involved. Given the circumstances, and the District Court's ruling which clearly preserves the Trust Estate for the benefit of all involved, Remainder Beneficiaries respectfully submit the District Court abused its discretion by refusing to order the reimbursement of their attorneys' fees and costs.

#### **IV. [33] CONCLUSION**

[¶34] The District Court's March 29, 2018 Order dismissing Shirley's Petition should be affirmed. The District Court's Order declining to award Remainder Beneficiaries their attorney's fees and costs should be reversed.

Dated this 18<sup>th</sup> day of October, 2018.

/s/ Ashley K. Champ

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**AFFIDAVIT OF SERVICE BY E-MAIL**

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

[¶1] The undersigned, being first sworn, says upon her oath that on the 18<sup>th</sup> day of October, 2018, she delivered via e-mail a true and correct copy of the following:

**BRIEF OF RESPONDENTS/APPELLEES/CROSS-APPELLANTS STEPHEN T. LINN, DEBORAH R. WAGNER AND MARK WAGNER**

to the following e-mail address(es):

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[¶2] To the best of Affiant’s knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail.

[¶3] I hereby certify under penalty of perjury that the foregoing is true and correct.

Dated this 18<sup>th</sup> day of October, 2018.

*/s/ Liza A. Gion*  
\_\_\_\_\_  
Liza A. Gion