

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

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.

SUPREME COURT NO. 20180206

Civil No. 09-2017-CV-02936

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

APPELLANT'S REPLY BRIEF

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1. Appellant Shirley T. Linn (“Shirley”) is not arguing Article V(10)(f) created a separate trust

[¶1] Appellees Wells Fargo Bank, N.A. and Harris W. Widmer (“Trustees”) argue that Article V(10)(f) did not create a separate trust. Shirley is not arguing a separate trust was created for her assisted living expenses. Article V(10)(f) contains a specific bequest to be fulfilled by either the Linn Family Trust or the Linn Marital Trust under Articles VI and VII.

2. Shirley is not ignoring the word “acquiring,” and the word “acquiring” is ambiguous

[¶2] The Trustees argue that Shirley has ignored the word “acquiring” in her arguments. Shirley is not ignoring the word “acquiring.” As argued in Section III of Appellant’s Brief, the Trust must be read as a whole with each clause helping to interpret the others, and interpretation of the Trust should not rely solely upon one word. Moreover, even if the use of the word “acquiring” was the only trust language to be interpreted in this matter, the word “acquiring” should be read to include the rent and expenses Shirley must pay each month to obtain assisted living. Monthly rent and expenses are part of acquiring assisted living and nursing home care. At the very least, the word “acquiring” in the trust language is ambiguous.

[¶3] Appellees Stephen T. Linn, Deborah R. Wagner, and Mark Wagner (“Linn and Wagner”) argue that if Roger Linn intended for the Trust to pay Shirley’s assisted living and nursing home costs, Roger Linn would have used the word “maintain” like he did elsewhere in the Trust. “Maintain” was clearly used elsewhere with respect to properties owned by the Trust because property that is already owned is maintained. None of those properties require monthly rent like Shirley’s assisted living arrangement, because the Trust already owned them.

3. The language of the Trust, including elements of both a support trust and a discretionary trust, is ambiguous

[¶4] The Trustees rely on Eckes v. Richland Cty. Soc. Servs., 2001 ND 16, 621 N.W.2d 851. The Court in Eckes was reviewing trust language to determine whether the trust beneficiary qualified for Medicaid benefits Id. Because the beneficiary could compel distributions of income for expenses necessary for her support, the Department of Human Services could consider the trust income as an available asset to determine whether she was eligible for Medicaid benefits. Id. at ¶ 14. The trust language provided that if, in the trustee's judgment, the income and property accumulated during the beneficiary's lifetime was not sufficient to provide for her suitable support, care, necessities, and medical attention, then the trustee had discretion to pay from the principal for the beneficiary's benefit, with specific instructions that the principal not be invaded until the beneficiary exhausted all property held by her. Id. at ¶ 2. The Court held that the language created a support trust for trust income, and a hybrid of support and discretionary trusts with respect to the principal. Id. at ¶ 14.

[¶5] The trust language at issue in this matter is more similar to Bohac v. Graham, where the trust was deemed ambiguous because it included language of both support and discretionary trusts. In Bohac, the trustee could invade the principal as the trustee deemed necessary for the beneficiary's "support, maintenance, medical expenses, care, comfort and general welfare." 424 N.W.2d 144, 146 (N.D. 1988). The trustee in Bohac did not have uncontrolled discretion, and the language allowed invasion of the principal for items such as "comfort and general welfare." Id.

[¶6] The trust language in this case provides that, if income is insufficient for Shirley's support and *comfort* in her *accustomed manner of living*, and taking into consideration

her other property and means of support, then the Trustee may pay to the Donor's spouse or for her benefit, from the principal of the Linn Marital Trust, such sums as the Trustee determines is required for those purposes, not to exceed \$3,000 per month. (App. at 14, Art. VII.) Article VI requires the Trustee to consider Shirley's support, comfort, and welfare, to maintain her in her accustomed manner of living, and principal may be paid if Shirley's other income is not sufficient for her reasonable support and comfort. (App. at 13, Art. VI.) "Inclusion of provisions for items such as "comfort" and "general welfare" may take the trust language outside that of a general support trust." Bohac, at 146 (citing Restatement (Second) of Trusts § 154 (1959)). The language in Articles VI and VII includes discretionary language, and a directive to the Trustees to consider support for Shirley, in addition to her comfort, welfare, and her accustomed manner of living.

[¶7] The ambiguities lie at the heart of the dispute in this matter. The Trustees argue they have discretion whether to invade the principal. Shirley contends the Trustees are subject to the specific bequest in Article V(10)(f), and that Articles VI and VII direct the Trustees to consider not only her support, but also her comfort and welfare in her accustomed manner of living, when deciding whether to invade the principal and distribute more than just net income.

4. The Trustees did not consider Shirley's comfort and welfare and her accustomed manner of living

[¶8] Linn and Wagner argue the Trustees already considered Shirley's other resources and her needs when exercising their discretion. Harris Widmer testified Shirley's monthly income prior to the hearing was roughly the same as Shirley's assisted living monthly rent and expenses. (Tr. 97:10-12, 104:18-20.) Mr. Widmer did not testify about any consideration the Trustees gave to Shirley's comfort and welfare, and her accustomed

manner of living, as directed by the Trust. Before moving in to assisted living, Shirley received income from the Trust for her own use, and did not have to pay \$6,000 or more per month for assisted living.

5. The district court did not consider extrinsic evidence in its Order

[¶9] Linn and Wagner argue that Shirley did not present sufficient extrinsic evidence for the district court to consider. The district court did not consider extrinsic evidence in its Order. For the purpose of replying to Linn and Wagner, Shirley contends that the extrinsic evidence shows Roger Linn’s intent was for the Trust to pay Shirley’s assisted living expenses, in addition to paying her income from the Trust.

[¶10] Mr. Ottum testified that in his conversations with Roger Linn, he was reassured that Shirley would have a place to live and a home, and that her expenses would be covered, and that she would be provided income from the Trust as well. (Tr. 17:1-12.)

[¶11] Greg Selbo, the attorney who drafted the Trust, said he had no specific recollection of why the word “acquiring” was used. (Tr. 75:8-12.) Mr. Selbo had prepared a letter to Roger Linn before the final draft of the Trust was executed, that explained to Roger in layperson’s terms that

We also have a provision that in the event Shirley would become disabled or because of age, need assisted living through a nursing home or the like, that both properties could be sold but that the trusts would pay all of Shirley’s expenses associated with that assisted living situation.

(Tr. 69:14-16; Ex. 5, Index #24, at p.4.) Mr. Selbo recalled after looking at the documents that some changes were then made to some amounts in the prior draft. (Tr. 71:24-25, 72:1-12.) Mr. Selbo did not testify that the assisted living or nursing home provision in Article V(10)(F) was changed, and when prompted, he stated that he did not recall whether that language was changed and said the language in the letter was “not the same”

as the language in the Trust. (Tr. 72:15-18, 74:16-23.) No testimony, evidence, or argument was submitted that Roger Linn changed the language in Article V(10)(F) after the letter and for the final draft. Mr. Selbo said only the language in the letter and the language in the final draft was not the same, which is true because the purpose of the letter was to explain the draft provisions and not recite it word for word. Mr. Selbo did not testify Roger Linn's intent changed between drafts.

[¶12] Mr. Widmer did not testify regarding Roger Linn's intent in using the word "acquiring," or what Roger's intent was, and instead gave his "opinion, as a Trustee" and his own interpretation. (Tr. 93:8-15, 108:19:23.)

[¶13] Stephen Linn did not give testimony regarding Roger Linn's intent with respect to the specific language in the Trust, and instead, only recounted general conversations with Roger Linn where Stephen Linn said he was concerned that Shirley would find a way to get more money into her own estate to leave her kids, and Roger said that would not happen. (Tr. 125:14-25, 126:1-3.)

[¶14] Linn and Wagner contend that Shirley failed to furnish the court with the amount of her Touchmark bills related to her housing expense. Exhibit 2 includes detailed billing statements for October 2016 through January 2018. (Index # 21.)

6. The court did not abuse its discretion in denying attorney fees and costs

[¶15] The determination of whether to award attorney fees and costs rests within the sound discretion of the trial court and will not be overturned unless an abuse of discretion has been shown. Matter of Sturdevant, 340 N.W.2d 888, 893 (N.D. 1983).

[¶16] Linn and Wagner argue they had no choice but to employ counsel to resist Shirley's petition to make sure Shirley's children would not be benefited from Roger's

Trust and to ensure the corpus of the Trust would not be consumed. Linn and Wagner further argue that Shirley's actions increased expenses.

[¶17] First, Shirley is the primary beneficiary of the Trust and was seeking enforcement of a provision that was for her benefit. Prior to living in a nursing home, the Trust provided Shirley with housing and income each month, and Shirley's Petition seeks to place her in the same position, based upon Article V(10)(F). Linn and Wagner may be remainder beneficiaries seeking to protect their own interests, but Shirley is also a beneficiary seeking enforcement of the Trust provisions.

[¶18] Second, the Trustees actively defended their decisions in this matter, and their pleadings and arguments in this matter were in line with Linn and Wagner's positions. Linn and Wagner were certainly entitled to seek to protect their interests, but the Trustees' position in this matter also protected their interests. That Linn and Wagner believed they needed to ensure Shirley's children would not benefit from the Trust, is pure speculation and conjecture.

[¶19] Shirley did not increase the costs of litigation beyond what the parties agreed to, and did not engage in significant costly discovery. Linn and Wagner had the opportunity to seek summary disposition based upon the language of the Trust before the hearing, but did not. As Linn and Wagner pointed out, all parties agreed to the evidentiary hearing. The court proceeded with the hearing to move the case along quickly. (Tr. 8:1-3.) As Linn and Wagner's counsel noted at the beginning of the hearing, little discovery was conducted. (Tr. 7:11-13.) Only two depositions were taken and there was no written discovery.

[¶20] Finally, it has not previously been alleged in this matter that the corpus is in

danger of being consumed by Shirley's Petition. For example, at the end of November 2012, the Linn Marital Trust alone had an account value of nearly \$2.4 million. (Ex. 8, Index #26, at p. 70.) As Harris Widmer testified, Shirley received income from that Trust, but he could not recall her ever receiving any principal. (Tr. 118:5-20.)

CONCLUSION

[¶21] The Court ought to reverse the dismissal of Shirley's Petition because the Trust is ambiguous, and remand this matter to the district court for consideration of extrinsic evidence on Roger Linn's intent.

Respectfully submitted November 1, 2018.

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