

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

**Supreme Court Case No. 20180206
Cass County District Court No. 09-2017-CV-02936**

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.

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

**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**

Michael T. Andrews (ND ID 05516)

Ashley K. Champ (ND ID 07987)

ANDERSON, BOTTRELL, SANDEN & THOMPSON

4132 30th Avenue SW, Suite 100

P.O. Box 10247

Fargo, ND 58106-0247

mandrews@andersonbottrell.com

achamp@andersonbottrell.com

(701) 235-3300

Attorneys for Respondents/Appellees/Cross-Appellants

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LAW AND ARGUMENT

[¶1] Appellant/Cross-Appellee Shirley T. Linn (“Shirley”) has interposed her Response to the Cross Appeal of Respondents/Appellees/Cross-Appellants Stephen T Linn, Deborah R. Wagner and Mark Wagner (hereinafter collectively referred to as “Remainder Beneficiaries”). Shirley’s responsive arguments are without merit.

[¶2] Shirley couches her Petition as merely “seeking enforcement of a provision that was for her benefit”. In truth, however, Shirley’s Petition seeks to invade Trust principal, to the obvious detriment of Remainder Beneficiaries. By requesting the Trust pay all of her assisted living expenses—over and above her \$6,000.00 monthly income distributions and without regard to principal invasion limitations—Shirley’s Petition very clearly threatened to consume the corpus of the Trust. Accordingly, Remainder Beneficiaries were necessary and indispensable parties to this action, and had no choice but to employ Counsel so as to resist Shirley’s Petition. See Bogert, The Law Of Trusts And Trustees § 871 (in a suit by one beneficiary to protect his interest, it is generally held that all beneficiaries (or the other beneficiaries) are necessary parties since a decree will or may benefit or prejudice them).

[¶3] Shirley’s argument that Remainder Beneficiaries raise this very real concern for the first time on appeal is also incorrect. As stated in their closing brief to the District Court, “[u]nchecked, Petitioner’s extraordinary 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 Respondent Beneficiaries, but also Roger's intentions as to his Estate and potentially even Shirley herself." [Doc ID# 40]

[¶4] Also incorrect is Shirley's argument that Remainder Beneficiaries' concerns regarding her request to invade Trust principle is "pure speculation and conjecture." Simple math reveals Remainder Beneficiaries' concerns are anything but. According to the figures provided by Shirley in her response brief, at the end of November 2012, the Linn Marital Trust had an account value of \$2.4 million dollars. Shirley's monthly Touchmark fees at the time of the evidentiary hearing totaled approximately \$6,000.00, or \$72,000 annually. [Doc ID# 21]. Further, Scott Ottum testified Shirley's cost of care had increased in the relatively short time she had resided at Touchmark. Tr. 18:5-15. The record contains substantial evidence of the very real financial consequences of Shirley's faulty interpretation of the Trust.

[¶5] Shirley also denies her actions unnecessarily increased the costs of litigation, because the parties agreed to conduct an evidentiary hearing. However, Remainder Beneficiaries certainly did not agree to waive their right to request reimbursement of their legal fees and expenses (indeed, they affirmatively sought them in response to Shirley's Petition). Nor did Remainder Beneficiaries "agree" that Shirley initiate litigation rather than enlist Article VII(2) of the Trust, which expressly provides the appropriate mechanism for a request to invade Trust principal.

[¶6] Indeed, if anything, Shirley's invocation of this "agreement" further supports Remainder Beneficiaries' cross appeal. Through her main appeal, Shirley

essentially requests this Court remand this matter to the District Court, with instruction to conduct an evidentiary hearing in order to consider extrinsic evidence of Roger's intent. As Shirley admits, however, she already had this chance when an evidentiary hearing was conducted by agreement of the parties, and she produced no extrinsic evidence whatsoever to support her proffered interpretation of the Trust. All the while, Remainder Beneficiaries were required to and did expend significant resources so as to preserve Trust principal for the benefit of all beneficiaries.

[¶7] Along these lines, Shirley's argument that Remainder Beneficiaries are not entitled to be reimbursed because they were "aligned with" the co-Trustees is unavailing. As this Court is well aware, in determining the appropriateness of awarding attorney fees from an estate/trust, the crucial factor is whether the services of the attorney are for the common benefit of the estate. In re Estate of Hass, 2002 ND 82, ¶¶ 21-22, 643 N.W.2d 713 (citing cases). This analysis is commonly known as the "common fund doctrine" and has been readily adopted by this Court. Matter of Estate of Rohrich, 496 N.W.2d 566, 572 (N.D. 1993); First Int'l Bank & Trust v. Peterson, 2011 ND 87, ¶ 24, 797 N.W.2d 316; Hayden v. Medcenter One, Inc., 2013 ND 46, ¶ 30, 828 N.W.2d 775. Importantly, adversity of interest is not a determining factor when applying the common fund doctrine. Id.

[¶8] Regardless of the fact that Remainder Beneficiaries and the co-Trustees were aligned on certain issues, Shirley's Petition seeks to deplete Trust principal which was explicitly left to Remainder Beneficiaries. Accordingly, as set forth

above, Remainder Beneficiaries are necessary and indispensable parties to this action, as adverse ruling from the District Court would prejudice their remainder interests. Further, while there is no doubt the co-Trustees have capably and dutifully represented the interests of the Trust and defended their own actions against Shirley's claim they breached their fiduciary duties, the co-Trustees were legally not in a position to jointly represent themselves, the Trust, and Remainder Beneficiaries. See Bogert, § 871 (in a suit by one of the beneficiaries to protect his interest, the interests of the Trustee and other beneficiaries may conflict and the trustee should not be allowed to represent them). It is also clear from the record that Counsel for Remainder Beneficiaries advanced arguments not proffered by the co-Trustees; took an active role in the examination of witnesses at the evidentiary hearing; and extensively briefed the issues following the hearing.

[¶9] Of utmost consideration to this Court's decision is that, in response to Shirley's unbridled demand to invade Trust principle, Remainder Beneficiaries presented a vigorous and successful defense which undeniably benefitted the Trust as a whole. Remainder Beneficiaries respectfully submit the District Court abused its discretion by refusing to order the reimbursement of their attorneys' fees and costs.

Dated this 15th day of November, 2018.

/s/ Ashley K. Champ

Michael T. Andrews (ND #05516)

Ashley K. Champ (ND #07987)

Anderson, Bottrell, Sanden & Thompson

4132 30th Avenue SW, Suite 100

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Fargo, ND 58106-0247

mandrews@andersonbottrell.com

achamp@andersonbottrell.com

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