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CASE NO. A05-1774

State of Minnesota
In Court of Appeals

In the Matter of the Vera Lyons Marital Trust Created Under Article 4 of the Last Will and Testament of M. Arnold Lyons, Dated October 9, 1985.

File No. 27-TR-CV-04-125

In the Matter of the M. Arnold Lyons Family Trust Created Under Article 4 of the Last Will and Testament of M. Arnold Lyons, Dated October 9, 1985.

File No. 27-TR-CV-04-126

In the Matter of the Vera Lyons Revocable Trust Created Under Agreement, Dated May 31, 1988.

File No. 27-TR-CV-04-127

APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

PAGE

Table of Authorities iv

Legal Issues 1

Statement of Facts 2

Statement of the Case 5

Argument 7

I.

Where a trustor/husband establishes a testamentary trust naming specific family members as beneficiaries (Permitted Beneficiaries), and naming a specific family member who is prohibited from receiving benefits from the trust (Prohibited Beneficiary) and then excluding all other persons from receiving benefits (Non-Permitted Beneficiaries), and then grants a testamentary power of appointment over the trust assets to his wife, who by her Will appoints the husband's trust's assets to her own revocable trust (a Non-Permitted Beneficiary) thereby co-mingling the husband's trust's assets with the wife's personal assets and thereafter by direction to the wife's trustee distributes the co-mingled funds in equal shares to the wife's three children, one of whom is a Prohibited Beneficiary under her husband's will, did the trial court err in: 7

(a) Refusing to find that the wife made an invalid exercise of the power of appointment by transferring the whole of the testator's trust assets to the wife's Revocable Trust (a Non-Permitted Beneficiary);

(b) Reforming the wife's Will to avoid her invalid exercise of the testamentary power of appointment by directing that the husband's trust assets be divided equally between two Permitted Beneficiaries while excluding all other Permitted Beneficiaries;

(c) Reforming the wife's Revocable Trust to direct that the combined assets of the husband's trust and the wife's personal assets be distributed to the Prohibited Beneficiary in an amount equal to the individual shares described in subparagraph b above and then distributing any remaining amounts of the co-mingled assets in equal shares to each of the two benefitted Permitted Beneficiaries and the Prohibited Beneficiary.

1. Standard of Review 8

2. There is No Ambiguity in Any of the Testamentary Instruments 8

3. Analysis of Power of Appointment 10

4. Analysis of Objectors' Claim that Vera Lyons' Estate Plan Should be Re-written by the Court 13

CONCLUSION 22

APPENDIX AND ITS INDEX

PAGE

1. Notice of Appeal 1

2. Trial Court Order Affirming Referee Kruger's Order of February 7, 2005; 3

3. Referee Kruger's Order Reforming Will and Trust and Instructing Trustees; 6

4. Petition to Instruct Trustees on Proper Distribution of Trustees (Duplicate Petitions Omitted); 15

5. Will of M. Arnold Lyons (Administrative Provisions Omitted) 26

6. Vera Lyons Revocable Trust Agreement (Administrative Provisions Omitted); 41

7. Will of Vera Lyons 53

8. Motion for Evidentiary Hearing 60

9. Partial Transcript Referee Kruger Hearing 61

10. Affidavit of Sidney Kaplan 64

11. Partial Transcript of Pretrial Hearing 66

12. Response of Andrew W. Buirge and William C. Buirge Supporting Trustees' Request for Instructions (Parts Omitted); 70

TABLE OF AUTHORITIES

CASES PAGE

Applegate v. Brown, 95 N.W. 2d 341, 346 (Nebr. 1959) 11

Bussing v. Hough, 21 N.W. 2d 587, 590 (Iowa 1946) 10

In Re Cudahy, 125 N.W. 2d 344, 348-350 (Wis. 1963) 11

Matter of Florance, 343 N.W. 2d 297, 302 (Minn. App. 1984) 11

Frank v. Mangum, 237 U.S. 309, 347 (1914) 23

In Re Trust of George B. Lane, 660 N.W. 2d 421, 425 (Minn. App. 2003) 16, 17

In Re Trust Known as Great Northern Iron Ore Properties,
243 N.W. 2d 302, 306 (1976) 8

In Re Hartman, 347 N.W. 2d 480, 483, 484 (Minn. 1984) 18

In Re Trust Created by Hill, 499 N.W. 2d 475, 482 . . . . . 8, 10

In Re Trust of Holt, 491 N.W. 2d 25, 27 (Minn. App. 1992) 11

In Re Kischel, 299 N.W. 2d 920, 923 (Minn. 1980) 17

In Re Estate of Kerr, 520 N.W. 2d 512, 514 (Minn. App. 1994) 18

Massey v. Guarantee Trust Company, 5 N.W. 2d 279, 282-3 (Nebr. 1942) . . 11

In Re Peavey's Estate, 175 N.W. 105, 106 (1919) 8

In Re Pope's Estate, 97 N.W. 1046, 1048 (1904) 19

In Re Proestler's Will, 5 N.W. 2d 922 (Iowa 1942) 10

In Re Estate of Ruth N. Cole, 621 N.W. 2d 816 (Minn. App. 2001) . . 17, 19, 20

In Re Shields, 552 N.W. 2d 581, 582 (Minn. App. 1996) 17

In Re Silverson's Will, 8 N.W. 2d 21, 23 (Minn. 1943) 17, 18

In Re Estate of Spencer, 232 N.W. 2d 491, 498 (Iowa 1975) 12

In Re Stork's Estate, 9 N.W. 2d 273, 279 (Iowa 1943) 11

Estate of Zagar, 491 N.W. 2d 915, 916 (Minn. App. 1992) 8

STATUTES AND RULES PAGE

38 Dunnell Minnesota Digest, Powers of Appointment, Section 1.00 (4th Ed. 1998) 10

Minn. Stat. § 501B.16 (23) 5

Minn. R. Civ. P. 52.01 8

Minn. Stat. § 502.62 10

Minn. Stat. § 502.69 11

LEGAL ISSUES

I.

Where a trustor/husband establishes a testamentary trust naming specific family members as beneficiaries (Permitted Beneficiaries), and naming a specific family member who is prohibited from receiving benefits from the trust (Prohibited Beneficiary) and then excluding all other persons from receiving benefits (Non-Permitted Beneficiaries), and then grants a testamentary power of appointment over the trust assets to his wife, who by her Will appoints the husband's trust's assets to her own revocable trust (a Non-Permitted Beneficiary) thereby co-mingling the husband's trust's assets with the wife's personal assets and thereafter by direction to the wife's trustee distributes the co-mingled funds in equal shares to the wife's three children, one of whom is a Prohibited Beneficiary under her husband's will, did the trial court err in:

(a) Refusing to find that the wife made an invalid exercise of the power of appointment by transferring the whole of the testator's trust assets to the wife's Revocable Trust (a Non-Permitted Beneficiary);

(b) Reforming the wife's Will to avoid her invalid exercise of the testamentary power of appointment by directing that the husband's trust assets be divided equally between two Permitted Beneficiaries while excluding all other Permitted Beneficiaries;

(c) Reforming the wife's Revocable Trust to direct that the combined assets of the husband's trust and the wife's personal assets be distributed to the Prohibited Beneficiary in an amount equal to the individual shares described in subparagraph b above and then distributing any remaining amounts of the co-mingled assets in equal shares to each of the two benefitted Permitted Beneficiaries and the Prohibited Beneficiary.

STATEMENT OF FACTS

For clarity of presentation, the description and discussion of persons, events and documents, family members may be referred to by first name or degree of kindred.

M. Arnold Lyons (hereinafter "Arnold") and Vera Lyons (hereinafter "Vera") are both deceased, Arnold having died on January 29, 1988, and Vera having died on May 28, 2003. Arnold and Vera's lifetime marriage produced three children, Lisa Lyons, David Lyons, and Barbara Hobbs, all of whom survive. Arnold and Vera have four grandchildren, two of whom are Appellants in this case. Those two grandchildren, Andrew W. Buirge and William C. Buirge (hereinafter referred to as "Andrew and William") are the children of Barbara Hobbs. A-7.

In this testamentary contest, the Court is asked to decide whether a share of Arnold's estate will be distributed to Andrew and William, or whether it will be distributed to their mother, Barbara Hobbs.

Approximately two years prior to his death, Arnold executed a Will which distributed the assets of his estate into two trusts, referred to herein as the Marital Trust and the Family Trust. The Marital Trust is solely for the benefit of Vera and contains a general testamentary power of appointment exercisable by Vera with no limitation upon possible beneficiaries. The Marital Trust is not in issue in this litigation. A-26.

The Family Trust contains typical provisions for discretionary distributions of income or principal by the trustees during Vera's lifetime and those discretionary distributions are not in issue in this litigation. A-30.

Arnold's Will makes provision for distribution of remaining assets in his Family Trust following the death of both Arnold and Vera. One vehicle for this distribution from the Family Trust is a testamentary power of appointment in Vera. A-32. Arnold's Will, both in its distributive scheme under the Family Trust, and in the creation of the power of appointment, sets up both preferences as to beneficiaries, and exclusions as to beneficiaries, and these preferences and exclusions are the foundation stones of this controversy. A-26. Those preferences and limitations are as follows:

> A. ARTICLE 1 of Arnold's Will defines his children to specifically exclude his daughter, Barbara Hobbs and to include his daughter and son, Lisa Lyons and David Lyons. ARTICLE 1 further states that Barbara Hobbs "is specifically excluded from the provisions of this Will."
>
> B. ARTICLE 1 of Arnold's Will defines issue of his children (his grandchildren) to exclude issue of Barbara Hobbs "<u>except</u> Andrew W. Buirge and William C. Buirge... for whom I have specifically provided in this Will." (Emphasis in original).
>
> C. ARTICLE 3 of Arnold's Will excludes Barbara Hobbs from receiving a distribution of personal property.
>
> D. ARTICLE 4.2 (03) and (04) of Arnold's Will use the above described definition of children and issue to exclude Barbara Hobbs from receiving assets of the Family Trust during Vera's lifetime or at Vera's death and also to exclude as beneficiary, Vera, her estate, or creditors thereof.

E. ARTICLE 4.2 (05) of Arnold's Will provides that in the event Vera fails to dispose of the corpus of the Family Trust by exercise of her testamentary power of appointment, the remainder of the Family Trust is divided into three equal shares, one for Lisa Lyons, one for David Lyons and one for Andrew and William, collectively.

F. ARTICLE 5.1 of Arnold's Will provides that in the event Vera does not survive Arnold, Arnold's entire estate shall be divided into three equal shares, one share of Lisa Lyons, one share of David Lyons and one share of Andrew and William, collectively.

Shortly after Arnold's death on January 29, 1988, Vera executed a revocable trust agreement as her chosen vehicle of testamentary disposition (hereinafter "Vera's Revocable Trust"). A-41. At the same time, May 31, 1988, Vera executed her Last Will and Testament and in ARTICLE 4 thereof, Vera exercised her power of appointment over the Family Trust created in the Will of Arnold by appointing the entirety thereof to Vera's Revocable Trust. A-53. Vera's Revocable Trust then distributes the assets of the Family Trust under Arnold's Will equally to Lisa Lyons, David Lyons and Barbara Hobbs, after payment of Vera's inheritance and estate taxes, expenses of last illness, and other expenses of the administration of Vera's estate. Andrew and William receive no inheritance from their grandfather's estate. A-41.

STATEMENT OF THE CASE

By identical Petitions filed in each of the above captioned trust matters, the Trustees petitioned the Trial Court for a Court Order pursuant to Minn. Stat. § 501B.16 (23) instructing the Trustees upon the administration and distribution of the assets of the Trusts. A-15. The Trustees' Petitions allege the Trustees' belief that Vera Lyons exercise of the special power of appointment over Arnold Lyons' Family Trust is invalid because it would ultimately result in the transfer of a beneficial interest in the Family Trust to Barbara Hobbs, a Prohibited Beneficiary. A-18. The Trustees' Petitions further allege the Trustees' belief that the proper interpretation of the Arnold Lyons Family Trust would be to distribute the balance thereof in equal shares to Lisa Lyons, David Lyons and to Andrew and William, collectively. The Trustees' Petitions also allege the Trustees' belief that the Vera Lyons Revocable Trust and the Arnold Lyons Marital Trust should be distributed to Lisa Lyons, David Lyons and Barbara Hobbs in equal shares in accordance with Vera Lyons' testamentary plan. A-18.

Respondent Barbara Hobbs filed an objection to the Trustees' Petition requesting reformation of Vera Lyons' Will and Trust on October 26, 2004. On October 27, 2004, at a Pre-trial Conference, the parties agreed that the matter would be submitted upon written and oral arguments. A-68.

On December 7, 2004, Respondent filed her Memorandum in objection to the Trustees' Petition and also filed an Affidavit of Sidney Kaplan stating various facts

and opinions about Vera Lyons' intentions in the execution of her Will and Revocable Trust. A-64. Also on December 7, 2004, Appellants filed their Response in support of the Trustees' Petition, which contained the following:

> "In the event the Court decides to receive testimony extrinsic to the estate plans of either Arnold or Vera, or receive testimony of the facts and circumstances surrounding the execution of either estate plan an evidentiary hearing is requested with a time frame for discovery to be conducted." A-71.

The matter came on for hearing before the Honorable Bruce Kruger, Referee of District Court on December 21, 2004, and again the parties agreed the matter would be submitted on the arguments of counsel. A-63.

On February 4, 2005, Referee Kruger submitted recommended Findings and Order which were countersigned by the Honorable H. Peter Albrecht, Judge of District Court on February 7, 2005. A-6. On February 16, 2005, Appellants filed Notice of Review of Referee Kruger's Order and on May 5, 2005, moved the Court for an Evidentiary Hearing and discovery schedule together with a Memorandum detailing previous requests for an Evidentiary Hearing and the anticipated scope of discovery. A-60.

The Notice of Review Hearing came on before the Honorable H. Peter Albrecht on May 12, 2005, and the Court's Order denying an Evidentiary Hearing and affirming Referee Kruger's Findings and Order of February 7, 2005, was issued on May 26, 2005. A-3.

This Appeal followed. A-1.

ARGUMENT

I.

Where a trustor/husband establishes a testamentary trust naming specific family members as beneficiaries (Permitted Beneficiaries), and naming a specific family member who is prohibited from receiving benefits from the trust (Prohibited Beneficiary) and then excluding all other persons from receiving benefits (Non-Permitted Beneficiaries), and then grants a testamentary power of appointment over the trust assets to his wife, who by her Will appoints the husband's trust's assets to her own revocable trust (a Non-Permitted Beneficiary) thereby co-mingling the husband's trust's assets with the wife's personal assets and thereafter by direction to the wife's trustee distributes the co-mingled funds in equal shares to the wife's three children, one of whom is a Prohibited Beneficiary under her husband's Will, did the trial court err in:

(a) Refusing to find that the wife made an invalid exercise of the power of appointment by transferring the whole of the testator's trust assets to the wife's Revocable Trust (a Non-Permitted Beneficiary);

(b) Reforming the wife's Will to avoid her invalid exercise of the testamentary power of appointment by directing that the husband's trust assets be divided equally between two Permitted Beneficiaries while excluding all other Permitted Beneficiaries;

(c) **Reforming the wife's Revocable Trust to direct that the combined assets of the husband's trust and the wife's personal assets be distributed to the Prohibited Beneficiary in an amount equal to the individual shares described in subparagraph b above and then distributing any remaining amounts of the co-mingled assets in equal shares to each of the two benefitted Permitted Beneficiaries and the Prohibited Beneficiary.**

1. **Standard of Review**. The first question which the Trial Court should address in interpreting a Will or a Trust is whether or not the Will or Trust is ambiguous. The Court of Appeals reviews the question of ambiguity in a Will or Trust as a question of law. The Court of Appeals need not defer to the Trial Court's decision on that question. Estate of Zagar, 491 N.W. 2d 915, 916 (Minn. App. 1992); In Re Peavey's Estate, 175 N.W. 105, 106 (1919). While disputed issues of fact are reviewed by the Court of Appeals under the clearly erroneous standard, material facts which are not in dispute are reviewed by the Court of Appeal as questions of law under a de novo standard. In Re Trust Created by Hill, 499 N.W. 2d 475, 482; In Re Trust Known as Great Northern Iron Ore Properties, 243 N.W. 2d 302, 306 (1976); see also Minn. R. Civ. P. 52.01 stating that "Findings of Fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous." Since the issue was submitted on the testamentary documents, no evidence should have been received.

2. **There is No Ambiguity in Any of the Testamentary Instruments**. The instruments under review consist of the Last Will and Testament of M. Arnold

Lyons (Arnold's Will) and the Family Trust set up under Section 4.2 thereof which grants a Special Testamentary Power of Appointment to Vera Lyons under 4.2(04) of the Will. Also under consideration is the Vera Lyons Revocable Trust Agreement (Vera's Revocable Trust) which distributes all of its assets equally to Vera's children, Lisa Lyons, David Lyons and Barbara Hobbs. Also at issue, is the Last Will and Testament of Vera Lyons (Vera's Will) which exercises a power of appointment in the Family Trust in Arnold's Will by appointing all of that property to Vera's Revocable Trust.

Under Arnold's Will, including the assets of the Family Trust which are in dispute, Barbara Hobbs is prohibited as a beneficiary both during the lifetime of Arnold's Family Trust and as a testamentary beneficiary thereof. Vera Lyons, her estate, and her creditors are not permitted beneficiaries of any testamentary disposition from Arnold's Family Trust.

Appellants argue that exercise by Vera of the special power of appointment in which the assets of the Family Trust are appointed, in total, to Vera's Revocable Trust constitutes a transfer to a Non-permitted Beneficiary. Further, Appellants' argue that the ultimate disposition of the assets of Arnold's Family Trust after co-mingling with other assets in Vera's Revocable Trust ultimately are awarded to a Prohibited Beneficiary, Barbara Hobbs.

Upon review of the testamentary documents alone, without defference to any Trial Court Findings and without reference to any documentary evidence, the Court

of Appeals must be lead to the conclusion that Vera Lyons' exercise of the special power of appointment over the Family Trust in Arnold Lyons' Will is invalid. In Re Trust Created by Hill, Supra. (Where material facts are not in dispute, the reviewing Court uses the de novo standard).

3. **Analysis of Power of Appointment**. Following several decades of practice under a statutory Power of Appointment, Minnesota adopted the common law of powers in 1943, subject to certain limited statutory modifications. Minn. Stat. § 502.62.

The common law power of appointment is an authority conferred by the Donor or upon the Donee to select certain individuals who will receive the Donor's property. 38 Dunnell Minnesota Digest, Powers of Appointment, Section 1.00 (4th Ed. 1998). Property subject to a power of appointment belongs to the estate of the Donor, not the estate of the Donee, and property passing under the exercise of a testamentary power of appointment passes under the Will of the Donor, not the Will of the Donee. Id. See also Bussing v. Hough, 21 N.W. 2d 587, 590 (Iowa 1946) (appointed property passes by the Will of the Donor, the Will of the Donee merely designating the persons who are to take the property under the Donor's Will); see also In Re Proestler's Will, 5 N.W. 2d 922 (Iowa 1942) (power of appointment does not constitute a part of Donee's estate, therefore residue clause does not constitute exercise of a power of appointment).

In construing the exercise of a power of appointment, the Court must first ascertain the intent of the Donor in creating the power, in creating the method of its exercise, and in establishing the limitations on the class to be benefitted. The Court must determine whether the Donee exercised the power within terms set out by the Donor strictly using the method of exercise prescribed by the Donor and limiting benefitted persons to the Permissible Beneficiaries identified by the Donor. Applegate v. Brown, 95 N.W. 2d 341, 346 (Nebr. 1959); Massey v. Guarantee Trust Company, 5 N.W. 2d 279, 282-3 (Nebr. 1942); In Re Trust of Holt, 491 N.W. 2d 25, 27 (Minn. App. 1992) (Court interpreting testamentary trust first determines the intent of the Trustor; In Re Stork's Estate, 9 N.W. 2d 273, 279 (Iowa 1943) (careful consideration of Wills of Donor and Donee support finding of valid exercise of power of appointment); Matter of Florance, 343 N.W. 2d 297, 302 (Minn. App. 1984) (Court looks at the trust instrument as a whole to the end that the intention of the settlor or testator is carried out).

A special power of appointment is one in which the class of possible beneficiaries is limited by the Donor. Under a special power of appointment, the appointment by the Donee, of the Donor's property to a person not included in the class of beneficiaries designated by the Donor is invalid. Minn. Stat. § 502.69; In Re Cudahy, 125 N.W. 2d 344, 348-350 (Wis. 1963) (person who is not within the class to which appointment was limited by partial release, could not take under testamentary exercise of power of appointment).

The invalid exercise of a power of appointment constitutes a default in the exercise of the power and where a default occurs, the disposition of the trust property is controlled by the Donor's Will. In Re Estate of Spencer, 232 N.W. 2d 491, 498 (Iowa 1975) (in default of exercise of special power of appointment, Court will distribute Donor's property in accordance with Donor's intent).

The Trial Court gave no deference to Arnold's estate plan which excludes Barbara Hobbs and treats Barbara's children as members of the same class, and in equal degree with Arnold's children, to be his primary beneficiaries. A-26, 32, 33, 35, 36. Instead, the Trial Court turns its entire focus on the adoption of the of the scheme suggested by Barbara Hobbs, the essential characteristic of which is to circumvent and defeat her father's testamentary plan. A-6. Vera's intention (as found by the Trial Court within the four corners of her estate plan), is to reward her three children equally using, in part, Arnold's assets which Arnold carefully and thoughtfully denied to Barbara Hobbs and granted to her two children, Andrew and William. Effect can be given to both testamentary plans if the intent of the testator in both plans is given due consideration.

By making a proper review of the Will and Trusts created by Arnold, and a proper review of the Will and Trust created by Vera, and a proper review of the exercise of the power of appointment over the remaining assets in Arnold's Estate, the Court of Appeals can reach a reasonable conclusion about ambiguity in the documents and about the intentions of Vera Lyons as described in her estate plan.

There is no ambiguity in the documents. Vera Lyons intended to dispose of the assets in the Vera Lyons Revocable Trust by dividing those assets equally between her three children. She did so, and no one argues with that decision. Secondly, Vera Lyons intended to exercise her general power of appointment over the Marital Trust in Arnold's Estate by distributing those proceeds equally among her three children. She did so and no one argues with that decision.

However, Vera Lyons also intended to exercise the special power of appointment over the Family Trust in Arnold's Estate by appointing those assets to her Revocable Trust, a Non-Permitted Beneficiary, (thereby co-mingling Arnold's assets with her own funds) and then distributing to at least one additional Prohibited Beneficiary. Both Vera's Revocable Trust and the ultimate beneficiary, Barbara Hobbs are prohibited from receiving those funds from Arnold's Family Trust and therefore that exercise of the special power of appointment is invalid. Under Arnold's Will, the assets remaining in the Family Trust are distributed equally among Lisa Lyons, David Lyons and Andrew and William Buirge, collectively. Those three dispositions of the remaining assets of Arnold and Vera should be approved by the Court of Appeals and the decision of the Trial Court to reform Vera Lyons' entire estate plan should be reversed.

4. **Analysis of Objector's Claim that Vera Lyons' Estate Plan Should be Re-written by the Court**. The Objector's basic argument is that Vera attempted to divide the combined estates of Arnold and Vera equally between the couples'

three children, Lisa Lyons, David Lyons and Barbara Hobbs. Since Arnold's Will prohibits Barbara Hobbs from sharing in Arnold's assets, the Objector argues that the Court must find a way to circumvent Arnold's testamentary plan by doing three things:

> A. Reform and rewrite the exercise of the special power of appointment contained in Vera's Will by dividing Arnold's assets under the Family Trust equally between Lisa Lyons and David Lyons, thereby excluding Andrew and William;
>
> B. Reform and rewrite the exercise of the general power of appointment contained in Vera's Will by appointing Arnold's assets to Barbara Hobbs alone;
>
> C. Reform and rewrite Vera's Revocable Trust to distribute her personal assets among her three children in such a way as to achieve an approximately equal distribution of the assets from both estates among the three children.

The first problem with this scheme is one of simple arithmetic. As Referee Kruger noted in his Findings, A-9, the value of the assets in none of the Trusts is known, nor is the value of Vera's personal estate known. It is impossible, therefore, for either the Trial Court or the reviewing Court to know whether or not this scheme will actually result in an equal distribution of the assets of both estates to the three children. The Trial Court's Finding that rewriting Vera's entire estate plan will achieve equal distribution of Arnold and Vera's combined assets is without a factual basis. Nor can the Court of Appeals achieve a meaningful review of that same issue because the record does not contain the needed information.

The effort of the Objector to bolster her claim of her mother's intentions with an Affidavit by the lawyer who drafted and witnessed the execution of the estate plans of both Arnold and Vera should be unavailing. A-64. The Objector argues that the Affidavit helps prove that her mother intended to divide the assets of both estates equally between the Objector and her two siblings; and that her mother made a mistake which should be corrected.

First, the Affidavit was presented to the Trial Court after the parties had agreed to submit the case to the Trial Court on the basis of the testamentary documents, together with the Petition of the Trustees, followed by written and oral arguments by the lawyers. A-68. A request for an Evidentiary Hearing in the event the Trial Court accepted evidence outside these documents was denied by the Trial Court and therefore, the Affidavit should not be considered without a remand in order to permit cross-examination and the testimony of other witnesses regarding the intention of Vera Lyons, in the event the Court of Appeals determines that an ambiguity does exist with respect to the testamentary documents. A-60, 4.

Without arguing these facts in detail, it should be pointed out that Mr. Kaplan drafted Arnold's estate plan in October of 1985, so he was aware that Barbara Hobbs is a Prohibited Beneficiary; that Arnold discussed the Prohibited Beneficiary clause approximately two years later near the time of Arnold's death in January of 1988 (according to his Affidavit); that Mr. Kaplan, an experienced estate planning lawyer, did not apprise Vera of the Prohibited Beneficiary when he drafted her estate

plan a few months after Arnold's death in 1988; and that Mr. Kaplan (presumably) did not remember the alleged conversation he had with Arnold until fifteen years later when he was sued for malpractice.

A second problem is that neither Mr. Kaplan's Affidavit, nor the testamentary documents can tell the Trial Court or the Court of Appeals what Vera Lyons would have done in her estate plan if she had known that her recently deceased husband's Will contained a prohibition on transferring assets from his estate to Barbara Hobbs. Apparently, both Vera and her attorney were blind to this fact. Yet, Barbara Hobbs suggests, and the Trial Court holds that Vera would have agreed to circumvent Arnold's plan by the scheme which has been proposed. There is no way of knowing on this record, what Vera would have done if confronted with the reality of her husband's wish to exclude Barbara Hobbs. The Court cannot know and under the law, should not write into Vera's Will, the conclusion that she would have knowingly violated her husband's final estate plan. See In Re Trust of George B. Lane, 660 N.W. 2d 421, 425 (Minn. App. 2003) (Court should not speculate on what the testator would have done with unknown facts, and thereby rewrite the testator's Will).

Minnesota Courts have developed a series of rules for considering claims made by potential beneficiaries of decedents' estates and those rules have been finely honed by more than a century of litigation. Although these rules have changed, expanded or contracted over the years, the two rules which have not changed are that the testator's intent must be expressed in the language of the Will,

and any ambiguity which the Court may seek to interpret must be apparent in the language of the Will. As a corollary to these two principles, if there is no ambiguity in reviewing the testamentary documents, then there is no room for extrinsic evidence that a testator meant to say something more, or something different, or use a different method to achieve a desired result. In Re Silverson's Will, 8 N.W. 2d 21, 23 (Minn. 1943). The extrinsic evidence cannot be used to create the ambiguity, but rather the ambiguity must be discernable and then the extrinsic evidence is used to resolve the ambiguity. Estate of Cole, 621 N.W. 2d 816, 819 (Minn. App. 2001) (Extrinsic evidence is to be used to determine what the testator meant by the words used, not to determine an intent that cannot be found in the words employed in the instrument).

In Trust of George B. Lane, 660 N.W. 2d 421, 425 (Minn. App. 2003), the Court of Appeals reviewed many of the basic rules of construction for interpreting Wills, some of which are as follows:

> When construing a testamentary trust, this Court's "primary concern is to give effect to the testator's intent as expressed in the plain language of the Will." In Re Kischel, 299 N.W. 2d 920, 923 (Minn. 1980).
>
> In construing a Will, the cardinal rule is that the testator's intention is to be gathered from the language of the Will itself. In Re Shields, 552 N.W. 2d 581, 582 (Minn. App. 1996).
>
> Though the Court is to consider surrounding circumstances, it cannot speculate what the testator would have done with knowledge of events subsequent to his or

> her death and thereby rewrite the Will. In Re Hartman, 347 N.W. 2d 480, 484 (Minn. 1984).

In other cases, the Court has stated the rule as follows:

> It is fundamental that the intention of a testator must be sought in the language of his Will, and, if that is clear, what he meant to say and did not is foreign to the inquiry. No violence must be done to the language used. Except in cases of equivocation, and in some cases of ambiguity, parole evidence, in the sense of declarations of the testator directly expressing his testamentary intentions is not admissible. To admit it is to ignore the requirement that the Will be in writing. In Re Silverson's Will, supra.

In Estate of Kerr, the Court of Appeals states that extrinsic evidence of the meaning of a Will is admissible only where the text of the Will is ambiguous and whether the Will is ambiguous is a question of law which the Court of Appeals reviews de novo. In Re Estate of Kerr, 520 N.W. 2d 512, 514 (Minn. App. 1994).

Application of these rules of construction must be viewed in light of the distinction between evidence of the testator's surrounding circumstances, and evidence such as Mr. Kaplan's Affidavit which is extrinsic evidence of the testator's intent. The Minnesota Supreme Court described this distinction in the case of In Re Hartman, 347 N.W. 2d 480, 483 (Minn. 1984) as follows:

> In construing a Will, the Court is to put itself in the position of the testator at the time the Will was executed (citations omitted). To do so, the Court must be aware of the facts around the testator's family... [a]mong the surrounding facts and circumstances which the Court will consider... are the character and the occupation of the testator; the amount, the extent and condition of testator's property; the number, identity and the like of testator's family and of

> other natural objects of his bounty; and testator's relation to the beneficiaries and to the natural objects of his bounty. (Citations omitted).

While "surrounding facts and circumstances" may be admitted into evidence to assist the Court in resolving an ambiguity, extrinsic evidence such as that found in the Affidavit of Mr. Kaplan can be admitted only when an ambiguity is found to exist in the Will and that ambiguity is of such a nature that the operative provisions of the Will cannot be executed. Such ambiguities have historically been classified as latent ambiguities or patent ambiguities although the distinction between the two, in terms of the available remedy, was collapsed into a single rule in the case of In Re Estate of Ruth N. Cole, 621 N.W. 2d 816 (Minn. App. 2001). Latent ambiguities are those which arise when a gift or devise under a Will is at odds with reality which can only be demonstrated by extrinsic evidence from outside the Will and by implication, outside of the "surrounding facts and circumstances" of the testator. Typical cases are those in which the testator makes a gift to a person who does not exist, or where there are two persons with the same name; where there is a mis-description of property, (the most typical being an erroneous legal description of real estate); where there is a mis-description of the person, a case where there is no such person by that name, or if the person does exist, it is not the one intended, or the property constituting the gift or devise does not belong to the testator. In Re Pope's Estate, 97 N.W. 1046, 1048 (1904).

The type of ambiguity which was traditionally a patent ambiguity is the contradiction which appears on the face of the Will. The classic example is found in In Re Estate of Cole, supra., in which a bequest of a cash gift was stated to be "two hundred thousand dollars ($25,000.00)." In order to avoid declaring such a bequest void for uncertainty, the Court in Cole permitted extrinsic evidence of the scrivener who described his use of a computer to copy and paste that provision from another Will and neglected to alter the substitution to conform with the testator's wishes as found in the scrivener's notes. See In Re Estate of Cole, supra. at 817-8.

The Court in the Cole case then goes on to restate the combined rule for patent and latent ambiguities by stating that a scrivener's testimony may be employed to resolve contradictory provisions in a Will subject to certain limitations. Those limitations are:

> A. The surrounding circumstances should be examined first and direct evidence of the testator's intention should be considered only if the ambiguity or contradiction persists.
>
> B. Extrinsic evidence is to be used only to determine what the testator meant by the words used, not to determine an intent that cannot be found in the words employed in the instrument. Id. at 819. (Emphasis supplied).

Patent and latent ambiguities may both be identified by a single characteristic. That characteristic is an uncertainty which prevents the execution of the testator's directive as expressed in the Will.

In applying these rules to the testamentary documents which are before the Court in this case, it is clear that there is no ambiguity which is cognizable under

Minnesota law. There is no contradictory language in any of the several testamentary documents which prevents execution of the directions of the two testators as described in their testamentary documents, therefore there is no patent ambiguity. Nor is there an ambiguity which prevents execution of the directives in these testamentary documents by reference to some contradictory fact which lies outside either the documents themselves, or the facts and circumstances surrounding the testator's signing of the documents, which makes execution of the plain meaning of the testamentary directives uncertain. Rather, we have an attempt to exercise a special power of appointment in contravention of the settlor's directive that a certain beneficiary be prohibited. The exercise of that power of appointment is invalid. The Court should not participate in an rewriting of an entire estate plan because the holder of that power of appointment chose to exercise it in a way that was prohibited.

Let us not be mislead into the conclusion that Vera Lyons' estate plan "failed" and we must "fix it." To avoid that trap, we need only to focus on our earlier discussion that there are two estate plans to be considered; there are two testators whose intentions are important. The assets in question are Arnold's assets over which he granted a power of appointment to Vera–a power which Vera "may" exercise or she may not. Arnold's estate plan provides for distribution of the Family Trust if the power of appointment is not exercised, or if it is invalid in its exercise. There will be no failure of a legacy if a portion of Vera's plan is invalid. There is no

intestacy here. Arnold and Vera's estate plans, when properly taken together, will be nicely self-executing. Rather than rewrite Vera's estate plan, thereby doing violence to Arnold's estate plan, the Court should let the plain meaning of the words of these two testators operate under their own power.

CONCLUSION

If a Will or a trust contains an uncertainty which prevents the execution of the testator's directives as expressed in the Will, an ambiguity exists which should be resolved by the Trial Court's examination of the facts and circumstances surrounding the testator, the natural objects of the testator's bounty, and the testator's property. If the ambiguity persists, extrinsic evidence of the testator's intent may be received by the Trial Court. When the testamentary directives of Vera and Arnold Lyons are examined in light of the intention expressed by each testator, there is no uncertainty which prevents the execution of the testator's directives as expressed in their Will. Accordingly, the Order of the Trial Court should be reversed and direction given to enter an Order in accordance with the distribution proposed by the trustees in their petition.

In the event the Court of Appeals finds that the testamentary documents contained an uncertainty which prevents the execution of the testator's directive, the Order of the Trial Court should be reversed and remanded for the purpose of granting the evidentiary hearing requested by Appellants for the purpose of resolving the ambiguity by examination of the facts and circumstances of the testator, her

family and property, and in the event the ambiguity persists, take direct evidence of the testator's intent.

> " 'Due process'... embraces the fundamental conception of a fair trial, with opportunity to be heard." O.W. Holmes in Frank v. Mangum, 237 U.S. 309, 347 (1914).

Respectfully submitted,

ANDERSON, DOVE, FRETLAND &
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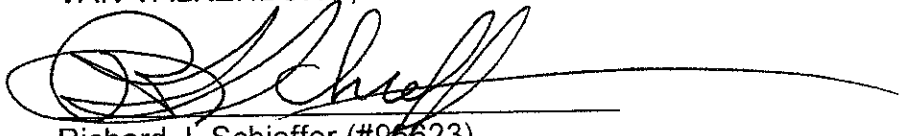

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).