

NO. A10-1646

State of Minnesota
In Supreme Court

In the Matter of the Pamela Andreas Stisser Grantor Trust
Under Second Amendment and Restatement of Trust
Agreement dated June 6, 2001.

**RESPONDENT/CROSS-APPELLANT'S
PRINCIPAL AND RESPONSE BRIEF AND ADDENDUM**

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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).

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LEGAL ISSUES

1. **When a trust agreement directs the trustee to pay the grantor's "legal debts," does the plain language control and require payment of all debts, both secured and unsecured debts?**

The court of appeals held that the plain language controls and that the district court erred by not directing the Trustee to pay the grantor's margin loan debt secured by a Charles Schwab brokerage account.

Authority:

In re Trust Created by McLaughlin, 361 N.W.2d 43 (Minn. 1985)

In re Fiske's Trust, 242 Minn. 452, 65 N.W.2d 906 (1954)

U.S. v. O'Shaughnessy, 517 N.W.2d 574 (Minn. 1994)

2. **Does the plain language of a trust agreement that directs payment of "legal debts" also apply to mortgage debt secured by real property that passed by joint tenancy with right of survivorship?**

The court of appeals held that the plain language did not apply to the mortgage debt based on a theory that had not been argued by the Trustee – namely that the real property secured by the mortgages passed by joint tenancy, thus were not probate assets, and therefore the personal representative could not assert a claim that the mortgages should be paid by the Trust.

Authority:

In re Trust Created by McLaughlin, 361 N.W.2d 43 (Minn. 1985)

In re Fiske's Trust, 242 Minn. 452, 65 N.W.2d 906 (1954)

U.S. v. O'Shaughnessy, 517 N.W.2d 574 (Minn. 1994)

3. **When a trust agreement uses mandatory, not discretionary, language stating that "fiduciaries shall be entitled to ... receive compensation for their services" related to the estate, does a trustee have discretion to deny any compensation whatsoever for services performed by the personal representative for the grantor's estate?**

The court of appeals erroneously applied an abuse of discretion standard, deferring to the Trustee, and held that denial of all compensation, while "harsh," was not an abuse of discretion.

Authority:

In re Trust Created by McLaughlin, 361 N.W.2d 43 (Minn. 1985)
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)
Restatement (Second) of Trusts § 187 cmt. a

4. **When a trust agreement uses mandatory, not discretionary, language stating that the trust “shall” pay “expenses of administration” of the grantor’s estate, does a trustee have discretion to completely deny payment of administrative expenses of legal counsel for the personal representative?**

The court of appeals erroneously applied an abuse of discretion standard, once again deferring to the Trustee, and affirmed the denial of any personal representative’s fees, despite once again characterizing the result as “harsh.”

Authority:

In re Trust Created by McLaughlin, 361 N.W.2d 43 (Minn. 1985)
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)
Restatement (Second) of Trusts § 187 cmt. a

STATEMENT OF THE CASE

This appeal involves interpretation and application of the plain language of a trust agreement. The Appellant is David L. Andreas, the sole trustee (“Trustee”) of the Pamela Andreas Stisser Grantor Trust (the “Trust” or “Trust Agreement”). The Trustee’s sister, Pamela Stisser (“Pamela”) was the Trust’s grantor. Pamela is survived by her husband, Respondent/Cross-Appellant Vernon L.E. Stisser (“Vernon” or “Stisser”), who is the personal representative of Pamela’s estate.

The issue on which the Trustee sought and was granted review is straightforward: Does Pamela’s directive in the Trust Agreement that the Trust pay her “legal debts” upon her death apply to a margin loan debt in her name alone which was secured by a Charles Schwab brokerage account? The Court also granted Vernon’s request for cross-review of (1) whether the same “pay my legal debts” directive also applies to mortgage debt for which the Stissers were jointly liable, and (2) whether the Trustee had the right to deny any compensation for Vernon as the estate’s personal representative and to deny any reimbursement of administrative expenses incurred by the estate for legal fees of Laird A. Lile, the estate’s Florida lawyer, despite mandatory language in the Trust Agreement stating that the Trust “shall” pay such obligations.

Although there has been litigation in a variety of courts in Minnesota, Illinois, and Florida, this appeal arises from Vernon’s January 29, 2008, Petition in his capacity as personal representative of the Estate of Pamela Stisser under Minn. Stat. § 501B.16 for Accounting of Trust, Instructions to the Trustee, Instructions to Certain Beneficiaries, for Removal of the Trustee, for Transfer of the Trust, and for Appointment of a Successor

Trustee (AA34-52)¹ and the Trustee's April 23, 2008, Response and Objections of Trustee David L. Andreas to Petition of Vernon L.E. Stisser, as Personal Representative of the Estate of Pamela Jane Andreas Stisser (AA235-53). On November 4, 2008, the district court dismissed all other claims for relief from Vernon's Petition except the claims for payment of legal debts, compensation as personal representative, expenses of administration, and litigation expenses.

The parties brought cross-motions for partial summary judgment. In a July 2, 2009 order, the Hennepin County District Court, the Honorable Marilyn J. Kaman, denied Vernon's motion and granted the Trustee's motion, ruling that the Trust was not obligated to pay any of Pamela Stisser's secured debts. (Add.19-46.) However, the court found genuine issues of material fact regarding the Trust's obligation to pay the personal representative's litigation fees and to provide compensation to Vernon and reimbursement of Lile's estate administration expenses. After a bench trial, the district court issued Findings of Fact, Conclusions of Law, and an Order filed on June 14, 2010, which deferred to the Trustee's denial of personal representative litigation fees, compensation and reimbursement for administrative expenses. (Add.49-102.) Judgment was entered on July 21, 2010. Vernon did not appeal from the portion of the judgment denying reimbursement of the personal representative's litigation fees.

In a May 31, 2011 unpublished decision, the court of appeals affirmed in part and reversed in part. (Add.1-18.) The court held that because the Trust Agreement plainly

¹ "AA" refers to Appellant's Appendix. "Add." refers to Appellant's Addendum. "RA" refers to Respondent/Cross-Appellant's Appendix. "R.Add." refers to Respondent/Cross-Appellant's Addendum.

directs the Trust to pay Pamela's legal debts upon her death, the district court erred by concluding that the margin loan debt was not to be paid. The court of appeals also held the district court erred by relying on a "non-exoneration" statute that is part of Minnesota's Probate Code but is not contained in Minnesota's trust statute. (Add.6-7.) However, the court also held that because the mortgage debts were not secured by probate assets, the Trust was not obligated to pay those legal debts. (Add.8.) The court of appeals further affirmed the Trustee's decisions to deny Vernon any compensation for his services as personal representative and the Trustees' refusal to pay any administrative fees for Lile's legal services, despite recognizing in both instances that such a denial was "harsh." (Add.10-13.)

On August 16, 2011, this Court granted the Trustee's petition for review on the issue of whether a Trust Agreement's directive to pay legal debts requires payment of secured debts upon the grantor's death. This Court also granted cross-review on whether the plain language of the Trust Agreement requires payment of the mortgage debt and whether the Trust Agreement requires payment of compensation to the personal representative and of administration expenses.

STATEMENT OF FACTS

This appeal involves interpretation of the language of the Second Restatement of the Pamela Andreas Stisser Grantor Trust Agreement (AA1-33) and review of the district court orders that construed the Agreement's "pay my legal debts" language and affirmed

the Trustee's refusal to pay estate expenses (Add.19-102). The facts relevant to those issues are straightforward.²

The Stissers' Marriage and Family, and Their Joint Will

Respondent/Cross-Appellant Vernon L.E. Stisser married Pamela Andreas Stisser in 1983. (R.Add.1.) Vernon had four children and Pamela had three children from earlier marriages. (*Id.*) All seven children survived Pamela. (Add.51.)

During his business career, Vernon held several high-ranking and well-compensated management and executive positions with companies such as Ralston Purina and Griffith Laboratories USA. (R.Add.2.) At Pamela's urging, Vernon semi-retired in 1985, when he turned 45, to help raise their family of seven children, who then ranged in age from 13 to 20. (*Id.*) Another reason Pamela wanted Vernon to retire early was because her father, Lowell Andreas, retired at age 50 and she wanted the same for her husband and their now combined family. (*Id.*)

In 1998, the Stissers purchased a condominium in Florida in the same development where Pamela's parents lived. (R.Add.4.) In applying for a mortgage for the condominium, the Stissers listed several assets, all – or virtually all – of which were

² The judgment from which this appeal arises relates to district court orders filed July 2, 2009 and June 14, 2010. Appellant's Statement of Facts references several prior orders but then correctly states that appeals were not taken from those prior orders. (App. Br. 3-7.) Nevertheless, Appellant's Brief proceeds to state a litany of facts relevant only to those prior orders for no apparent reason other than to try to tarnish Vernon's reputation. Issues related to matters resolved in those prior orders are not before this Court. Nor is the district court's ruling on litigation expenses (Add. 79-82) relevant because Vernon did not appeal the district court's denial of litigation expenses. Nor did he appeal the right to estate tax refunds or reimbursement for his attorneys' and expert fees incurred in the district court or in Florida and Illinois courts even though the Trust Agreement directed such payments.

owned solely by Pamela or were held in the Trust for her benefit. (*Id.*) Thus, the lending bank relied upon the assets in Pamela's Trust in granting the loan. Had the Stissers not listed these assets on the mortgage application, they likely would not have been able to finance the purchase, especially since Vernon was not working at the time. (*Id.*) For the last 13 years of their marriage, the Stissers lived on Vernon's accumulated savings and distributions from Pamela's Trust. (R.Add.2.)

The Stissers made a joint last will dated January 19, 1987 ("Joint Will"). (AA161-63.) The Joint Will, which was handwritten and properly executed and witnessed, states that "each of us wishes the proceeds of our individual estate go to the surviving spouse. . . ." (AA161.) The Joint Will provides that upon the first spouse's death, the deceased spouse's entire estate goes to the surviving spouse, and that upon the second spouse's death, his or her entire estate is to be divided equally among their seven children. (*Id.*) The Joint Will nominates the surviving spouse to serve as the personal representative of the deceased spouse's estate. (*Id.*)

The Pamela Andreas Stisser Grantor Trust

When Pamela was a minor, her parents funded an irrevocable trust for her benefit. (Add.50.) The funds from that irrevocable trust were transferred to the Pamela Andreas Stisser Grantor Trust ("Trust"), which was created in 1966. (*Id.*) The Trust was amended in 1987 and was amended and restated in 1999 and 2001. (Add.50-51.)

The Trust, as amended and restated, provides that after Pamela's death the assets of the Trust shall be divided equally among Vernon and Pamela's seven children. (Add.51.) Section 12.4.5 of the Trust Agreement provides that Vernon is not a

beneficiary of the Trust, but the trust instrument expressly provides for payment of certain expenses of Pamela's fiduciary, defined in Section 13.6 as "any Trustee of any trust created hereunder and any personal representative of my estate." (AA29-30 (emphasis added).) The parties do not dispute, and the district court concluded, that Vernon is a "fiduciary" within the meaning of the above language in the Trust Agreement. (Add.95.)

The Trust states that the "legal representative of my estate" – i.e. Vernon Stisser – is entitled to reimbursement from the Trust for "expenses of administration," "my legal debts," "litigation expenses," and fiduciary compensation:

3. Payments. After my death, the Trustees shall make distributions from the remaining trust estate, including all property that becomes distributable to the Trustees at or after my death, as follows:

3.1 Expenses and Taxes. The Trustees shall, if requested by the legal representative of my estate, or in their own discretion may, pay the following expenses, debts and taxes, directly or through the legal representative of my estate by way of advancement to or reimbursement of said legal representative:

3.1.1 Expenses. The expenses of my last illness, funeral, burial or other disposition, unpaid income and property taxes properly chargeable against my estate, expenses of administration of my estate, including my non-probate assets, and my legal debts.

....

11. Fiduciary Provisions. The following provisions shall govern the fiduciaries:

11.1 Compensation. My fiduciaries shall be entitled to reimbursement for expenses and to receive compensation for their services. Such compensation shall be based principally upon the time and labor required in order to fulfill their responsibilities hereunder, giving due regard to the complexity and novelty of any special problems or issues encountered in the administration of my

estate or such trust, as well as the nature and extent of their responsibilities assumed and the results obtained in performing their duties.

....

11.6.8 Litigation Expenses. In the event of litigation involving my estate or any trust created hereunder, the fiduciaries shall be fully reimbursed by my estate or such trust for reasonable expenses, including attorneys' fees consistent with then prevailing customary rates for similar services, incurred by them in connection with their good faith proceedings in their capacity as fiduciaries.

(AA5, 14, 26 (emphasis added).)

From the Trust's inception until 2004, Lowell Andreas, Pamela's father, served as trustee. David L. Andreas, Pamela's brother, was appointed co-trustee in 2003. When Lowell Andreas stepped down as trustee in 2004, David Andreas became the sole Trustee of the Trust.

Pamela Stisser's Death and the Trustee's Refusal to Pay Debts

In 2000, Vernon began experiencing significant health problems, including a ruptured aortic aneurysm (which required a significant stay in an intensive care unit), kidney failure (necessitating a kidney transplant), and Crohn's disease. (R.Add.4-5.)

Pamela also had serious health issues, but her condition had not been diagnosed, and she and Vernon did not understand its seriousness. (R.Add.5-6.) The couple discussed what would happen if Pamela was the first to die. As Vernon stated in an affidavit to the district court:

When we discussed this possibility, Pam consistently informed me that her intention and belief was that if I survived her, the Trust would pay off all of our joint debts (for example, the debt on our [Illinois] house and the [Florida] residence, among others), and that I would be left debt free. I

understood that part of the reason this was Pam's intention was that she knew I agreed to undertake many of these joint debts so that she could have the type and quality of homes, for example, that she wanted and had grown accustomed to throughout her life.

(R.Add.6 (emphasis added.)) Pamela died suddenly on November 17, 2002. (*Id.*)

After Pamela's death, the Trustee paid some of her legal debts as required under Sections 3.1 and 3.1.1 of the Trust Agreement, including funeral expenses and estate taxes. (RA1-8.) Vernon asked the Trustees to pay additional debts, including a margin loan in the amount of approximately \$1.7 million secured by Pamela's Charles Schwab equity account; a mortgage note with an approximate balance (as of Pamela's date of death) of \$625,000 held by Central Illinois Bank secured by the Stissers' house in Illinois; a mortgage note with an approximate balance of \$1.4 million secured by the Stissers' condominium in Florida; and a debt of approximately \$660,000 secured by a commercial property in Illinois (collectively "Secured Debts"). (Add.35.) Despite the language in the Trust Agreement directing payment of Pamela's legal debts, the Trustees refused to pay the full amount of the above debts. (Add.54.) Vernon and the Trustees were unable to reach agreement on payment. (Add.55-56.)

The Litigation

After Pamela's death, Vernon became involved in litigation in Illinois, Florida, and Minnesota concerning the venue of Pamela's estate, who would serve as personal representative, and whether the estate was entitled to certain funds from the Trust. Both the Trustee and Vernon, in his capacity as personal representative of Pamela's estate, brought trust petitions – the Trustee in Hennepin County District Court and Vernon in the

Florida court – for instructions as to whether the estate or the Trust was entitled to keep a federal estate tax refund. (Add.62.)

As described in the Statement of the Case, Vernon, in his capacity as personal representative of Pamela's estate, filed a Petition in the Hennepin County District Court asking that the Trustee be ordered to pay Pamela's debts pursuant to Section 3.1.1, pay compensation for Vernon's services as personal representative of the Estate pursuant to Section 11.1, and pay other "expenses of administration" and "litigation expenses" pursuant to Sections 3.1.1 and 11.6.8, respectively. (AA34-35.)

As also referenced in the Statement of the Case, in an Order dated July 2, 2009, the district court granted partial summary judgment to the Trustee and concluded that the Trustee was not required to pay Pamela's secured debts, neither the Schwab margin loan nor the Florida and Illinois mortgages. (Add.43-46.) The remaining issues relating to the personal representative's petition for compensation as personal representative, reimbursement of the estate for administration expenses and litigation expenses were tried by the court in a bench trial in November and December 2009. In its Findings of Fact, Conclusions of Law, and Order filed June 14, 2010 the district court concluded that (1) the Trustee was not required to pay the secured debts; (2) Vernon was not entitled to any compensation as personal representative; and (3) the Trustee was required to pay certain administrative expenses incurred by the estate, but not attorneys' fees of the estate's Florida probate counsel, Laird A. Lile. (Add.49-102.)

In a May 31, 2011 decision, the court of appeals reversed in part, holding that because the "pay my legal debts" directive is unambiguous, the district court erred by

concluding that the margin loan debt was not to be paid. The court of appeals also held that the district court erred by relying on a “non-exoneration” statute that is part of Minnesota’s Probate Code but is not contained in the Minnesota trust statute. (Add.6-7.) However, the court also held that because the mortgage debts were not secured by probate assets, the Trust was not obligated to pay those debts. (Add.8.) Applying an abuse of discretion standard, the court of appeals deferred to the Trustee, and affirmed the Trustee’s decisions to deny Vernon any personal-representative compensation and his refusal to pay any of Lile’s fees, despite recognizing that both denials were “harsh.” (Add.10-13.)

SUMMARY OF THE ARGUMENT

It is a basic principle of Minnesota trust law that a trust should be construed in order to effectuate the intent of the grantor. *In re Trusteeship Under Agreement with Mayo*, 259 Minn. 91, 95, 105 N.W.2d 900, 903 (1960); *In re Cosgrave’s Will*, 225 Minn. 443, 448, 31 N.W.2d 20, 25 (1948); *see also* App. Br. at 24 and cited cases. If a grantor’s intent can be determined by the clear and unambiguous language of the trust instrument, then the Court should determine such intent based on the four corners of the trust agreement. *In re Trust Created by McLaughlin*, 361 N.W.2d 43, 44-45 (Minn. 1985). Only if the trust’s language is ambiguous should a court look to extrinsic evidence to determine the grantor’s intent. *Id.* If the language is ambiguous, then the court cannot resolve disputed issues of fact. Minn. R. Civ. P. 56.03. Therefore, district courts cannot make findings of fact when deciding a motion for summary judgment. *See J.E.B. v. Danks*, 785 N.W.2d 741, 747 (Minn. 2010). Those disputes must be left for trial.

In light of these principles, the court of appeals correctly held that the Trust Agreement's directive to pay "my legal debts" is unambiguous and required the Trustee to pay Pamela's Schwab margin loan debt upon her death. However, the court of appeals should have applied the same principle to Vernon and Pamela's mortgage debts that were secured by real property. The Trustee attempts to inject the Minnesota Probate Code's non-exoneration statute into this appeal, but the non-exoneration statute is contained in the Probate Code, and has no application to construction of a trust. If the legislature concludes that the trust statute should include such a provision it can enact one, but as it stands, Minnesota's trust law does not contain a non-exoneration provision. Thus, this Court should hold that Pamela's direction to her Trustee to "pay my legal debts" means what it says, and that both the Schwab margin loan and Vernon and Pamela's joint mortgage loans should be paid by the Trust.

Alternatively, if this Court believes that Pamela's intent is ambiguous and cannot be ascertained from the plain language of the trust instrument, then the Court must consider extrinsic evidence. As will be described below, the only such evidence in the record was Vernon's unrebutted affidavit and his deposition testimony stating that Pamela intended the trust language to require payment of her debts, and the couple's joint debts, so that Vernon would not be left with huge obligations in the event of her prior death. This testimony was not rebutted by any competent evidence showing a contrary intent. Thus, if the language of the trust instrument is deemed to be ambiguous, then a holding that the Trustee must pay both the Schwab loan and the mortgage debts is also mandated by the undisputed extrinsic evidence.

The one result that cannot be justified under either the law or the summary judgment record is a holding that pay “my legal debts” means the opposite of what it says, and that the language clearly and unambiguously excludes payment of secured debts. The district court reached such a conclusion – holding that “legal debts” excludes secured debts – improperly making findings of fact on the cross-motions for summary judgment, and discerning its own view of Pamela’s intent by looking at the value of the Trust and estate assets at the time of her death, and finding that she must have intended to equalize distributions to Vernon and to the seven children. (Add.35-37.)

However, at the time Pamela restated her Trust in 2001, she had no way of knowing what the value of the Trust or estate assets would be at the time of her death. The district court’s purported findings concerning Pamela’s intent are not only outside of the summary judgment record, but they are also based upon pure speculation and conjecture as to what Pamela might have been thinking, without any support in the record.

The district court’s effort to extrapolate Pamela’s intent based upon date of death values of her Trust and estate was clear error. Thus, summary judgment in favor of the Trustee cannot be affirmed. Alternatively, if there any ambiguity that is not resolved by the summary judgment record, then this Court should remand to the district court for further findings concerning Pamela’s intent.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRUST AGREEMENT’S PLAIN LANGUAGE CONTROLS AND REQUIRES PAYMENT OF PAMELA’S MARGIN LOAN DEBT

There is no dispute the Charles Schwab account was in Pamela Stisser’s name alone and she was the sole obligor on a margin loan of approximately \$1.7 million secured by the account. Nor is there a dispute that the margin loan debt constitutes a “legal debt” of Pamela’s. The Trustee concedes in his deposition that the Schwab loan is Pamela’s legal debt. (RA16.)

The sole issue for which the Trustee sought review is whether the margin loan debt is among Pamela Stisser’s “legal debts” that the Trust is obligated to pay. The relevant language is Section 3.1.1 of the Trust Agreement, which states:

3. Payments. After my death, the Trustees shall make distributions from the remaining trust estate, including all property that becomes distributable to the Trustees at or after my death, as follows:

....

3.1.1 Expenses. The expenses of my last illness, funeral, burial or other disposition, unpaid income and property taxes properly chargeable against my estate, expenses of administration of my estate, including my non-probate assets, and my legal debts.

(AA5-6 (emphasis added).)

Applying this Court’s settled precedent, the court of appeals correctly held that the language means what it says – that the Trustee is required to pay Pamela Stisser’s debts, and that the Trust had an obligation to pay Pamela’s margin loan debt upon her death.

(Add.5-7.) That conclusion must be affirmed.

A. Standard of Review

A district court's order for summary judgment is reviewed *de novo* and the Court determines whether the law was properly applied and whether there were genuine issues of material fact that precluded summary judgment. *Allen v. Burnet Realty, LLC*, 801 N.W.2d 153, 156 (Minn. 2011). When a lower court has interpreted an unambiguous written document such as a trust agreement, the standard of review is *de novo*. See *Nat'l City Bank v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 175 (Minn. 1989) (insurance contract); *Horton Mfg. Co. v. Tol-O-Matic Inc.*, 973 F.2d 649, 650 (8th Cir. 1992) (stipulation subject to interpretation under Minnesota law).

B. Because the Trust Agreement Is Unambiguous, Words Cannot Be Substituted and/or Inserted into It

During the cross-motions for summary judgment, the parties agreed that the Trust Agreement is unambiguous. (App. Br. 8.) It was the district court that strayed from the plain language by considering evidence outside of the summary judgment record in an effort to ascertain Pamela's intent through a mathematical analysis of date of death values and its own view of what would be a fair result. (Add.35-37.)

The court of appeals recognized and corrected this error. The court of appeals holding is correct because "[w]here the language of the trust instrument is not ambiguous, the intent of the settlor must be ascertained from the four corners of the agreement, without resort to extrinsic evidence of intent." *In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 44-45 (Minn. 1985). "One of the court's highest duties is to give effect to the donor's dominant intention as gathered from the instrument

as a whole.” *In re Mayo*, 259 Minn. at 95, 105 N.W.2d at 903 (citation and footnote omitted).

The Trust Agreement could not be more clear. It states that after Pamela’s death, the Trustee is obligated to pay “my legal debts.” No one disputes the fact that the Schwab margin loan was legal debt, and that it was Pamela’s debt alone. The Trustee essentially conceded this fact by agreeing that the margin loan debt constitutes “legal debt.” (RA16.) Yet the district court ignored the plain language and concluded that Pamela did not intend for the Trust to pay the margin loan debt. In effect, its decision made Vernon responsible to pay the margin loan even though it was not his debt. But the district court never even made a finding that the language was ambiguous as would be required before extrinsic evidence could be examined. *McLaughlin*, 361 N.W.2d at 44-45. Nor did the district court examine any such evidence in the record to arrive at its summary judgment ruling.

What the Trustee sought, and what the district court in effect did, was to alter the Trust Agreement’s directive to pay “my legal debts” to insert the word “unsecured” before the word “legal.” This was error because “[i]n arriving at the intent of the settlor of a trust the court is not at liberty to disregard the plain language of the terms employed in the trust instrument; to insert or add words thereto; to substitute other words for those used therein; or to engraft inconsistent limitations thereon.” *In re Fiske’s Trust*, 242 Minn. 452, 460, 565 N.W.2d 906, 910 (1954) (emphasis added).

The district court acted outside of its authority and created a common law rule, based on no precedent, that when a trust directs that debts be paid, this means that only

unsecured debts are to be paid. The court of appeals correctly reversed this error, and the Trustee provided no authority demonstrating that the district court should be affirmed. To the contrary, precedent dictates that in trust documents, “[i]t is fundamental that words used must be given their ordinary meaning unless it clearly appears that they were otherwise used or that an unreasonable or absurd result will follow therefrom.” *Id.*, 65 N.W.2d at 911.

Pamela was a layperson who would have known and used the ordinary meaning of “debts.” The dictionary meaning of a “debt” is “something owed.” Webster’s 9th New Collegiate Dictionary 328 (1989). In the legal context, “debt” is broadly defined to include “a specific sum of money due by agreement or otherwise.” Black’s Law Dictionary 432 (8th ed. 2004). No legal authority or any facts in the record suggest that Pamela defined “debt” differently than the dictionaries do.

There is nothing in the record to suggest Pamela distinguished or had the intent to distinguish between secured and unsecured debts. As the dissent correctly stated, the “grantor was not an attorney nor is Stisser.” (Add.15.) Accordingly, it is neither unreasonable nor absurd to conclude that Pamela’s margin loan debt should be paid from her principal source of income throughout her adult life: the Trust.

Chapter 501B of Minnesota Statutes, which governs trusts, does not define “debt,” likely because doing so would be superfluous. But other statutes define “debt” broadly. The Revenue Recapture Act defines a “debt” as “a legal obligation of a natural person to pay a fixed and certain amount of money.” Minn. Stat. § 270A.03, subd. 5(a). A Mortgage Registry Tax statute defines “debt” as “the principal amount of an obligation to

pay money that is secured in whole or in part by a mortgage of an interest in real property.” Minn. Stat. § 287.01, subd. 3. And in interpreting this language, this Court has held that “[t]he definition of ‘debt’ in the Mortgage Registry Tax statute does not appear to be limited to secured debt.” *Business Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). If a mortgage statute’s definition of “debt” is read to include even unsecured debt, unquestionably the term “debt” must be given its plain and ordinary meaning in a Trust Agreement to include secured debt.

The Trustee repeatedly suggests that section 12.4.5 of the Trust Agreement, which excludes Vernon as a beneficiary, is important, but the question of who is entitled to receive the proceeds of a trust after payment of debts and expenses of administration is wholly separate from the question of what debts and expenses of administration first must be paid. It is undisputed that the seven Stisser Children were to receive the proceeds of the Trust, but only after payment of the obligations set forth in the instrument, including the obligation to pay legal debts. Pamela’s intentions were clear. Accordingly, the Court should affirm the court of appeals’ conclusion that the plain language of the Trust Agreement controls and that the district erred by ruling that the Trust was not to pay Pamela’s margin loan debt.

C. The Doctrine of Non-Exoneration Is Part of the Minnesota Probate Code and Has No Relevance to the Trust Agreement’s Directive to “Pay My Legal Debts”

The Trustee and the court of appeals’ dissent suggest that despite the plain language of the trust instrument, that the doctrine of “non-exoneration” is determinative because under the common law, only debts associated with gifts of land were exonerated.

(App. Br. 24-33; Add.17.) The Trustee’s theory is that the district court properly refused to give effect to the “pay my legal debts” language because the brokerage account securing the Schwab margin loan was not real property. The Trustee and dissent further suggest that the district court properly looked to a “non-exoneration” statute in the Minnesota Probate Code to ascertain Pamela’s intent with respect to the Trust’s payment of her debts.

There are four main problems with these arguments. First, the doctrine of exoneration and the Minnesota non-exoneration statute are irrelevant. The common law doctrine of exoneration applies to a bequest under a will where the property to be inherited is subject to a mortgage or security interest. The issue in such a case is whether the personal representative of the estate must use estate funds to satisfy the indebtedness. Here, in contrast, the issue is the interrelationship between two distinct testamentary instruments, a will and a Trust, where the Trust specifically directs the Trustee to pay certain obligations of the estate. What is at issue here is a question of Pamela’s intent – a matter of trust construction – not application of the common law principle of exoneration or the Probate Code’s non-exoneration statute. No state non-exoneration statute has ever been applied in this context.

Second, even if exoneration principles were to apply, requiring a trust to pay the grantor’s debts is consistent with the common law of exoneration.

Third, the non-exoneration statute is entirely a creature of statutory law, and while Minnesota’s Probate Code has a non-exoneration provision, the trust statute does not.

Finally, because the legislature had not even enacted the non-exoneration statute at the time this Trust's "pay my legal debts" language was first written, it cannot have any relevance in determining Pamela's intent.

1. The Issue Here Is Pamela's Intent, Not Principles of Exoneration or the Probate Code's Non-Exoneration Statute

The Trustee devotes a substantial portion of his brief to discussing the common law doctrine of exoneration and the operation of Minnesota's anti-exoneration statute, including a claim that the court of appeals construction of the trust instrument would lead to significant confusion as to the proper interpretation of both wills and trusts. (App. Br. 24-33 & 43-44.) But, the reality is that this is not an exoneration case. The facts here are quite unusual so that a holding that the Trust is required to pay the Schwab margin loan or the real estate mortgages would narrowly apply to the rather unique circumstances presented here. What is at issue is reconciling the dispositive provisions of a will that was executed in 1987, and a Trust that was restated 14 years later, and construing the Trust's meaning in light of those two documents.

The common law of exoneration involves obligations within a single dispositive instrument, i.e., the right of a beneficiary of an estate to ask the personal representative or trust estate to pay secured obligations so that the beneficiary can take free and clear of liens. See, e.g., *Estate of Peterson*, 365 N.W.2d 300, 303 (Minn. Ct. App. 1985) (articulating common law of exoneration with respect to real property). That is not what is an issue here. Rather, this is a request from one fiduciary to another (from the personal

representative of the estate to the Trustee) that the Trust pay obligations of the estate under Pamela's directive in paragraph 3.1.1 of the Trust Agreement.³

The issue is a search for Pamela's intent based on the language in the Trust Agreement – or if this Court deems the language to be ambiguous – a search for her intent based on a review of extrinsic evidence. That question should be addressed by applying principles of trust construction, not common law principles of exoneration. Exoneration is simply a default rule to help ascertain the grantor's intent when it cannot be determined based on the language of the trust instrument or by extrinsic evidence. *See J. Kraut, Annotation, Right of Heir or Devisee to Have Realty Exonerated from Lien Thereon at Expense of Personal Estate*, 4 A.L.R.3d 1023, § 1 (1965 & Supp.) (explaining annotation does not include cases where will showed express intent by testator to have encumbrances discharged from testator's personal property). Here, as discussed above, Pamela's intent can be determined from the plain language of the trust instrument.

Pamela's intent can also be determined from the extensive factual record indicating that Pamela and Vernon incurred most of their debts that are in dispute based

³ Although the Trustee now argues that the request to pay the Schwab loan was made by Vernon personally (App. Br. 44-45), the Trustee accurately notes that, "[t]he District Court did not make any legal or factual finding in this respect." (App. Br. 45 n.23.) With no finding, there would be nothing for the Court to review even if the district court had mentioned the issue, which it did not. *See, e.g., Lemley v. Lemley*, 290 Minn. 525, 525-26, 187 N.W.2d 136, 136 (1971) (per curiam) ("This court cannot review an order ... if there are no findings of fact to show the basis for the order."). In fact, Vernon's petition was filed in his capacity as personal representative of the Pamela Stisser estate. (AA34), and the Trustee agreed that Vernon had been appointed personal representative (AA237). Further, the Trustee's Petition for Review demonstrates that he did not seek this Court's review of any legal issue involving the purported error by the court of appeals in treating Vernon as making his Schwab claim in his representative capacity as Minn. R. Civ. App. P. 117, subd. 3(a) required.

on credit backed by her Trust. Pamela also told Vernon that he would be debt free if she were the first to die. (R.Add.2, 6, 13-14.) The typical canons that govern trust construction – the plain language rule, construing trust language on the basis of the four corners of the instrument if the language is unambiguous, and by looking at extrinsic evidence if it is not – are what control here, not common law principles of exoneration.

The Trustee argues that affirming the court of appeals decision would create uncertainty and confusion as to the proper interpretation of both wills and trusts. (App. Br. 43-44.) However, the facts of this case are unique, both because of the extensive factual record showing that Pamela intended the language of the trust instrument to leave Vernon debt free upon her death and because of the existence of both a will and a Trust with separate dispositive provisions, drafted years apart. Typically, whenever a revocable trust is created disposing of significant portions of the grantor’s property, there is almost always a “pour over” will that directs that any assets in the grantor’s sole name that pass under the will go to the trust.⁴ In other words, the trustee is almost always the beneficiary of the pour over will so that any assets in the grantor’s sole name wind up passing under the dispositive provisions of the trust.

That did not occur in this case. The Stissers had no pour over will, and the record does not reflect the reason why. In virtually all cases, the substantive dispositive provisions of a decedent are expressed either in a will that disposes of most of the

⁴ A pour over will is “[a] will giving money or property to an existing trust.” Black’s Law Dictionary 1630 (8th ed. 2004); *see also Morrison v. Doyle*, 582 N.W.2d 237, 239 (Minn. 1998) (describing “pour-over” will where decedent “devised the residue and remainder of her estate into a trust that she had previously created”).

decedent's assets or in a revocable trust accompanied by a pour over will. There are unlikely to be many future cases where there are dispositive provisions in a will that leave property to a beneficiary that is encumbered by a debt, where there is not a pour over will, and there is a trust directing the payment of debts. The cases governing both exoneration and non-exoneration are inapplicable to this unique situation. A holding that Pamela intended to have her Trust pay her debts so that her husband would not be left with large obligations that were incurred at her request, based on the credit of her Trust, would have little or no impact on future cases.

2. Requiring the Trust to Pay Pamela's Debts Is Consistent With the Common Law of Exoneration

Even if the doctrine of exoneration has some application here, it does not support the Trustee. The Trustee traces the roots of the common law doctrine of exoneration to English common law, which recognized “the especially high value that English society placed upon real estate and the relatively low value placed on all forms of personal property.” (App. Br. 27.) According to the Trustee, because the margin loan debt was secured by personal property and not by real property, the debt cannot be “exonerated.” Therefore, under the Trustee's theory, “[t]he Court of Appeals' decision effectively (but erroneously) expanded the abrogated presumption of exoneration to revocable trusts, even though no presumption of exoneration by a trust ever existed at common law.” (App. Br. 41.) Of course, under the same reasoning, the common law of exoneration would cover the Illinois and Florida real estate mortgages that are also in issue in this case, and the non-exoneration provision in Minnesota's Probate Code would not abrogate

the common law because that statute applies only to assets passing as specific devises under the Probate Code, not to trust construction. *See* § I.B.3, *infra*.

The basic problem with the Trustee's argument is that it ignores the plain language of the Trust Agreement. For all intents and purposes, "exoneration" is synonymous with payment of debt, and as the court of appeals correctly held, the Trust Agreement plainly directed the payment of all debts irrespective of the common law. The court of appeals recognized this basic principle by citing this Court's precedent in *McLaughlin*, which states a district court errs by resorting to extrinsic evidence when the trust document's language is unambiguous.

Further, the Trustee's reference to English common law is telling. Inherent in the argument that real property was accorded "especially high value" in English society is the realization that personal property has taken on increased significance in today's American society, such that a trust grantor's "general directive" to pay debts should be fully and broadly enforced and applied to "exonerate" even debt secured by personal property.

This reality is reflected in the very lifestyle the Stissers were fortunate enough to enjoy. At Pamela's urging, Vernon retired from his lucrative career at age 45 to help take care of the children. (R.Add.2.) The resultant margin loan debt was Pamela's debt. (R.Add.2.) If Pamela had intended that Vernon take the Charles Schwab account subject to significant debt when she died, she would and could have said so.

To try to demonstrate what the law should be with respect to trusts, the Trustee and district court relied on the opinion of the Trustee's expert Amy Morris Hess, one of

the editors of the treatise commonly known as *Bogert on Trusts and Trustees*. The Bogert treatise contains a form will – to be used when creating a testamentary trust – that contains the following language: “My executors shall pay my debts (other than debts secured by life insurance or by real property, whether held by me individually or otherwise)” George Gleason Bogert et al., *The Law of Trusts and Trustees* § 1040 (2010 ed.) (emphasis added).

The implication of this language is that, without the modifying parenthetical excluding secured debts, the phrase “My executors shall pay my debts” by itself applies to all debts. A grantor who wants to limit the directive to pay debts to unsecured obligations can and should use language similar to that contained in the Bogert treatise. Accordingly, in light of the form will language in the Bogert treatise, “pay my debts” is not – as the Trustee argues – a throwaway phrase that has lost its meaning over the years. Rather, it should be construed to require payment of secured or joint debts.

3. The Probate Code’s Non-Exoneration Provision Does Not Apply to Trusts

The heart of the Trustee’s exoneration argument is that the district court correctly turned to the Probate Code’s non-exoneration provision to gauge the “history, purpose, and commonly-used meaning of a general directive to pay debts.” (App. Br. 21.) The provision at issue is Minn. Stat. § 524.2-607, which states: “A specific devise passes subject to any mortgage or security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.”

But the Probate Code applies only to wills. Minn. Stat. § 524.2-601. As the court of appeals explained, “[t]he trustee concedes that Minn. Stat. § 524.2-607 does not apply to trusts.” (Add.5.) Chapter 501B of Minnesota Statutes applies to trusts, and it is silent on exoneration and non-exoneration. For this basic reason, the Trustee’s argument that the Probate Code’s non-exoneration statute should also apply to trusts is simply wrong.

What the Trustee appears to suggest is that the Court consider § 524.2-607 not to ascertain Pamela’s intent regarding the Trust, but rather to predict the legislature’s intent with respect to the trust statute. The Trustee asks this Court to assume the legislature wants a non-exoneration provision for trusts even though the Trustee has provided no legislative history suggesting that the legislature ever considered such a provision.

The Trustee claims “[t]here is no reason that a general directive to pay debts should be read any differently depending on whether it is in a will or a trust.” (App. Br. 21.) But that is an issue for the legislature. Furthermore, this Court has specifically distinguished between probate and trust matters and has unambiguously rejected the exact argument that the Trustee makes here. For example, in *U.S. v. O’Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994), the court characterized the Probate Code’s definition of “property” as of “little help in discerning the nature of undistributed discretionary trust assets.” Against this authority, the Trustee’s suggestion that the line between trusts and estates should be blurred lacks merit.⁵

⁵ Many provisions in the Minnesota Probate Code do not apply to trusts. For example, a will lacking two witnesses’ signatures is invalid under Minn. Stat. § 524.2-502, but “[a] trust does not require the formalities of witnesses, attestation, and notarization which safeguard a testator’s wishes for the disposition of his or her estate.” 76 Am.Jur.2d

The Trustee suggests that because this Court issued a holding 98 years ago in which it characterized a will's general directive to pay debts as "a well-worn stereotyped expression that really means nothing," similar but not identical language can be ignored and/or rewritten in a trust agreement. (App. Br. at 25 (quoting *In re Norseth's Estate*, 121 Minn. 104, 110, 140 N.W. 337, 339 (1913).) The policy-based problem with the Trustee's argument is two-fold. First, *In re Norseth's Estate* involved a will, not a trust, and much more recently this Court has unambiguously differentiated between the two. *O'Shaughnessy*, 517 N.W.2d at 577. Second, the legislature enacted the non-exoneration statute to require more specificity when a testator intends for debts in a will to be exonerated. The legislature has simply failed to enact such a provision in the trust statute.

The Trustee and district court both relied on the court of appeals' decision in *Estate of Peterson*, 365 N.W.2d 300 (Minn. Ct. App. 1985), to contend that the Trust should not pay Pamela's secured debts. But, *Estate of Peterson* is not precedential in this Court. See *In re Collier*, 726 N.W.2d 799, 806 (Minn. 2007) (court of appeals cases "do not constitute precedent for the purpose of our court's jurisprudence").

Nor does *Estate of Peterson* provide persuasive support for the Trustee's position. In reversing the district court here, the court of appeals did not even cite its own published authority – likely because the real property in *Peterson* passed under a will,

Trusts § 63. A person is deemed competent to make a will if he or she has minimal knowledge of his or her assets and the natural objects of his or her bounty. See, e.g., *In re Estate of Congdon*, 309 N.W.2d 261, 266 (Minn. 1981). However, "a valid trust can be created only where the trustor or settlor has the legal competence to make a contract and to make a disposition of the legal title to the property." 76 Am.Jur.2d Trusts § 49.

and the holding is simply that the non-exoneration statute in the Probate Code prohibits payment of the mortgage debt that encumbered such property. The only issue was whether the mortgage was covered by the non-exoneration statute because it passed under the residual clause of the decedent's will rather than as a specific devise.

The Trustee cites decisions from New Jersey, Georgia, Nebraska, Tennessee, Alabama, California, and Florida where courts and legislatures have required various levels of specificity for exoneration of debts in wills. (App. Br. 31-33.) But several states have held the opposite: “[T]he presence in a will of a clause generally directing the payment of the testator’s debts has been held in many other cases to include debts secured by a mortgage lien on real property, so as to show an intention by the testator to have the devisee of such encumbered realty take it exonerated of the lien at the expense of the decedent’s personal estate.” J. Kraut, Annotation, *Right of Heir or Devisee to Have Realty Exonerated from Lien Thereon at Expense of Personal Estate*, 4 A.L.R.3d 1023, § 14 (1965 & Supp.); *see also Succession of Thoms*, 298 So. 2d 731 (La. 1974) (provision directing “all just debts” be paid out of residuary estate construed as express disposition to pay both secured and unsecured debts); *In re Miller’s Estate*, 127 F. Supp. 23 (D.D.C. 1955); *In re Brackey’s Estate*, 147 N.W. 188 (Iowa 1914) (provision directing executor to first pay all just and lawful debts which did not differentiate between secured and unsecured debts construed to require exoneration of mortgage from estate).

Furthermore, the Trustee’s cited cases involve wills, not trusts. The Trustee provides no authority demonstrating that even one jurisdiction has created common-law

non-exoneration rules involving trusts, let alone a majority of jurisdictions. Nor has the Trustee cited even one non-exoneration statute applicable to trusts.

This Court acts with exacting caution when expanding the bounds of common law. *See, e.g., Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234-35 (Minn. 1998) (joining “vast majority of jurisdictions” to make Minnesota 48th state to recognize common-law right to privacy). Minnesota should not be the first state to intrude on an area of law normally left for the legislature by enacting a common-law non-exoneration rule.

4. The Nonexoneration Statute Cannot Be Used To Determine Pamela’s Intent Because That Statute Did Not Exist When the “Pay My Legal Debts” Language Was First Used in the Trust Agreement

Finally, even if the non-exoneration provision in Minn. Stat. § 524.2-607 can be read to provide insight into the legislature’s general intention regarding debt exoneration, it is impossible to conclude that the statute could have provided insight into Pamela’s intention regarding “exoneration” of her debts. As the dissent acknowledged, the Trust Agreement’s “pay my legal debts” language “was contained in grantor’s original trust in 1966, and it remained in her trust without amendment, despite two marriages and two amendments made to other provisions in the trust.” (Add.14.) But the non-exoneration statute did not take effect until a full decade later.

The non-exoneration statute was enacted in 1975 when Minnesota adopted Article 2 (“Intestate Succession”) of the Uniform Probate Code. Act of June 5, 1975, ch. 347, § 22, 1975 Minn. Laws 1024, 1029 (codified at Minn. Stat. § 524.2-609 (1976)). Its

effective date was January 1, 1976.⁶ *See id.*, 1975 Minn. Laws at 1104. Accordingly, the non-exoneration statute, now found at Minn. Stat. § 524.2-607, “has no application to this case.” *State v. Nesgoda*, 261 N.W.2d 356, 357 (Minn. 1977) (holding criminal statute enacted in 1976 “has no application to this case” where crime occurred in 1975).

Even if the non-exoneration provision had some application, by its plain language, the statute applies only to a “specific devise.” Minn. Stat. § 524.2-607. The Schwab account was not a specific devise because it was not mentioned in the Joint Will. Rather, it passed to Vernon under the residuary clause of the Joint Will. (AA161-63.) And the fact that the legislature enacted a non-exoneration statute in the Probate Code – and amended it in 1994 to add mortgages – only highlights the absence of such a statute governing trusts.

Accordingly, judicial enactment of a common law non-exoneration doctrine would be unwise, unnecessary, and unauthorized in light of the deference the Court generally affords to the legislature in such policy matters. *See, e.g., Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 128 n.8 (Minn. 2007) (“the question whether paid time off wages should be regulated in the same manner as ordinary wages is a policy matter for the legislature to address”).

⁶ At the time, the statute read: “A specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.” Minn. Stat. § 524.2-609 (1976). In 1994, the non-exoneration statute was amended (and renumbered as Minn. Stat. § 524.2-607) to specify that “a specific devise passes subject to any mortgage or security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.” Act of Apr. 18, 1994, ch. 472, § 54, 1994 Minn. Laws 375, 411 (emphasis added).

D. The Trust Is Not a “Will Substitute” to Which the Probate Code Applies

Additionally, the Trustee contends the Trust is a “will substitute” to which the non-exoneration provision would apply. (App. Br. 36-38.) A will substitute is “[a] document or instrument that allows a person, upon death, to dispose of an estate in the same or similar manner as a will but without the formalities and expenses of a probate proceeding.” Black’s Law Dictionary 1631 (8th ed. 2004). The Trustee cites the Uniform Trust Code (UTC) for the proposition that the rules of construction that apply to the disposition of property by will also apply to the disposition of trust property. (App. Br. 38.) But the UTC has not been adopted in Minnesota.

More importantly, as the court of appeals held, the Pamela Stisser Trust is not a will substitute as to Vernon Stisser. (Add.6 n.2.) Some of Pamela’s assets passed to Vernon under her 1987 will, and other assets passed to her children and Vernon’s children under the 2001 Trust. The Trustee cites no authority suggesting a decedent properly disposes of an estate through both a will and a will substitute, and the court of appeals did not err by rejecting the Trustee’s argument that the Trust was a will substitute as to Vernon. (Add.6.) Furthermore, as described above, this case is quite unusual because typically when there is a revocable trust disposing of a significant portion of a decedent’s estate, there is also a pour over will so that the trust typically is the exclusive substantive testamentary instrument. Here, there is both a will and a trust with separate dispositive provisions.

The Trustee cites Restatement (Third) of Property § 7.2, which states that although will substitutes need not comply with statutory formalities for a will, will substitutes are subject to “rules of construction ... applicable to testamentary dispositions.” (App. Br. 37-38.) But rules of construction are not substantive statutory rules. All this Restatement provision says is that will substitutes, like wills, must be interpreted to give effect to their plain language.

Further, even if the Trust could be considered a “will substitute,” it would be subject to the law of wills as it existed in 1966 when the “pay my legal debts” language was drafted. As explained above, the non-exoneration statute on which the Trustee’s theory is based did not take effect until 1976. *See* § I.C.4, *supra*.

II. THE UNDISPUTED RECORD SHOWS PAMELA’S INTENT WAS TO HAVE HER TRUST PAY HER SECURED DEBTS. ALTERNATIVELY THAT ISSUE SHOULD BE REMANDED FOR TRIAL

As demonstrated above, if the intent of the grantor cannot be ascertained from the clear, unambiguous language of the four corners of the trust instrument, then the Court should look to extrinsic evidence to ascertain the grantor’s intent. *McLaughlin*, 361 N.W.2d at 44-45. If the extrinsic evidence is clear and undisputed, then the Court may rule as a matter of law. Otherwise, it should leave the issue of intent for the trier of fact. *Id.*; *J.E.B.*, 785 N.W.2d at 747.

Here, if this Court determines that Pamela’s intent cannot be ascertained from the Trust Agreement’s plain language, the evidence in the record nevertheless reflects that Pamela intended that all of her debts, including margin loan and mortgage debts, be paid from the Trust. Thus, this Court should rule as a matter of law that the extrinsic evidence

establishes that Pamela intended that the Schwab loan and the mortgage debts be paid by her Trust.

Alternatively, this Court should hold that the district court improperly made findings of disputed fact on a summary judgment motion, and that its methodology for ascertaining Pamela's intent was applied in error. Therefore, alternatively, the case should be remanded for trial on the issue of Pamela's intent.

A. Vernon's Undisputed Affidavit and Deposition Testimony Demonstrate Pamela's Intent and the Trustee Failed to Meaningfully Refute This Sworn Testimony

In his brief, the Trustee argues that the common law of exoneration was abrogated because of the belief that the rule "frustrates the intent of most testators" who would not want secured debts to be satisfied at the expense of other beneficiaries. (App. Br. 28.) But, as both parties have agreed, exoneration is a default rule, and what ultimately controls is the intention of the particular grantor who created the trust in issue, not the intent of "most testators." (App. Br. 24; p. 12 *supra*.)

At the summary judgment stage, both Vernon and the Trustee submitted affidavits in an effort to show Pamela's intent. Vernon's sworn affidavit stated that Pamela wanted to incur the debts that are in dispute so that the couple could enjoy the style of homes to which she had become accustomed. Vernon further attested that Pamela intended for the Trust to pay the joint debts after she died. (R.Add.6, 13.) Vernon also explained that he had agreed to incur the joint obligations because of Pamela's assurance that if something happened to her, the Trust would pay the obligations. (*Id.*) It is undisputed that the debts were incurred in the first place because lenders loaned in reliance upon the value of

Pamela's Trust, and the expectation that the Trust would pay Pamela's individual debts, and Pamela and Vernon's joint debts, in the event of Pamela's death. (R.Add.4, 6.)

In addition, in Vernon's deposition he testified that Pamela left her Trust assets to their seven children because she believed the language of the Trust would leave him "debt free"; that Pamela requested that he retire early, as her father had done, to help raise their seven children which caused him to forgo additional executive level compensation, and limited his ability to save for retirement or pay joint debts; and that the couple financed the last 13 years of their lives together – during which they incurred the three mortgage obligations – by living exclusively on Vernon's accumulated savings and money from the Trust. (R.Add.2-6, 12-14.)

The Trustee did not respond to the Vernon's Affidavit or deposition testimony with any facts contradicting Vernon's sworn statements that Pamela intended that her Trust pay the couple's joint debts in the event of her death. The Trustee's only rebuttal was two affidavits from Larry Koch, an attorney involved in the drafting of the Trust, who stated that he never heard Pamela express this intent. But he did not deny that this was her intent, and he did not indicate that she ever expressed a different intent. (R.Add.8-11.) Thus the Koch affidavits did not meaningfully contradict Vernon's sworn testimony. This is the totality of the record on this issue. Accordingly, if the Court determines Pamela's intent cannot be ascertained from the plain language of the trust instrument, it should hold as a matter of law that the undisputed record dictates that the Trust has an obligation to pay the margin loan debt and the couple's mortgages.

Under Rule 56.05 of the Minnesota Rules of Civil Procedure, if the Trustee believed that there were facts to contradict Stisser's sworn testimony, he had an obligation to present evidence that would create a disputed issue of fact. The best he came up with was the Koch affidavits, which did not contain any contrary facts. (R.Add.8-11.) As a result, even if this Court looks to extrinsic evidence of intent, it should hold as a matter of law that the undisputed record shows that Pamela wanted her legal debts to be paid by the Trust.

B. Alternatively, the Court Should Remand for a Trial to Ascertain Pamela's Intent

Vernon's argument in district court was that the "pay my legal debts" language was clear and unambiguous, but alternatively that any ambiguity should be resolved at trial by examining extrinsic evidence. (Add.25.) However, instead of concluding that the decedent's intent was a disputed question of material fact, the district court made a factual finding about Pamela's intent based on speculation and conjecture and nothing in the record. The court of appeals similarly concluded without citing to any factual or legal authority that Pamela intended only debts secured by non-probate assets to be paid.

These are reversible errors because "[q]uestions of intent are questions of fact." *Oehler v. Falstrom*, 273 Minn. 453, 457, 142 N.W.2d 581, 585 (1966). Further, a "district court is not to find facts by resolving disputes at the summary judgment stage, but is to determine whether, when the evidence is viewed in the light most favorable to the party opposing summary judgment, there is a genuine issue of material fact." *J.E.B.*, 785 N.W.2d at 747.

C. There Is No Persuasive Rationale for Affirming the Summary Judgment Order, Which Was Predicated on Improper Findings of Fact

As described above, the plain language of the trust instrument supports the court of appeals' majority opinion that Pamela intended that the Trustee pay her "legal debts" following her death. Alternatively, if this Court concludes that the language is ambiguous, then it can rule as a matter of law that secured debts should be paid on the basis of extrinsic evidence, or it can remand to the district court for further findings of fact. The only result that cannot be justified is the one reached by the district court – and urged by the Trustee here – namely, that this Court rule as a matter of law that the language of the trust instrument clearly and unambiguously limited payment of "legal debts" to "unsecured debts."

The district court ruled in favor of the Trustee, and did so as a matter of law; however, the district court never specifically stated that the language of the trust instrument is unambiguous. Instead, it stated that because "a testator's intention for exoneration cannot be inferred from the general pay 'my legal debts' language in the trust," it could not order such payment. (Add.37 (emphasis added).) On the very first page of its brief, the Trustee acknowledges that the basis of the district court's summary judgment ruling was that the court could not "infer" an intent on the part of the grantor to have her secured debts paid by the Trust based on the general directive to pay debts in the Trust Agreement. (App. Br. 1.) But the district court should not have been "inferring" anything in the summary judgment context. If the court could not ascertain intent from

the unambiguous language of the Trust Agreement, then instead of “inferring” intent in favor of the Trustee, it should have left the issue of Pamela’s intent for the trier of fact.

Despite its grant of summary judgment, it appears that the district court actually thought that the language of the Trust Agreement was ambiguous because even after its analysis of the text of the Trust Agreement and Minnesota’s non-exoneration statute, the district court went on to concede that “[n]otwithstanding the above analysis, the question nevertheless must be asked whether the Trust provisions of Section 3.1.1 (pay ‘my legal debts’) was Pamela Stisser’s way of expressing a ‘testator’s intention’ to have secured debts paid out of estate assets . . .” (Add.32.)

At that point, if the district court could not rule for Stisser based upon the undisputed factual record (*see* § IIA, *supra*), then it was required to rule that a genuine issue of material fact existed for trial as to Pamela’s intent. *See J.E.B.*, 785 N.W.2d at 747; *Oehler*, 273 Minn. at 457, 142 N.W.2d at 585; *see also Myrick v. Moody*, 802 S.W.2d 735, 738 (Tex. Ct. App. 1990) (if the “instrument is ambiguous, its interpretation presents a fact question precluding summary judgment”); *In re Revocable Trust of Margolis*, 731 N.W.2d 539, 547 (Minn. Ct. App. 2007). Instead, the district court went on to make findings concerning Pamela’s intent by comparing the distributions that the Stissers’ seven children would receive if the debts were paid with the distributions they would receive if the debts were not paid. The effort is reflected in the following portion of the district court’s summary judgment memorandum:

What can be deduced from Pamela Stisser’s estate plan is that she desired to leave approximately equal shares of cash each to her husband and children, but that her husband would also inherit the real properties (subject

to mortgage). Even after mortgage debts on each property were paid, Vern Stisser would have inherited a sum of cash and real estate having considerable value after Pamela Stisser's death.

The secured debt claim by Stisser on the Schwab account alone is \$2,381,192. Trustee Memo In Support, p. 15. If full effect were to be given to the pay "my legal debts" language and if the margin loan on the Schwab account were paid before distribution of the trust assets to the trust beneficiaries, that would mean each child would receive approximately 29% less (\$340,170 less per beneficiary) from the trust than if the Schwab margin debt had not been paid. The Court finds that such payment is not what testator Pamela Stisser intended.

(Add.35-36 (emphasis added).)⁷ This was error, both because a district court cannot make findings of fact in deciding a motion for summary judgment, Minn. R. Civ. P. 56.03, and because the above finding is based on total speculation and conjecture, not by the summary judgment record.

The record contains nothing evincing that equalizing distributions was Pamela's intent. The summary judgment record consists only of the parties' pleadings, depositions, answers to interrogatories, admissions, and affidavits, *see* Minn. R. Civ. P. 56.03, not the district court's *sua sponte* mathematical computations. The only evidence that met the Minn. R. Civ. P. 56.03 standard was (1) Vernon's April 7, 2009 affidavit in which he attested that Pamela told him that if she died before he did, her Trust would pay the couple's joint debts and he would be left debt free (R.Add.6); and (2) his deposition

⁷ Aside from constituting improper fact finding on a summary judgment motion, the district court's conclusion that Vernon and the seven children were treated equally under the will and trust is questionable. For example, the district court assumed that there would be equity in the Schwab account after payment of the margin loan; however, there was an interpleader action involving right to the Schwab proceeds, and as the Trustee acknowledges in his brief, by the time the margin loan was paid, the decline in the market meant that the account had virtually no value after the loan was paid. (App. Br. 20)

in which he stated Pamela had said “that if anything happened to her that I would be debt-free” (R.Add.13-14).

Further, the district court’s analysis is flawed because comparing the final distributions to be received under the will and Trust doesn’t provide any clue as to Pamela’s intent. The two documents were not part of a unified estate plan. Pamela’s will and the law of joint tenancy determined what Vernon inherited, and the Trust determined what the children inherited. The will and the Trust were executed 15 years apart. It was mere coincidence that the estate and Trust contained assets of similar value in 2002 – and thus not something Pamela could have known when she executed either of her testamentary documents.

The flaw in the district court’s analysis can be illustrated by simply changing some of the numbers that the court used in the calculations it made on pages 17 and 18 of its summary judgment order. (Add.35-36.) What if Pamela had paid off most of the margin loan on the Schwab account shortly before she died and the loan balance had been \$50,000 on the date of her death rather than \$1.7 million? The reasoning the court followed at pages 17 to 18 of its order – i.e., comparing what Vernon would inherit versus what would be received by the seven children – would then have led the court to the conclusion that the Trust should pay the margin loan in order to comply with Pamela’s intent because such payment would not significantly reduce the inheritance of the children. But how can the language pay “my legal debts” be construed differently merely because the debt is larger or smaller? Certainly, the meaning of the Trust language does not change merely because the size of the loan rises and falls. The court’s

finding of Pamela's intent was based on speculation and conjecture and on what the value of the assets and amount of debt happened to be on the date of her death, not on evidence in the record.

For these reasons, if this Court concludes that it cannot rule in favor of Vernon as a matter of law based upon the plain language of the trust instrument, or based on Vernon's un rebutted affidavit and deposition testimony, it certainly cannot rule as a matter of law in favor of the Trustee. The argument that payment of "legal debts" should be limited to payment of "unsecured legal debts" cannot be supported by the plain language of the trust instrument, by anything in the summary judgment record, or by the district court's post-hoc mathematical calculations designed to justify the district court's desired results.

III. THE COURT OF APPEALS' PLAIN LANGUAGE HOLDING SHOULD APPLY EQUALLY TO DEBTS SECURED BY NON-PROBATE ASSETS

The court of appeals' determination that "pay my legal debts" means what it says applies equally to the other debts Vernon requested the Trust to pay. These were (1) a mortgage note with an approximate balance of \$625,000 secured by the Stissers' Illinois residence; (2) a mortgage note with an approximate balance of \$1.4 million secured by the couple's Florida condominium; and (3) a debt of approximately \$660,000 secured by the Illinois commercial property. Section 3.1.1 of the Trust Agreement plainly directs that Pamela's legal debts are to be paid – whether secured or unsecured, individual or joint, secured by a probate or non-probate asset. Accordingly, on Vernon's petition for

cross-review, the Court should reverse the court of appeals' determination that the Trust was not obligated to pay mortgage debts upon Pamela's death.

A. There Is No Reason to Construe the Language to Pay Legal Debts Differently for Probate and Non-Probate Assets

There is no reason why the language of the Trust Agreement to pay "my legal debts" should apply differently to probate and non-probate obligations. *Cf. Enright v. Lehmann*, 735 N.W.2d 326, 334 (Minn. 2007) (holding court of appeals erred by concluding Multi-Party Accounts Act provision applied only to accounts held at death because provision appeared in statutory article titled "Nonprobate Transfers on Death"). Just as the district court erred by creating a distinction between secured and unsecured debt, the court of appeals erred by creating a probate versus non-probate distinction.

The court of appeals' rationale was that Vernon's claim for payment of the mortgage debts is an individual claim, not a claim in his capacity as personal representative. (Add.8.) But, his petition seeking payment of the mortgage was filed in his capacity as personal representative (AA34). The Trustee never argued in either the district court or in the Court of Appeals that the mortgage debts should be treated differently than the Schwab loan, either because the mortgage loans were nonprobate assets or because Stisser's petition was filed in his individual capacity with respect to the mortgages. The court of appeals made the distinction between probate and nonprobate assets on its own. The Trustee makes that argument for the first time before this Court, which is improper.

Furthermore, the court of appeals' stated that "the plain language of the trust does not mandate the payment of these debts." (Add.8.) But the core problem with the holding is that the plain language does not exclude payment of these debts either. As the court of appeals correctly held, the "pay my legal debts" language is not ambiguous. The court simply erred when it failed to apply the language across the board. The same language that caused the court of appeals to apply the plain meaning doctrine to the Schwab margin loan should also apply to the real estate mortgages.

Although the court of appeals noted that Vernon also had a joint ownership interest in the real properties (Add.8.), the mortgages were also Pamela's "legal debts." The properties securing the mortgage debts were Pamela's as much as they were Vernon's, and the mortgage debts were also hers as much as they were Vernon's. At the time of Pamela's death, she was just as responsible for the debts as was Vernon.

If the legislature wishes to enact a distinction similar to those made by the court of appeals, it can do so, and in fact has done so in a related context. Because of "uncertainty in the law" over who between spouses owns a joint bank account, the legislature enacted the Multi-Party Accounts Act to clarify that "[i]n a controversy between parties to a multi-party account and their creditors, funds in a joint account belong to the parties in proportion to their net contributions." *Enright*, 735 N.W.2d at 331-32. Nothing would prevent the legislature from enacting a similar provision with respect to a trust's payment of debts secured by jointly owned real property that does not pass through probate. But as it stands, the law contains no such provision, and the court of appeals' attempt to create one was unauthorized. *See id.* at 334.

The same rules of trust construction apply to debts regardless of the nature of the security. Irrespective of whether the property is a probate asset or non-probate asset, Pamela's intent "must be ascertained from the four corners of the agreement, without resort to extrinsic evidence of intent." *McLaughlin*, 361 N.W.2d at 44-45. "In arriving at the intent of the settlor of a trust the court is not at liberty to disregard the plain language of the terms employed in the trust instrument; to insert or add words thereto; to substitute other words for those used therein; or to engraft inconsistent limitations thereon." *In re Fiske's Trust*, 242 Minn. at 460, 65 N.W.2d at 910.

In one sense, the case for construing the Trust language to require payment of the mortgage debts is even stronger than it is for the Schwab loan. The Trustee argues strenuously that the common law of exoneration was limited to real estate. (App. Br. 26-29.) The non-exoneration statute is limited to assets passing in probate, not by way of joint tenancy. Thus, under the Trustee's own reasoning, the mortgage loans should be "exonerated" under the Trust provision directing payment of "legal debts."

For these reasons, the Court should reverse the court of appeals on this cross-review issue and hold the "pay my legal debts" language applies to debts secured by probate as well as non-probate assets.

B. At the Very Least, Vernon Is Entitled to Equitable Contribution

The district court also erred by concluding that Vernon was not entitled to equitable contribution for at least half of the mortgage debts. Because Pamela and Vernon were joint obligors on the mortgage debts, equitable principles would justify

construing the directive to pay my “legal debts” to require payment of at least half of the amount of the couple’s joint obligations.

Minnesota law is silent on the issue, but a majority of the jurisdictions that have addressed the point have adopted a rule of equitable contribution from the deceased spouse’s estate to satisfy 50% of any liens remaining on jointly held property, and a greater percentage may be allowed under “special circumstances.” C.C. Marvel, Annotation, *Right of Surviving Spouse to Contribution, Exoneration, or Other Reimbursement Out of Decedent’s Estate Respecting Liens on Estate by Entirety or Joint Tenancy*, 76 A.L.R.2d 1004, §§ 2-5 (1961); see also *Caine v. Freier*, 564 S.E.2d 122, 127 (Va. 2002) (surviving spouse entitled to contribution from estate for one-half joint indebtedness on marital home owned as tenants by the entireties with right of survivorship); *Stewart v. DeMoss*, 590 N.W.2d 545, 547 (Iowa 1999) (equitable contribution applies to personal as well as real property); *In re Estate of Tollefsrud*, 275 N.W.2d 412, 419 (Iowa 1979) (surviving spouse entitled to contribution from estate for one-half joint obligation on home that passed to spouse through joint tenancy); *Pietro v. Leonetti*, 283 N.E.2d 172 (Ohio 1972); *In re Linker’s Estate*, 488 P.2d 1128 (Colo. 1971); *Goldstein v. Ansell*, 258 A.2d 93 (Conn. 1969). *Contra Lopez v. Lopez*, 90 So. 2d 456 (Fla. 1956); *In re Estate of Vincent*, 98 S.W.3d 146 (Tenn. 2003).

Here, equitable contribution is warranted in light of Section 3.1.1’s plain language, the evidence that Pamela wanted Vernon to live “debt-free,” Pamela’s encouragement of Vernon to take on debt amid assurances that the Trust would satisfy the obligations,

Vernon's agreement to retire early at Pamela's urging, and the fact that the couple lived for more than a decade on Vernon's accumulated savings and money from the Trust.

IV. THE TRUST IS OBLIGATED TO PAY PERSONAL REPRESENTATIVE COMPENSATION AND ESTATE ADMINISTRATIVE EXPENSES BECAUSE THE LANGUAGE OF THE TRUST IS MANDATORY, NOT DISCRETIONARY

This Court also granted cross-review as to whether the Trustee abused his discretion by denying the estate's requests for the Trust to pay for personal representative services and Florida lawyer Laird Lile's fees in administering the probate estate. The district court deferred to the Trustee's decision to completely refuse such payments, and the court of appeals deferred to the district court, even though the Trust's plain language was mandatory, not discretionary. The court of appeals conceded that the results were "harsh" but affirmed based on an abuse-of-discretion standard. (Add.10-13.)

But when a trust contains mandatory language such as a directive that a trustee "shall" make payments after death, the trustee has no discretion other than to follow the trust's clear directive and the trustee's acts are reviewed *de novo*. That is the case here. Section 11.1 of the Trust Agreement stated Pamela's fiduciaries including Vernon and attorney Lile "shall be entitled to reimbursement for expenses and to receive compensation for their services." (Emphasis added.)

In light of this language, the district court should have reviewed the Trustee's decision *de novo* rather than under a deferential standard of review. Further, the court of appeals erred by applying an abuse of discretion standard to the district court's ruling.

And this Court should apply *de novo* review to hold the Trustee erred by refusing to pay any personal representative compensation and any of Lile's expenses.

A. Standard of Review

“Whether the exercise of a power is permissive or mandatory depends upon the terms of the trust. Even though in terms the trustee is authorized or empowered to do something, the provision may be interpreted as directing him to do it.” 3 W. Fratcher, *Scott on Trusts* § 187, p. 14 (4th ed. 1988) (emphasis added); *see also* Restatement (Second) of Trusts § 187 cmt. a (“The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees” (emphasis added); *O’Shaughnessy*, 517 N.W.2d at 577 (applying another Restatement (Second) of Trusts § 187 comment and citing *Scott on Trusts* as authoritative).

If the trust's terms require mandatory action, there is no deferential review. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); *see also Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 130-31 (2008) (Scalia, J., dissenting) (describing Restatement's “clear guidelines for judicial review” as requiring *de novo* review when “the trustee had no discretion in making the decision”) (citing *Firestone Tire & Rubber Co.*, 489 U.S. at 111-12); *In re Flygare*, 725 N.W.2d 114, 119-20 (Minn. Ct. App. 2006) (applying *de novo* review to issue of whether trust was support trust or discretionary trust) (citing *In re Fiske's Trust*, 242 Minn. at 460, 65 N.W.2d at 910; *O’Shaughnessy*, 517 N.W.2d at 577).

Under the Minnesota canons of construction, “[s]hall is mandatory.” Minn. Stat. 645.44, subd. 16; *see also In re Flygare*, 725 N.W.2d at 119-20 (holding trust with several “shall” directives was support trust, not discretionary trust). That canon applies equally to contracts, and therefore to trusts. *See Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004) (holding contractual provision stating rights and obligations “shall not be assignable” denoted a mandatory contractual term); *McLaughlin*, 361 N.W.2d at 44-45 (“Where the language of the trust instrument is not ambiguous, the intent of the settlor must be ascertained from the four corners of the agreement”).

Accordingly, the Trustee had no discretion but to follow the mandatory “shall” directive to pay personal representative compensation and attorney Lile’s administration expenses. *See, e.g., In re Lunkes*, 406 B.R. 812, 817 (Bankr. N.D. Ill. 2009) (where trust directed that “upon my death the trustee shall” distribute assets in a certain way, “the trustee has no discretion” but to follow the directive) (emphasis added); *Gibault Home for Boys v. Terre Haute First Nat’l Bank*, 85 N.E.2d 824, 825 (Ind. 1949) (holding “trustee has no discretion” when trust directs proceeds “shall be paid”); *In re Erie Golf Course*, 992 A.2d 75, 87 (Pa. 2010) (“under the *cy pres* doctrine, a trustee has no discretion to divert from purposes specified by a settlor”).

B. The Payment of Compensation for Personal Representative Services Was Mandatory, Not at the Discretion of the Trustee

The Trustee plainly violated Pamela’s intent with respect to the Trust’s duty to compensate the personal representative for his services because Section 11.1 of the Trust

Agreement unambiguously states that the personal representative “shall” be entitled to such compensation:

My fiduciaries shall be entitled to reimbursement for expenses and to receive compensation for their services. Such compensation shall be based principally upon the time and labor required in order to fulfill their responsibilities hereunder, giving due regard to the complexity and novelty of any special problems or issues encountered in the administration of my estate or such trust, as well as the nature and extent of their responsibilities assumed and the results obtained in performing their duties.

(AA14 (emphasis added).) Yet the Trustee denied any compensation; the district court deferred to the decision of the Trustee; and the court of appeals affirmed even while confirming the Trust’s plain language was controlling and while acknowledging “that the denial of all compensation is harsh.” (Add.10-11.) The district court’s and court of appeals’ erroneous applications of a deferential standard of review effectively immunized the Trustee from any scrutiny even though he has acted contrary to explicitly clear trust language.

Neither the Trustee nor either of the courts below identified any ambiguity in the language. The district court recognized the rules of statutory construction applied but simply chose to ignore them, evidenced by its concession that it made its ruling “notwithstanding canons of statutory construction in Minn. Stat. 645.08.” (Add.37.) This was error. A district court’s application of or failure to apply a statute is reviewed *de novo*. *Enright*, 735 N.W.2d at 330.

The courts below relied on *In re Simmons’ Estate*, 214 Minn. 388, 8 N.W.2d 222 (1943). But that case involved payment of an administrator’s fees at the discretion of the court. *Id.* at 397, 8 N.W.2d at 226. Here, because the plain language stating that Vernon

“shall” be compensated is mandatory, the courts had no discretion but to conclude that the Trustee erred.

And significantly, in *Simmons* this Court did not affirm a decision denying an administrator any compensation whatsoever. Rather, the Court indicated the reasonable value of the administrator’s services was \$25,000 in the year 1943. 214 Minn. at 398-99, 8 N.W.2d at 227. Here, nearly seven decades after *Simmons* was decided, Vernon seeks \$160,000 – half of which he attributed to his time and labor at approximately \$13 an hour, the other half of which he attributed to the complexity of the various actions he defended as personal representative. (Add.72-73, 95.) This amount is *prima facie* reasonable when measured against the amount of compensation affirmed in *Simmons*.

In its findings of fact, the district court repeated the error that it made in its summary judgment ruling based on its after-the-fact mathematical analysis of date of death values. (Add.99.) Thus, there was no basis for the finding that the estate is not entitled to payment of any compensation from the Trust because Pamela’s “estate plan” was designed to gift assets in “equal shares” to Vernon and to the seven children. Nothing in the record evinces equalization as being Pamela’s intent. *See* § I.C, *supra*.

The district court also suggested Section 11.1 “require[d] some modicum of record keeping for compensation purposes.” (Add.98.) But the section’s plain language does not. It simply states that Pamela’s fiduciaries are entitled to reimbursement based “upon the time and labor required,” without regard to record-keeping. In the *Simmons* case cited by the district court, the administrator was a lawyer accustomed to keeping time records.

In *In re Estate of Bush*, 304 Minn. 105, 230 N.W.2d 33 (1975), this Court affirmed a fee award to a corporate fiduciary even though no time records had been submitted. In doing so, the Court observed the “appellants offered no testimony at trial to contradict the executors [sic] claim for compensation. If the amounts claimed were so excessive, one wonders why appellants did not come forward with expert testimony.” *Id.* at 126, 230 N.W.2d at 45.

If corporate fiduciaries are not required to keep written time records, then a lay personal representative should not be held to a stricter standard. Vernon testified that he typically spent at least 20 hours a week personally handling estate administration matters since being appointed personal representative (RA19-20), but the district court ignored this testimony out of hand. No authority suggests that record-keeping requirements for a lay personal representative should be more rigid than those for a professional fiduciary. Moreover, as the district court concluded, “Obviously the death of his wife and his subsequent health problems seriously impacted Stisser’s ability to move forward as quickly as the Trustee wanted.” (Add.88.)

The Trustee here did come forward with expert testimony, but the expert conceded that Vernon was not required to keep a written log of his time. (RA22-23.) The trust expert also testified that because the Trustee was either a party to or was bankrolling all of the Illinois, Florida, and Minnesota litigation against the estate, the Trustee could rely on his own participation as evidence of the time Vernon spent on the same matters. (*Id.*)

Even if some deference would otherwise be given to the Trustee’s decision to deny Vernon any compensation whatsoever, in this case the relationship between the

parties made that deference particularly inappropriate. The district court acknowledged that Vernon and the Trustee had “been at odds virtually since the grantor’s death.” (Add.98.) As a result, the Trustee was hardly objective in deciding whether or not to follow the mandatory language of the trust instrument and award compensation. Accordingly, judicial intervention was required. Restatement (Second) of Trusts § 187 cmt. g (“The court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive, that is where he acts from a motive other than to further the purposes of the trust.”)

At most, the Trustee might have had some discretion in deciding the amount of compensation. However, a complete denial violated the mandatory language of the trust instrument. Accordingly, Vernon requests the Court hold that the Trust Agreement’s plain directive for personal-representative compensation must be given full force and effect and that he is entitled to \$160,000 for his services. Alternatively, the matter should be remanded to district court for determination of appropriate compensation.

C. The Trustee Also Lacked Discretion to Refuse to Pay Any “Expenses of Administration” Incurred by Estate Attorney Laird A. Lile

The Trustee also refused to reimburse the estate for any “expenses of administration” incurred by Laird A. Lile, who served as counsel in administering the estate in Florida and billed \$266,126.09 in attorneys’ fees and expenses. (Add.89.) Vernon’s request came pursuant to Section 3.1.1. The district court specifically and correctly found that Lile’s fees were “expenses of administration” within the meaning of Section 3.1.1 but nevertheless found that the Trustee had acted properly by denying Lile

any reimbursement, even while providing reimbursement to others who provided similar if not identical administrative services.

The court of appeals affirmed, although it again characterized the Trustee's denial as "harsh" and acknowledged that it "might have reached a different result on the same evidence." (Add.13.) But again, because the language of the trust instrument is mandatory, and because review of the Trustee's decision rested primarily if not exclusively on documentary evidence, abuse of discretion was not the appropriate standard of review.

Consistent with Minn. R. Civ. P. 52.01, "a trial court's findings of fact will be subject to review *de novo* where those findings are based on documentary evidence equally available to this court." *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986). This Court has explicitly applied this rule in trust cases, explaining:

Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that [its] evaluation of credibility has no significance.

In re Trust Known as Great N. Iron Ore Props., 308 Minn. 221, 225-26, 243 N.W.2d 302, 305, (1976) (internal quotation omitted), *cert. denied*, 429 U.S. 1001 (1976).

Vernon's counsel offered evidence that met this standard in the form of billing records (RA28),⁸ but the district court dismissed the evidence out of hand. The district

⁸ As an exemplar of the billing records in the record, Respondent/Cross-Appellant has provided in his Appendix the initial pages of Trial Exhibit 76. The entire exhibit is 252 pages.

court justified its decision on the grounds that the redacted time records were “insufficient” because they “do not show the hours spent on each task nor the hourly rates for the services rendered.” (Add.89-91.)

But during trial Vernon offered unredacted records for the district court’s *in camera* inspection. The district court refused to examine them on grounds they “should have been given to counsel for the Trustee as part of discovery and not one day after the trial in this case had begun.” (Add.92.) Discovery issues aside, the bottom line is that competent evidence was offered and exists for the Trustee to pay Lile’s expenses of administration, but the district court chose to ignore it when analyzing whether the Trustee’s denial was authorized.

The district court’s cited authority was Minn. Gen. R. Prac. 119.02, which sets forth standards Minnesota lawyers should meet when seeking awards of attorneys’ fees. This was error for several reasons. First, this is not a request by an attorney for an award of fees under Rule 119. Rather, it is a request by a personal representative for reimbursement of expenses of administration, which in this case happen to be attorneys’ fees charged to the estate. Further, Lile performed his work not in Minnesota, but in Florida where the Minnesota General Rules of Practice provide no such standard. In any event, Minn. Gen. R. Prac. 119.03 contemplates that a district court review *in camera* previously redacted billing records – precisely the sort of records the district court refused to consider.

Finally, the Trust Agreement, and not the Minnesota General Rules of Practice, provides the applicable standard for what was required for the Trust to pay estate-administration expenses. Sections 3 and 3.1.1 state:

3. Payments. After my death, the Trustees shall make distributions from the remaining trust estate, including all property that becomes distributable to the Trustees at or after my death, as follows:

....

3.1.1 Expenses. The expenses of my last illness, funeral, burial or other disposition, unpaid income and property taxes properly chargeable against my estate, expenses of administration of my estate, including my non-probate assets, and my legal debts.

(AA5-6 (emphasis added).)

Even the redacted version of Trial Exhibit 76 far exceeded this standard. (RA28.) The records in the exhibit described each task Lile and other timekeepers performed on specific dates, provided each timekeeper's name and the total hours he or she incurred for each billing period, itemized total fees for professional services rendered, and contained detailed itemization of costs and disbursements. These itemized task descriptions, coupled with Lile's trial testimony, demonstrated how "complex" and "novel" the estate administration was.⁹ *See id.*

⁹ In connection with the summary judgment motions, Vernon submitted an order from the complex trust case *In re Galloway Family Trusts*, Court File Nos. C1-04-200006 *et al.*, Ramsey County District Court, over which the Ramsey County probate judge, the Honorable Margaret Marrinan, presided. (RA24-27.) At the close of the litigation, Judge Marrinan addressed the trustee's request for an award of reasonable attorneys' fees and ordered that the trustee's billing statements "may be provided in redacted format to avoid disclosure of information protected by the attorney-client privilege or the work product doctrine." (*Id.*) The court then considered the attorneys' fees petition and issued its ruling. Here, Vernon offered minimally redacted time records at trial and proposed that

The district court relied on *In re Trust Known as Great Northern Iron Ore Properties*, 311 N.W.2d 488 (Minn. 1981), another of this Court's cases involving a trust created by railroad baron James J. Hill. But that decision addressed the standards a court is to apply when determining an award of attorney's fees, not a trustee's duty to reimburse expenses of administration required by an unambiguous trust agreement. Only in that context did this Court state that a district court acts in its "sound discretion" when making attorneys' fee awards. *Id.* at 492. A trustee's interpretation and apparent wholesale rejection of a directive that expenses "shall" be paid is not entitled to any deference on review.

In affirming the district court, the court of appeals relied exclusively on another attorneys' fees case, *In re Estate of Baumgartner*, 274 Minn. 337, 144 N.W.2d 574 (1966), which states that "the allowance of compensation for attorneys' fees in probate proceedings rests largely in the discretion of the probate court; and ... the reasonable value of such services is a question of fact." *Id.* at 346, 144 N.W.2d at 580. (Add.11-12.) But again, what is at issue here is not a petition for a discretionary award of attorneys' fees, but rather a request by a personal representative for payment of administrative services that are mandated under the Trust Agreement.

Furthermore, *Estate of Baumgartner* did not involve a trust, let alone a trust agreement containing an unambiguous directive for the trustee to pay estate

the district court review unredacted copies *in camera* – an offer the court rejected. (Add. 92.) It is clear, however, that Vernon provided more than sufficient evidence to support the fees for which the Estate was entitled to reimbursement, and there was no rational basis for the district court to reject that evidence.

administration expenses from the trust. The case involved application of a statute that provided compensation “from the estate” for attorneys who perform services for the estate. 274 Minn. at 344-45, 144 N.W.2d at 579 (citing and applying Minn. Stat. § 525.49 (1965) (emphasis added)). This situation is fundamentally different because it involves a Trust Agreement’s provision directing compensation from the Trust.

On this record and against this authority, it was implausible that the Trustee would elect to pay some estate-administration expenses while completely denying payment of any of Lile’s fees. As with the Trustee’s refusal to pay Vernon any compensation as personal representative, the Trustee’s denial of any of Lile’s administration expenses is reversible error. Accordingly, on this cross-review issue, Vernon requests the Court reverse the court of appeals’ decision with respect to the estate administration expenses and order the Trust to reimburse \$266,126.09 for Lile’s administration expenses. Alternatively, the issue should be remanded to district court for determination of the correct amount to be reimbursed.

CONCLUSION

For the foregoing reasons, Respondent/Cross-Appellant Vernon Stisser respectfully requests that the Court affirm in part and reverse in part the decision of the court of appeals as follows:

- (1) Affirm the holding that the Trust Agreement unambiguously requires the Trustee to pay Pamela Stisser’s legal debts including the margin loan secured by the Charles Schwab brokerage account (Add.5-7);

- (2) Reverse the holding that the Trust Agreement does not require the Trustee to pay the Stissers' mortgage debt (Add.8-9); and
- (3) Reverse the holding that the Trustee had discretion to deny payment of Vernon Stisser's personal representative compensation and estate-administration expenses incurred by Laird A. Lile, and direct payment of such compensation and administrative expenses (Add.9-13).

Accordingly, the Court should remand to the district court with instructions to enter judgment consistent with these determinations.

Alternatively, the Court should remand to the district court for trial on (1) Pamela Stisser's intent with respect to the meaning of the directive to pay "my legal debts"; (2) the reasonable amount of personal representative compensation; (3) and/or the reasonable amount of estate administration expenses.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Proportional serif font, 13 point or larger. The length of this brief is 16,304 words. This brief was prepared using Microsoft Word 2000.

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