

NO. A06-1018

State of Minnesota
In Court of Appeals

In Re: The Naomi Margolis Revocable Trust

Barry Lorberbaum,

Appellant,

vs.

Jack Margolis,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF THE LEGAL ISSUES

1. Whether the trial court erred in allowing the trustee's account, and in particular, determining that the trustee's allocation of trust assets and income for the grantor's care at the Sholom Home and for related medical expenses were valid and appropriate allocations under Paragraphs 2.2 and 3.1 of the Trust Agreement, and that the trustee did not abuse his discretion in making those payments and allocations.

Trial Court Ruling:

The trial court allowed the trustee's account as amended to include reimbursement due the trust from the trustee in the amount of \$1,518.80, and discharged the trustee from any further liability upon proof of said reimbursement. In particular, the trial court determined that the trustee's allocation of trust assets and income for the grantor's care at the Sholom Home were valid and appropriate allocations of trust assets under Paragraphs 2.2 and 3.1 of the Trust Agreement, and that the trustee did not abuse his discretion in making those payments and allocations.

Apposite Cases and Statutory Provisions:

In re Bailey's Trust, 241 Minn. 143, 62 N.W.2d 829 (1954)

In re Cosgrave's Will, 225 Minn. 443, 31 N.W.2d 20 (1948)

In re Will of Tuthill, 247 Minn. 122, 76 N.W.2d 499 (1956)

In re: Trusts A & B of Divine, 672 N.W.2d 912 (Minn.App. 2004)

2. Whether the trial court erred in determining that a \$100,000.00 Norwest Certificate of Deposit was not an asset of the trust for which the trustee is obligated to account for because the Appellant failed to meet his burden of proof to show that the asset ever came into the hands of the trustee.

Trial Court Ruling:

The Trial Court found that the Appellant did not meet his burden of proof to show that the \$100,000 Norwest Certificate of Deposit ever came into the hands of the trustee, and therefore the trustee was not obligated to account for the asset.

Apposite Cases and Statutory Provisions:

Blythe v. Kujawa, 175 Minn. 88, 220 N.W.2d 168 (1928)

Stein v. Kemp, 132 Minn. 44, 155 N.W.2d 1052 (1916)

Village of Monticello v. Citizen's State Bank of Monticello, 180 Minn. 418, 230 N.W. 889 (1930)

3. Whether the trial court erred in allowing the trustee's account filed with the court as amended to include reimbursement due the trust from the trustee in the amount of \$1,518.80, and discharging the trustee from any further liability upon proof of said reimbursement.

Trial Court Ruling:

The Trial Court allowed the trustee's account as amended to include reimbursement due the trust from the trustee in the amount of \$1,518.80, and discharged the trustee from any further liability to the trust either individually or as a trustee, upon proof of said reimbursement.

Apposite Cases and Statutory Provisions:

NONE

STATEMENT OF THE CASE

This is an appeal from an Order dated March 29, 2006 allowing the trustee's account, issued by the Honorable Margaret M. Marrinan, Ramsey County District Court, Judgment entered May 2, 2006.

This matter was commenced by Appellant's filing of a Petition under Minn. Stat. §501B.16 for an Order removing respondent as trustee of the trust, appointing appellant as successor trustee, requiring respondent to account for his actions as trustee, and for redress of various alleged breaches of fiduciary duty. (AA1-9).

After the initial hearing on the petition on September 7, 2005, the trial court issued an Order dated September 13, 2005 (AA16-17) in which it accepted the resignation of Respondent as trustee, appointed Appellant as trustee of the trust and required Respondent to file and serve an accounting for the trust from its inception in 1994 to the present, and set a hearing on said account for November 29, 2005. Prior to this proceeding, the trust was not a court supervised trust, and as such, no annual accounts had been required or filed with the court.

Pursuant to the Court's Order dated September 13, 2005, Respondent filed his account of individual trustee for the period June 28, 1994 to December 31, 2004. (AA18-26). Appellant subsequently filed an objection to the Respondent's account. At the November 29, 2005 hearing, the court set the matter on for trial.

A trial on the Petition of Appellant, as well as Appellant's objections to the Respondent's account, was held on January 6, 2006, which resulted in the Findings of Fact, Conclusions of Law, Order and Order for Judgment subject to this appeal. At

trial, there were two live witnesses, Appellant, Barry Lorberbaum, and Respondent's daughter, Sherry Huff. Respondent did not appear for health reasons and his deposition transcript was admitted into evidence by stipulation, as part of the record in lieu of his live testimony. Likewise, the deposition transcript of the Margolis' accountant, Miles Locketz, was admitted into evidence by stipulation, as part of the record in lieu of his live testimony, due to his unavailability at the time of trial. A Joint Stipulation of Facts, as well as numerous exhibits was also admitted into evidence and made part of the record. (AA 27-41, T. Index of Exhibits).

The issues before the trial court were: 1) whether the trustee's allocations of trust assets and income for the grantor's care at a nursing home and for related medical expenses as reflected in the trustee's account were appropriate and whether the trustee abused his discretion with regard to such allocations; and 2) whether or not the trustee was obligated to account for a \$100,000.00 Norwest Certificate of Deposit which Appellant claims was an asset of the trust. The trial court found in favor of the trustee and allowed the trustee's account as amended by the court to include reimbursement due to the trust from the trustee in the amount of \$1,518.80, and discharging the trustee from any further liability upon the proof of said payment.

STATEMENT OF FACTS

Naomi Margolis executed the Naomi Margolis Revocable Trust in 1994. (AA29, AA58-81). Naomi Margolis and her husband, Jack Margolis, were named trustees under the trust instrument. (*Id.*). Each of them signed a "Delegation of Discretionary Powers" statement, which was attached to the trust document, and which allowed either

of them to act independently of the other and with full authority for the other, with respect to the powers given in the trust agreement. (AA82-83) (Id.). Naomi Margolis also executed a Minnesota Short Form Power of Attorney naming Jack Margolis as attorney-in-fact with all of the statutory powers contained in Minn. Stat. Sect. 523. (AA30, Ex. 38).

When the couple married in 1979, they had executed an antenuptial agreement. (Ex.1). The assets owned by Jack Margolis were grossly disproportionate to those owned by Naomi Margolis. (Id., AA2-3, 28-29). This was the case throughout their marriage, and the assets of Jack Margolis were ultimately used to fund the Naomi Margolis Trust to the extent that it was funded. (AA30-32).

The following assets were transferred to and used to fund the Naomi Margolis Revocable Trust:

Knollwood West Partners Real Estate Partnership Interest	12.619%
Rosewood Center Partners Real Estate Partnership Interest	7.5%
Ridgehill Partners Real Estate Partnership Interest	8.33%
Northstar Bank Certificate of Deposit #24842	\$10,000.00
Northstar Bank Certificate of Deposit #30740	\$10,000.00
Northstar Bank Certificate of Deposit #36392	\$10,000.00
Piper Jaffrey Investment Account	\$19,316.00

These assets were identified and included in the Trustee's Accounting filed with the court. Id.

Petitioner contends that a \$100,000.00 Certificate of Deposit held at Norwest Bank was also in the name of the trust. Respondent contended that this was not the case and testified as such. (Margolis Dep. pp.80-81).

Petitioner relies on two pages of handwritten notes, purported to be those of Naomi Margolis, which make reference to a \$100,000.00 Certificate of Deposit at Norwest Bank in support of his contention that the CD was actually held in the name of the trust. (AA84-85). However, the notes offer no independent proof that the asset was actually transferred into the trust.

Furthermore, the two pages of handwritten notes are in and of themselves contradictory. The first page of the notes refers to the CD under the heading "Trust Forwarded", and the second page of the notes lists the CD with a notation "Jack" next to it, which is inconsistent with the notion that the CD was held in the name of the trust. Id. Thus the document is unreliable, and inconclusive as to the assertion that the asset was ever held by the trust. Appellant, Mr. Lorberbaum admitted on cross examination that he had no other evidence to support his contention that the CD was ever in the name of the trust. (T. 84-85). Appellant also admitted on cross examination that his mother, the grantor, never discussed estate planning with him, and that she never told him what assets she had put in the trust. (T. 80-81).

On the other hand, there is reliable independent evidence that the CD in question was held in the name of Jack or Naomi Margolis individually, or Jack Margolis individually, and not in the trust (RA1-2, RA3-4; Locketz Dep.). Exhibit #17 (RA1-2) consists of two notices prepared by Norwest Bank, a Notice of Certificate Maturity, which indicated that the CD was to mature on February 22, 1994, and a CD/Retirement Disclosure, which indicated that the CD was reinvested on February 22, 1994, and was scheduled to mature on July 22, 1995. The last seven digits of the account number

listed on both of the bank notices are exactly the same as the digits referenced on the handwritten notes comprising Exhibit #16. (AA85). The first notice bears the names "Jack Margolis or Naomi Margolis", the second notice bears the name "Jack Margolis". Neither of these documents makes any reference to the Naomi Margolis Trust. Also, the Margolis' accountant, Miles Locketz, testified at his deposition that the social security number that appears on the CD/retirement disclosure is the social security number of Jack Margolis. (Locketz Dep. p. 12; RA2). He also testified that he had no recollection of any Norwest Bank Certificate of Deposit ever being held in the Naomi Margolis Revocable Trust. (Locketz Dep. p. 24).

Mr. Locketz further testified in substance as follows regarding his preparation of the couple's joint tax returns from 1994 on:

- any interest earned on a CD held by Norwest Bank would be reported by Norwest Bank of Minnesota, rather than Norwest Investment Services, where the couple also held investments. (Locketz Dep. p. 17).
- income was reported by Norwest Bank Minnesota for the years 1994, 1995 and 1996. (Locketz Dep. pp. 15, 17-18).
- the "tax organizer" used in the preparation of the couple's joint return for the year 1997 indicates that interest reported by Norwest bank for the year 1996 was considered and treated as income derived from a joint asset. (Locketz Dep. p. 23).
- there was no income reported by Norwest Bank for the year 1997, at least that he was aware of, and as such, no interest income was listed for Norwest Bank, N.A. on Schedule B (interest income) on the 1997 tax return. (Locketz Dep. p. 19).

The accountant further testified that Naomi Margolis was involved in the couple's finances and participated in the preparation of their tax returns and seemed

knowledgeable of their assets prior to her decline. (Locketz Dep. p. 25). There is no evidence that Naomi Margolis was not competent and able to handle her financial affairs during this time period in question (1994-1997).

In responding to a subpoena of bank records, Wells Fargo (successor to Norwest Bank) indicated that its records go back seven years, which would have been October of 1998. (Ex. 58). The subpoena response also states that there were no accounts in the name of the Naomi Margolis Revocable Trust from that time to the present, and in particular, there were no records of the Certificate of Deposit in question for that period as well. Id.

Thus, it is reasonable to conclude that this CD ceased to exist prior to 1997, and was titled in the name of Jack or Naomi Margolis, individually, and did not come into the hands of the trustee.

The three real estate partnership interests paid out periodic income from 1994 through the present. The trustee's account allocates the income from 1994 to 2001 as being distributions from the Trust to Naomi Margolis as a lifetime beneficiary, and not being reinvested or added to the principal of the Trust. Petitioner has not contested this allocation. Rather, Petitioner only contests the allocation of income from 2001 to the grantor's death in 2004.

In May of 2001, Naomi Margolis was admitted to the Sholom Home, a long-term health-care facility. By that time she was not communicating and could not handle her personal or financial affairs. (AA31, 32; Huff Dep. pp. 32-33). Jack Margolis testified that Naomi's doctor told him that it was necessary to have her admitted to a nursing

home in April of 2001 and that “the doctor insisted that no way can I take her home.” (Margolis Dep. 48; AA31). Jack Margolis also testified that he thought that Naomi Margolis was incapacitated as of 2001. (AA 31, 32; Margolis Dep. p. 47-49).

Paragraph 2.2 of the trust agreement provides that the trustees shall make payments from the trust for the support, maintenance, and health of the Grantor in the event the Grantor becomes incapacitated. (AA35, 60). The language of Paragraph 2.2 is as follows:

2.2 Payments in the event the Grantor becomes incapacitated.

At any time while the Grantor, in the opinion of the Trustees and a competent medical advisor is incapacitated through illness or any other cause, the Trustees shall pay to or spend for the benefit of the Grantor, and the Grantor’s issue such sum or sums from either the net income from or the principal Trust Estate as the Trustees, in the Trustees’ discretion, may deem necessary or advisable to provide for the proper support, maintenance and health of the Grantor, and the Grantor’s issue.

Id.

Paragraphs 2.3 and 4.1 of the trust agreement make it clear that the lifetime distribution provisions under paragraph 2.2 take priority over the remaining on death distribution provisions which follow. The language of Article 2.3 is as follows:

2.3 Disposition of Trust Estate Upon the Grantor’s Death.

Upon the death of the Grantor, the Trustees shall distribute the balance of the Trust Estate, including principal and all undistributed income, in accordance with Articles 3, 4 and 5 of the Trust Agreement.

Id.

Paragraph 4.1 provides that only amounts “remaining” after the lifetime distributions on behalf of the settlor for her care, are contemplated to be distributed to

the settlor's children upon her death. (AA61). The determinative language of Paragraph 4.1 is as follows:

4.1 Provisions for children and issue.

The Trust Estate remaining after compliance with the foregoing provisions of this Trust Agreement, or the property required to be distributed pursuant to this Article 4, as the case may be, shall be divided by the trustees into as many separate shares. . .

Id.

Paragraph 3.1 of the trust agreement provides for the allocation of trust assets to reimburse the trustee for expenses made by the trustee individually on the settlor's behalf. (AA60). The language of Paragraph 3.1 is as follows:

3.1 Payment of debts and expenses.

The Trustees may pay out of the Trust Estate, or reimburse the personal representative of the Grantor's estate for, such of Grantor's just debts, the expenses of the Grantor's last illness, funeral and burial. . ., as the Trustees, in the Trustees' discretion may deem necessary or advisable, taking into consideration any other assets available for such purposes and the liquidity of such other assets.

Id.

While Naomi Margolis was in the nursing home and until November of 2003, partnership income from the three real estate partnerships, and the proceeds from the three North Star Bank Certificates of Deposit were deposited into the couple's joint checking/savings account at Wells Fargo Bank. (AA31-32). From this joint account, Jack Margolis made payments to the Sholom Home for Naomi's care at the facility and for other related medical expenses. (AA34). He testified repeatedly that he used trust income and distributions to pay the Sholom Home. (AA35). Furthermore, Jack Margolis testified that regardless of his feelings towards one of the grantor's children,

Marlee Jo Ortego, he had no ill motive to the children of Naomi Margolis regarding his actions as trustee, which are subject to the account.

- Q. Back in 2003 when you talked to Kathleen Doar about moving these partnership interests from Naomi's trust to your own trust, you knew at the time that the beneficiaries under Naomi's trust were her kids and they weren't beneficiaries under your trust. You knew that, didn't you?
- A. That had nothing to do with that. I wasn't thinking. I really wasn't thinking. Why should I want to deprive them of anything? Barry knows that. I'd never deprive him of anything.

(Margolis Dep. p. 103).

- Q. I guess what I'm getting at, Mr. Margolis, I know you're unhappy with her because she didn't visit her mom and maybe other things, but was part of what went on with some of the assignments and having things transferred back to you, was that in part at least because you were unhappy with Marlee?
- A. Very unhappy with her. She was out for all she could get.
- Q. So you decided that you were going to move some of these assets into your name?
- A. Well, I don't think that had anything to do with it but - -.

(Margolis Dep. p. 129). (emphasis added)¹

- Q. Marlee, and I just wanted to make sure. It's my understanding as I listen to you speak that you indicating that the fact that you may not have been happy with Marlee had nothing to do with it. By that did you mean had nothing to do with you transferring any assets out of - -
- A. No.
- Q. - - the trust?
- A. No.
- Q. Are you agreeing with what I just said or - -
- A. I'm agreeing with it.

(Margolis Dep. p. 130).

¹ It is noted that this is a continuance of a quote from Respondent's deposition which is included in the Appellant's Statement of Facts at page 18, and which selectively neglects to continue with the portion of the quote which clarifies that he did not act with improper motive.

The allocations of the partnership income and the proceeds of the North Star Bank Certificate of Deposit for nursing home payments and related medical expenses were included in the trustee's account. (AA18-26). According to the Margolis' accountant, the total amount paid to the Sholom Home for her care and for related medical expenses from the year 2001 through 2004 was \$206,384.00 (AA34; Ex. 44).

In 2001, the Piper Jaffrey account was liquidated and the proceeds in the amount of \$10,987.00 were transferred to the Jack Margolis Revocable Trust. (AA5). The trustee allocated this asset for reimbursement for advances made from his own funds to cover the costs of the nursing home and other related expenses at a time when the trust income was insufficient. (RA11). This allocation is included in the trustee's account. (AA23).

In November of 2003, three months before Naomi Margolis' death, Jack Margolis transferred the three real estate partnerships from the Naomi Margolis Trust to the Jack Margolis Revocable Trust. (AA37, Ex. 21). He did so based upon the advice of his counsel that the transfers were allowable under the terms of the trust, and the Delegation of Discretionary Powers, as long as the source of funds used to purchase the assets was Jack Margolis and not Naomi Margolis. (Exs. 20, 52, 53, 54 and 55). Upon learning that this advice was not indeed proper, he transferred the real estate partnership interest back to the Naomi Margolis Trust in December of 2004, and prior to the commencement of this litigation. (Margolis Dep. pp. 101, 103-105; AA38).

From the beginning of 2001 until Naomi Margolis' death in February 2004, a total of \$123,329.00 in the way of cash distributions were made from the Knollwood,

Rosewood and Ridgehill Partnerships, which were either paid to or would have been (were it not for the November 2003 assignments) paid to the Naomi Margolis Revocable Trust. (AA40). As mentioned above, these distributions from the partnerships from 2001 through November 2003 were generally deposited into the Wells Fargo Checking/Saving account held in the name Jack or Naomi Margolis, which was a joint account, and from which payments to the Sholom Home were made. (AA34-35).

During the same period of time from 2001 through November of 2003, Jack Margolis liquidated the three Northstar Bank Certificates of Deposits and likewise deposited the proceeds thereof into the couple's joint checking/savings account. The total of these proceeds, including interest, was \$44,322.65. These proceeds also were used for payment to the nursing home expenses from the joint account. Id.

After Naomi's death in February 2004, the Jack Margolis Revocable Trust received the sum of \$29,263.65 in cash distributions from the Knollwood, Rosewood and Ridgehill Partnerships before Appellant began receiving partnership distributions as successor trustee of the trust. (AA40). Absent the November 2003 assignments, which transferred the partnership assets to the Jack Margolis Revocable Trust, this sum would have been received by the Naomi Margolis Revocable Trust. Id. The Respondent allocated this amount as proper reimbursement for advances made for nursing home expenditures from his own trust assets prior to Naomi Margolis' death when the income of the Naomi Margolis Trust was insufficient to cover the current ongoing bills at the nursing home. (RA15). This allocation is reflected in the trustee's account. (AA23).

The total amount of income from the three real estate partnership interests (\$152,592.65 (\$123,329 + \$29,263.65)), and the liquidation of the three Northstar Bank Certificates of Deposit (\$44,322.65), and the transfer of the Piper Jaffray account (\$10,987.00), is \$207,902.80. Notwithstanding the Appellant's claims regarding the \$100,000.00 Certificate of Deposit which was separately at issue before the trial court, Appellant contended at trial that the Respondent was liable for this amount. (Ex. 56). This is slightly more than the expenditures and reimbursement for the Sholom Home and related medical expenses of \$206,384.00, which were proper allocations of trust assets and income under Paragraphs 2.2 and 3.1 of the Trust Agreement. (AA34; Ex. 44). Thus, there is shortfall to the trust in the amount of \$1,518.80, for which the trust is entitled to reimbursement from the trustee.

STANDARD OF REVIEW

1. **Trial Court Findings of Fact – Clearly Erroneous.**

Minn. R. Civ. P. 52.01 provides that “findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial to judge the credibility of witnesses.” In applying this standard, Minnesota courts have found as follows: “Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999). “If there is reasonable evidence to support the district court’s findings, we will not disturb them.” Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999). “We view the record in the light most favorable to the judgment of the district court.” Id.

The decision of a district court should not be reversed merely because the appellate court reviews the evidence differently. Id. “That the record might support the findings other than those made by the [district court] does not support the . . . findings are defective.” Vangness v. Vangness, 607 N.W.2d 468, 474 (Minn.App. 2000). Rather, the findings must be “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole” to warrant reversal. Rogers at 656.

2. **Conclusions of Law as to Ultimate Issues – Abuse of Discretion.**

The trial court’s determination of ultimate facts and legal conclusions, including its exercise of its equitable jurisdiction is subject to an abuse of discretion standard. Maxfield v. Maxfield, 452 N.W.2d 219, 212 (Minn. 1990). If the underlying findings of fact made by the district court are undisputed or sustainable (because not clearly erroneous), the district court’s ultimate findings must be affirmed in the absence of a demonstrated abuse of the district court’s discretion. Id. “Particularly in cases of this kind, where the trial court is weighing statutory criteria in light of the found basic facts, the trial court’s conclusions of law will include determination of mixed questions of law and fact, determination of ‘ultimate’ facts, and legal conclusions. Id. In such a blend, the appellate court may correct erroneous applications of the law. As to the trial court’s conclusions on the ultimate issues, mindful of the discretion accorded the trial court in the exercise of its equitable jurisdiction, the reviewing court reviews under an abuse of discretion standard.” Id. (See also, Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn. 1997)).

In particular, the Minnesota appellate courts have applied an abuse of discretion standard in review of trial court's application of Minn. Stat. §501B. In re Mary O. Foley Trust, 671 N.W.2d 206, 209 (Minn.App. 2003); In re Trust Created by Hill, 509 N.W.2d 168, 172 (Minn.App. 1993), review denied (Minn. Feb. 1, 1994).

3. **Application of Statute.**

The Court, in determining whether the statute in question applies to the case at hand, is a matter of de novo review. O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996).

ARGUMENT

The trial court did not abuse its discretion in allowing the trustee's account, and in particular determining that the trustee's allocation of trust assets and income for the grantor's care at the Shalom Home and for related medical expenses were valid and appropriate allocations under paragraphs 2.2 and 3.1 of the trust agreement and that the trustee did not abuse his discretion in making these payments and allocations.

The trial court's findings on which it based its allowance of the trustee's account and the exercise of its discretion in doing so, were not clearly erroneous.

Minn. Stat. §501B.14 is not applicable to this case. Even if Minn. Stat. §501B.14 did apply to this case, the trustee did not violate the provisions of the statute. The trial court addressed the arguments of appellant under Minn. Stat. §501B.14 and found that there was not basis for appellant's arguments therein.

The trial court's finding that the \$100,000.00 Norwest Certificate of Deposit never came into the hands of the trustee, was not clearly erroneous. The trial court did

not abuse its discretion in deciding that the appellant failed to meet his burden of proof that the \$100,000.00 Norwest Certificate of Deposit never came into the hands of the trustee.

Given the above, it is clear that the trial court did not err in allowing the trustee's account as amended and in denying Appellant's request that the trustee be required to make restitution to the trust as requested by the Appellant.

I. **THE TRIAL COURT DID NOT ERR IN ALLOWING THE TRUSTEE'S ACCOUNT.**

In reviewing a trustee's accounting pursuant to Minn. Stat. §501B.16, the trial court has ultimate discretion in allowing or disallowing the account. Id. On review, the decision of the trial court should not be disrupted absent an abuse of discretion by the trial court. Maxfield, 452 N.W.2d at 221. The abuse of discretion standard in particular applies to review of a trial court's exercise of its equitable jurisdiction. Id.

Whether the trustee's bookkeeping fulfills the duty of disclosure is ordinarily a question of fact for the trial court. See In re Bailey's Trust, 241 Minn. 143, 149, 62 N.W.2d 829, 833-34 (1954). The district court's findings are given great deference and will not be set aside unless clearly erroneous. Minn. R. Civ. P. 52.01. Reasonable evidence is sufficient to support the district court's finding of fact. Rogers, 603 N.W.2d at 656.

In this case, Appellant has petitioned the trial court for an accounting of the trustee and for equitable relief regarding the trustee's administration of the trust. As set

forth below in particularity, the trial court did not abuse its discretion in allowing the trustee's account as amended and in denying the appellant's claims for restitution.

A. THE TRUSTEES ALLOCATIONS OF TRUST ASSETS AND INCOME FOR THE GRANTORS CARE AT THE SHOLOM HOME AND FOR RELATED MEDICAL EXPENSES WERE VALID AND APPROPRIATE, IF NOT MANDATORY EXPENDITURES UNDER PARAGRAPHS 2.2 AND 3.1 OF THE TRUST AGREEMENT.

1. The trustee did not abuse his discretion in allocating trust assets.

Under Minnesota law a court will not substitute its discretion for that of a trustee unless it is necessary to remedy an abuse of discretion. In re Trusts of A & B Divine, 672 N.W.2d 912, 919 (Minn.App. 2004). In Divine, this court adopted six factors for determining whether a trustee has abused discretion:

1. The extent of the discretion conferred upon the trustee by the terms of the trust;
2. The purposes of the trust;
3. The nature of the power;
4. The existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustees conduct can be judged;
5. The motives of the trustee in exercising or refraining from exercising the power; and
6. The existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries. Id. at 919-20.

Additionally, a trustee derives his authority from the instrument creating the trust and each case must be decided in light of the provisions of the particular trust instrument. Sword v. Marquette Nat'l Bank, 252 Minn. 544, 91 N.W.2d 75 (1958).

In applying the factors under Divine, given the provisions of this particular trust instrument, it is apparent that the respondent did not abuse his discretion.

EXTENT OF RESPONDENT'S DISCRETION

The trust provided that if the grantor were incapacitated, the trustee shall pay or spend to or for the benefit of the grantor from income or principal of the trust estate as the trustee, "in the trustees' discretion may deem necessary or advisable to provide for the proper support, maintenance and health of the grantor and the grantors issue." The trial court found that the allocation of trust assets for the grantors nursing home costs and related medical expenses were appropriate and valid, if not mandatory payments under the trust agreement, and that the trustee did not abuse his discretion in making such allocations. The record supports this determination.

TRUST PURPOSES

The purpose of the trust was clearly to provide for the support, maintenance and health of the grantor during her lifetime, and in particular during any period of her incapacity. That is, during her lifetime, the grantor was the sole beneficiary of the trust, and under the express provisions of the trust, these lifetime expenditures for the grantor's care take priority over the payment provisions upon death under paragraphs 2.3 and 4.1. The trial court determined that the trustee used the trust assets for its specified purpose, Naomi's support, maintenance and health and the trial court's determination was "a reasonable and sensible construction upon the language used [in the trust]". In re Will of Tuthill, 247 Minn. 122, 126, 76 N.W.2d, 499, 502 (1956).

In particular, paragraph 4.1, which is entitled "Provisions for children and issue", provides that the grantor's children would receive trust assets only from the "Trust Estate remaining after compliance with the foregoing provisions of this Trust

Agreement”. When the term “remaining” is used, it serves as an inference that what is available to the remaining beneficiaries after death, is subject to the primary beneficiaries use and that only what is left over is given over to the remaining beneficiaries. See In re Cosgrave’s Will, 225 Minn. 443, 31 N.W.2d 20, 27 (1948).

Likewise, Paragraph 2.3 entitled “Disposition of Trust Estate upon the grantor’s death”, provides that upon the death of the grantor the trustees shall distribute “the balance of the trust estate” in accordance with Articles 3, 4 and 5 of the Trust Agreement. Although the word “balance” is used here instead of “remainder”, the effect is the same.

Thus, given the structure and the strict language of the Trust Agreement, it is clear that the purpose of the trust was to provide for the grantor during her lifetime first, and only to provide for her children in the event trust assets remained upon her death after fulfilling that purpose. The trial court in its memorandum stated as such: “By funding the Naomi Margolis’ Trust and using its assets for its specified purpose – her support, maintenance and health – Jack Margolis satisfied his common law and statutory duty to support his wife. There is no case or statutory law that supports Mr. Lorberbaum’s position to the contrary.”

NATURE OF TRUSTEE’S POWER

Respondent clearly had power to make the allocations of trust funds on behalf of the grantor for her care. Although there may have been some dispute as to the actual amount of the health care expenses, there was no dispute that the care was necessary for the health of the grantor.

Arguably, the only restriction on this power is the stated necessity under the language of Paragraph 2.2 that the power applies only during a time while the grantor “in the opinion of the trustees and a competent medical advisor is incapacitated through illness or any other cause. . .”. In this case, however, the record clearly establishes that the grantor was not communicating, was unable to handle her personal and financial affairs, and was incapacitated. This includes the testimony of the witnesses and stipulated facts which supported the obvious conclusion that the grantor’s condition necessitated placement in a nursing home. The trial court issued findings of fact in this regard and in its Memorandum that “There is no dispute Ms. Margolis was ‘incapacitated’ to the extent that she required nursing home care; hence, the mere failure of Mr. Margolis to obtain an independent medical opinion regarding her medical capacity is of no consequence.” Furthermore, the record reflects through Respondent’s testimony, that Respondent did, in fact, confer with the grantor’s physician who indicated to Respondent that he would not be able to take care of his wife at home any longer and that it was necessary for her to be in a nursing home.

EXTERNAL STANDARD

The record does not reflect any external standard. There was no expert witness testimony at trial, or other evidence, which established an external standard in the record.

TRUSTEE’S MOTIVES

Despite the arguments of appellant to the contrary, the record supports that the motives of the Respondent were proper. The allocation of trust funds for the grantor’s

nursing home expense and related care were consistent with the well being of the grantor, and the provisions of her trust requiring the use of trust assets for her care given her incapacity and the necessity of such care. Respondent testified that the grantor's physician stated that the grantor could not return home, and must remain in the nursing home. Respondent repeatedly testified that he used the trust assets for the necessary care accordingly. Appellant's argument that the Respondent had improper motive in making the nursing home payments as relates to the death beneficiaries, is misplaced. As long as the grantor was alive, and there were funds in her trust, it was the duty of the Respondent as trustee to provide for her care from the trust assets. Respondent acted properly, and with the grantor's personal needs in mind in providing for her care from trust assets.

CONFLICT BETWEEN INTERESTS OF TRUSTEE AND BENEFICIARY

Once again, the administration of the trust as was before the trial court involved the lifetime allocations of trust assets for the grantor's care. The grantor was the sole beneficiary of the trust during her lifetime. The interests of the death beneficiaries is of no significance because the trust assets were depleted by the proper lifetime allocations of same for the grantor's care. Whether the suspicions of Appellant regarding the motives of Respondent as to his own financial interests are reasonable or not, albeit speculative, the fact is that the record does not support a determination that the allocations of trust assets for the grantor's care were anything other than proper, and not the result of a perceived or actual conflict of interest. Furthermore, it simply would

have made no difference given the language of the trust agreement which mandated the allocation of assets for the grantor's health.

2. **The trustee did not fail to follow the material provisions and purposes of the Trust Agreement.**

Appellant contends that the trustees account should not have been allowed because the trustee failed to follow the provisions of the trust agreement. Appellant fails to recognize that the material purpose and provisions of the trust was first to provide for the grantor's care, which is exactly what happened, and only if assets were remaining after fulfilling this purpose, to distribute the remaining assets to the remainder beneficiaries. (See discussion regarding "Trust Purposes" supra, at pages 19-20).

As the trial court pointed out, whether the Respondent acted alone as a sole trustee, or whether Respondent acted as a co-trustee along with Appellant, is a distinction without a difference. That is, it is meaningless as to the ultimate purpose of the trust. As the trial court pointed out, these expenses were expenses of the grantor, and were valid, if not required expenditures of trust assets regardless of who was serving as trustee. The trial court did not abuse its discretion in so deciding.

Likewise, Appellant's argument regarding the issue of the grantor's incapacitation as pertains to the successor trustee provision is also without merit, since there is no dispute as to whether or not the grantor was incapacitated. Appellant has not argued that the court erred in finding that the grantor was incapacitated, but rather that the trustee failed to follow the proper procedure under the trust in making this

determination. This is simply a moot point. The trust funds were expended for the stated purposes of the trust, as the trial court stated in its memorandum. The trial court also stated, "There is no dispute that Mrs. Margolis was 'incapacitated' to the extent that she required nursing home care; hence, the mere failure of Mr. Margolis to obtain an independent medical opinion regarding her capacity is of no consequence. That is also true of Mr. Margolis' failure to inform Mr. Lorberbaum that he could act as successor trustee following Mrs. Margolis' placement at the nursing home. Had Mr. Lorberbaum assumed the duties of successor trustee and had he objected to the payment of his mother's nursing home costs from her trust, the issue would have been brought before the court, which would have ordered payment from her trust."

Appellant argues, albeit in his Statement of Facts on page 11 of his brief, that Paragraph 8.7 of the Trust Agreement was a prerequisite for the operation of Section 2.2 of the Trust Agreement. This is erroneous. Section 8.7 only applied to the ability of the remaining trustee to continue to act as a sole trustee given the incapacity of the grantor as trustee. It has no bearing on the dispositive provisions of Paragraph 2.2 of the Trust, which require the allocations of trust assets and income upon incapacity, regardless of who was currently serving as trustee.

Appellant generally relies upon portions of the trust agreement which are immaterial to the ultimate issues of this case, namely provisions regarding successor trustees, or the ability of an original trustee to continue to act independently, to attack the trustee's actions which satisfied the material purposes of the trust. Appellant's argument is inconsistent with the overall purpose of the trust agreement.

Finally, Paragraph 8.8 of the trust agreement provides as follows:

8.8 Liabilities of Trustees.

No person or corporation acting as a trustee hereunder shall at any time be liable for a mistake of law and/or fact, for an error of judgment, nor for any loss or injury coming to any trust estate or to any beneficiary thereof (or to any beneficiary under this Trust Agreement or to any other person), except as a result of actual fraud or willful misconduct on the part of the trustee to be charged. Further, each of the trustees, under the above standard, shall be severally held to the faithful performance of his or her own acts, but shall not be liable for the acts or omissions of any other trustee in which acts or omissions the trustee sought to be held did not participate or concur.

(AA78 (emphasis added)).

Respondent was not a corporate trustee. The trust was never under court supervision during the ten years of its existence prior to the commencement of this litigation. Respondent was acting not only as a trustee, but primarily as a husband with regard to his actions. It needs to be kept in context that although every technical facet of the trust agreement may not have been followed, the material purposes of the trust were honored, as the trial court correctly found.

In essence, Appellant wishes to apply provisions of the trust agreement to create liability upon the Respondent/trustee, while at the same time ignoring the very provisions of the trust agreement which exonerate the trustee's actions or limit his liability.

3. The trustee did not breach his fiduciary duty of loyalty to trust beneficiaries and was not motivated by an improper purpose.

As stated above, the primary duty of Respondent as trustee was to allocate trust assets for the grantor's care given her incapacity. Appellant fails to acknowledge this in implying that the trustee had a duty to the death beneficiaries to not expend trust funds for the grantor's care accordingly. The trust document, and the provisions therein, create the duties of the trustee with respect to administration of the trust assets. This is the very nature of a trust. That is, Respondent's duty is defined by the four corners of the trust agreement and the assets which are under the control of the trustee in that capacity. By funding the trust, and by using the monies for its stated purpose, the trustee did not breach any duty of loyalty and acted properly.

Appellant's own authority in his brief on this issue actually supports this position. Appellant cited Rounds Loring A Trustee's Handbook, §6.1.3, at 236-44 (2005), for the premise that a trustee may not receive direct or indirect benefit from the trust unless authorized by the trust agreement, or by statute. Id. at 242 (emphasis added). However, in this case, it is clear that under Paragraphs 2.2 and 3.1 of the trust agreement, the allocation of trust assets which are at issue in this case were "authorized by the trust agreement."

The cases cited by Appellant, are not on point with this case. See In Matter of Eberhart, 171 Misc.2d 939, 656 N.Y.S.2d 159 (1997)(two fathers, both of whom are trustees of Mrs. Eberhart's Trusts, and of which their children are beneficiaries, improperly use trust funds to discharge their own legal obligation of support to their children). See also Sutliff v. Sutliff, 515 PA. 393, 528 A.2d 1318 (1987)(father used children's UGMA property to fulfill his own support obligation). Obviously this would

be a direct support obligation of the trustee and hence his principal obligation. This is not the case here. The nursing home expenses were the primary obligation of the grantor. They were expenses for her care, not Respondent's. Furthermore, to hold that Respondent's allocation of trust resources for the health of the grantor, who happens to be his wife, pursuant to the specific terms of the trust was improper or a breach of fiduciary duty would render virtually every standard marital trust agreement in this state void to that effect. Respondent contends that this would be against public policy. (See also discussion regarding 501B.14 infra at "C", page 34, and discussion regarding "Trustee's Motives" supra at page 21-22)

4. **The trustee did not have Unclean Hands.**

When Respondent made proper allegations of trust funds for the benefit of his wife's medical care pursuant to the terms of the trust, he was not acting with unclean hands. It is paramount to clarify that it is not Respondent who is seeking equity, but rather the Appellant. The Appellant petitioned the court for equitable relief and requested the court order Respondent to submit an accounting. Prior to that time, and during the first ten years of the trust, and in particular, during the time period covering the transactions in issue at this case, this trust was not under court supervision.

The expenditures of the trust assets are reflected in the trustee's account. It is Appellant who has objected to the account, and requested that the court not allow the account claiming that the trustee's actions were wrongful. It has been discussed at length above why the trustee's actions were not wrongful, but rather were appropriate and not an abuse of the trustee's discretion.

Appellant refers in his brief to certain actions by the trustee which he claims to be indicative of the supposed unclean hands of the trustee. These actions, including the affidavit of the respondent referred to by Appellant, deal with the disclosure of trust assets in the trust prior to the accounting of Respondent. However, other than the \$100,000.00 Norwest Certificate of Deposit, which is discussed below and is in dispute, the account, filed with the court, accurately reflects the assets held in the trust.

Furthermore, the November 2003 assignments of the three real estate partnership holdings referred to by Appellant in his brief were transferred back to the trust prior to the commencement of this litigation. It needs to be kept in context that the partnership transfers occurred only three months before the death of the grantor, and had no effect on the allocation of trust assets and income which are at issue in this case and which occurred prior to the transfers (i.e., 2001-2003). Thus, the partnership transfers really have no bearing on this case.

Therefore, the issue raised by Appellant regarding unclean hands is not germane to the issues before the court. Rather, what was before the court was whether or not allocation of trust assets for the grantor's nursing home costs and related medical expenses was proper, and whether the trustee was obligated to account for the \$100,000.00 Norwest Certificate of Deposit. Contrary to Appellant's argument, the trial court did not fail to make findings regarding the trustee's motive, his course of conduct or his alleged unclean hands. The trial court found that the trustee's allocation of trust assets were proper, that the trustee satisfied his common law and statutory duty to support his wife, and that there was no case or statutory law that supports Appellant's

proposition to the contrary. (See also discussion regarding "Trustee's Motives", supra at p. 21-22)

B. MINN. STAT. §501B.14 IS NOT APPLICABLE TO THIS CASE.

Appellant seems to put much stock in the language of Minn. Stat. §501B.14, Subd. 1(2). The entirety of Minn. Stat. §501B.14 is as follows:

Subdivision 1. Prohibition. No trustee may exercise or participate in the exercise of any of the following powers:

(1) any power of the trustee to make discretionary distributions of either principal or income to or for the benefit of the trustee as beneficiary, unless by the terms of the will or other written instrument those discretionary distributions are limited by an ascertainable standard relating to that trustee's health, education, maintenance, or support as described in sections 2041 and 2514 of the Internal Revenue Code of 1986, as amended through December 31, 1992; or

(2) any power to make discretionary distributions of either principal or income to discharge any legal support or other obligations of the trustee to any person.

Subd. 2. **Exercise of Affected Powers.** Any power described in subdivision 1 that is conferred upon two or more trustees may be exercised by the trustee or trustees who are not disqualified under subdivision 1. If there is no trustee qualified to exercise the power, any trustee or other person interested in the trust may petition the district court pursuant to section 501B.16 to appoint an additional trustee. The district court may limit the powers of an additional trustee appointed under this subdivision to exercise the power to make discretionary distributions when no other trustee may exercise that power.

Subd. 3. **Application.** (a) Except as provided in paragraph (b), this section applies to any exercise of any powers of the trustee after May 14, 1993, under any trust created before, on, or after May 14, 1993, unless the terms of the trust refer specifically to this section and provide that this section does not apply.

(b) This section does not apply to a trustee:

(1) who retains or is granted an unlimited lifetime or testamentary power, exercisable in a capacity other than as trustee, to revoke the trust, or to withdraw all of the income and principal of the trust, or to appoint all of the income and principal of the trust to the trustee individually or the trustee's estate;

(2) of a trust created on or before May 14, 1993, if the entire principal of the trust would be included in the gross estate of the trustee for federal estate tax purposes if the trustee had died on May 14, 1993, without regard to any power described in subdivision 1;

(3) of a trust created on or before May 14, 1993, if no part of the principal of the trust would be included in the gross estate of the trustee for federal estate tax purposes if the trustee had died May 14, 1993, without exercising the power; or

(4) of a trust created on or before May 14, 1993, if (i) the trust is not exempt from generation-skipping transfer tax under chapter 13 of the Internal Revenue Code of 1986, as amended through December 31, 1992, because of Public Law Number 99-514, section 1433(b) to (d); (ii) there would be a taxable termination with respect to the assets held in the trust if the trustee and all beneficiaries of the trust who are assigned to the trustee's generation or a higher generation had died on May 14, 1993; and (iii) the trust would have an inclusion ratio, as defined in section 2642(c) of the Internal Revenue Code of 1986, as amended through December 31, 1992, of one with respect to the taxable termination.

(c) This section has no effect on any action taken by a trustee on or before May 14, 1993.

Minn. Stat. §501B.14 (emphasis added).

Appellant misapplies this statute to the present case. This statute was not intended to create or set any standard regarding a trustee's liability to beneficiaries resulting from the distribution of trust assets. Rather, as set forth below, it is apparent that the statute was enacted solely for tax purposes, and in particular, to protect a trustee from tax pitfalls whereby certain distributions may be included in the trustee's taxable estate under the federal tax code.

Although not exactly the same, the language and intent of Minn. Stat. §501B.14 is consistent with that found in a similar provision of the Uniform Trust Code. Section

814 of the Uniform Trust Code is entitled “Discretionary Powers; Tax Savings.” That Section provides:

§814. Discretionary Powers; Tax Savings.

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute”, “sole”, or “uncontrolled”, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee’s personal benefit may exercise the power only in accordance with an ascertainable standard ~~relating to the trustee’s individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(e)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended];~~ and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended], was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended].

As amended in 2004.

UNIFORM TRUST CODE, §814 (2000)

The emphasized language of §814(b)(2), although not exactly the same as that of Minn. Stat. §501B.14, Subd. 1(2), is materially the same. Furthermore, the overall scheme and organization of this statute is materially the same in its entirety.

The drafters comments to §814 state the following:

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trust that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law.

* * *

Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustees minor children, results in inclusion of the trust in the trustees gross estate even if the power is limited by an ascertainable standard. The applicable regulations provides that the ascertainable standard exception applies only to distribution for the benefit of the decedent, not to the distribution to those to whom the decedent owes a legal obligation of support. See Treas. Reg. Section 20.2041-1(c)(2).

Id. (emphasis added).

It is clear from comparing the Minnesota statute to the similar provision of the Uniform Trust Code with its comments, that the statute was meant as a protective measure to maximize the estate tax benefits of trust agreements, and not to create liability upon the trustee for allocating assets according to the trust as regards to beneficiaries rights. The purpose of §501B.14 has also been noted by local trust law practitioners and authorities:

M. Section 501B.14 – Discretionary Powers

Section 501B.14 places restrictions on the power of a trustee: (i) to exercise discretionary powers to distribute principal or income to the trustee unless the power is limited by an ascertainable standard, and (ii) to exercise a discretionary power to distribute trust assets to discharge the trustee's legal obligation of support. Trustees not disqualified under these provisions can act. If no such qualified trustee is surviving, the court may appoint one. The exceptions listed in §501B.14(3)(b) are designed to limit this section's applicability to trusts which would otherwise not be included in the trustee's taxable estate. Section 501B.14 is intended to prevent undesirable gift and estate tax consequences stemming from the existence of such powers and to "correct" poorly drafted discretionary provisions in a trust.

MINNESOTA TRUST ADMINISTRATION DESKBOOK, §1, p. 4, (S. Morrison & M. Van Sambeek, 2d ed., 2005).

Appellant cites no cases which address Minn. Stat. §501B.14. The author of this brief is aware of only one case which cites the statute. See generally, Morrison v. Doyle, 528 N.W.2d, 237, 241 (Minn. 1998). The case is not on point for the purposes of the instant case before the court. It dealt with Subd. 1 of the statute, rather than Subd. 2, and was used only as a reference to the "ascertainable standard" provision of that subdivision by way of comparison to a spend-thrift clause under the trust at issue therein. The court made reference to the trust language at issue, its similarity to the

statute, and its similarity to the IRS' statutory provisions on the creation of ascertainable standards that limit distribution of trust assets accordingly. Id.

Thus, it is apparent that the purpose of the statute as enacted in Minnesota, was solely for tax purposes, and not to address non-tax liability issues as and between trustees and beneficiaries related to the trustee's administration of the trust as was before the trial court. Minn. Stat. §501B.14, Subd. 1(2) is not applicable to this case.

C. EVEN IF MINN. STAT. §501B.14 DOES APPLY, THE TRUSTEE DID NOT VIOLATE THE PROVISIONS OF THE STATUTE.

1. The cost of the grantor's nursing home expense and other related medical expenses was the principal obligation of the grantor, and hence the grantor's trust and not that of the trustee, and were proper expenditures of trust assets and income under the strict terms of the trust agreement.

Appellant fails to recognize the importance of the distinction that the nursing home expenses of the grantor were expenses for her care, not the care of Respondent. The fact that Respondent was required to sign the nursing home admission contract is irrelevant. It is common knowledge that spouses are routinely required to sign such contracts to facilitate the admission of their spouse to a long-term care facility. It must not be forgotten that Respondent was acting as a spouse in this regard, not a trustee. Furthermore, by signing the admission contract for his incapacitated wife, Respondent did not in anyway alleviate the personal obligation of the grantor for her care at the nursing home. Rather, it only meant that in the event she were unable to pay, that the

Respondent (husband) would be jointly and severally liable for payment. The trial court in its memorandum succinctly stated as such:

“That Mr. Margolis agreed that he would be financially responsible for his wife’s nursing home expenses *were she unable* to pay the nursing home means that if there were no assets in her trust to pay the expenses, he would be obligated to pay them. In this case, Mrs. Margolis *was* able to pay the nursing home with funds from her trust.”

Further, Appellant fails to recognize that the duties of the trustee are confined to the terms of the trust agreement. The grantor created a trust which provided that these nursing home expense should be paid from her trust assets. The primary obligor for these expenses was the grantor, and she did have sufficient assets in her trust for payment for her care at the nursing home according to the terms of the trust.

The cases that Appellant cites regarding spousal obligations, and his reference to Minn. Stat. §519.05(a) do not involve the applicability of a trust. This author contends that a trust is a separate creature whose provisions control the assets which are held by the trust. The amount and nature of the couple’s non-trust assets is immaterial. The trust in this case contained no language requiring the trustee to consider other sources of funds before making trust distributions according to the provisions of the trust. The language of the trust in this case regarding lifetime distributions for the grantors support, maintenance and health of the grantor, are standard provisions that are found in virtually all such marital trusts. To hold that the trustee in this case was prohibited from allocating the trust assets for the grantor’s care even though the strict plain language of the trust document requires same, would in essence render all marital living trusts in the

State of Minnesota void to this effect. This author contends that this would be contrary to public policy.

Finally, if the grantor truly had intended for her trust assets to be preserved for the benefit of her children upon her death, without regard to her lifetime care needs, she could have executed a trust agreement which did not provide for any lifetime payments for her care. Likewise, she could have conditioned Paragraph 2.2 of her trust agreement which provides for her care during her lifetime, to only apply in the event that her husband predeceases her. She did not do that.

Once again, the trial court properly found that the Respondent allocated the assets of the trust for the stated purposes of the trust, and that in doing so, he “satisfied his common law and statutory duty to support his wife.” The trial court also stated “there is no case or statutory law that supports Mr. Lorberbaum’s position to the contrary.” These issues were before the trial court and it is obvious that the court addressed them and made its ultimate decision accordingly contrary to Appellant’s assertions to the contrary. The Appellant may not be happy with the trial court’s decision, but that does not entitle him to the proverbial “second bite at the apple”.

II. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE \$100,000.00 NORWEST CERTIFICATE OF DEPOSIT NEVER CAME INTO THE HANDS OF THE TRUSTEE, AND THEREFORE WAS NOT A TRUST ASSET FOR WHICH THE TRUSTEE WAS OBLIGATED TO ACCOUNT FOR.

A. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE APPELLANT FAILED TO MAKE A SUFFICIENT SHOWING, GIVEN THE ENTIRETY OF THE EVIDENCE, AND MEET HIS BURDEN OF PROOF, THAT THE \$100,000.00

NORWEST CERTIFICATE OF DEPOSIT EVER CAME INTO
THE HANDS OF THE TRUSTEE.

A trustee is only accountable for assets which come into the hands of the trustee. Appellant had the burden of proof at trial of establishing that the asset in question in this case, namely the \$100,000.00 Norwest Certificate of Deposit, had come into the hands of the trustee. Bogert, Trust & Trustees, §923, at 451, (2d ed. 1980), citing Stein v. Kemp, 132 Minn. 44, 155 N.W. 1052 (1916); Blythe v. Kujawa, 175 Minn.88, 220 N.W. 168 (1928); Village of Monticello v. Citizens State Bank of Monticello, 180 Minn. 418, 230 N.W. 889 (1930). Absent the meeting of this burden by Appellant, Respondent was not obligated to account for the asset, it being deemed not to be an asset of the trust for which the Respondent would be accountable for as trustee.

The trial court did not abuse its discretion in finding that Appellant did not meet its burden of proof to show that the asset ever came into the hands of the trustee. The record and the trial court's findings support this determination, and the trial court's findings were not clearly erroneous. The only direct evidence that Appellant had at trial on this issue were two pages of grantor's handwritten notes which list and make reference to various assets. These notes in and of themselves are contradictory and inconclusive as to assertion that the CD was a trust asset. If, as Appellant contends, the first page of the notes implies that the Certificate of Deposit may have been or was intended to be as the case may be, an asset of the trust, the second page of the notes directly contradicts this and implies that this was an account that was owned

individually by the Respondent by way of the reference of the name Jack next to the account number.

By contrast, there is direct independent documentary evidence, namely the Norwest Bank Maturity Notices, that these accounts were held in the name of Respondent individually and/or Respondent and grantor jointly (and not in the trust). Furthermore, the subpoena response from Wells Fargo (successor to Norwest Bank) and the deposition of the Margolis' accountant likewise support the finding that this asset was an individual asset and not an asset of the trust, and that it never was an asset of the trust. In essence, Appellant seeks to transform suspicion into fact.²

The trial court correctly considered and weighed this evidence and concluded that Appellant did not meet its burden of proof on this issue. Thus the trial court did not abuse its discretion in determining that the Certificate of Deposit was not an asset of the trust for which Respondent was obligated to account for.

Appellant's authority on this issue is misapplied. Appellant cites Stein, Blythe and Village of Monticello above for the proposition that there is a presumption under Minnesota law that trust assets continue in the hands of a trustee when a beneficiary traces trust assets into the hands of the trustee who fails to prove what happened to those assets. However, the beneficiary in this case has not "traced" the Certificate of Deposit into the hands of the trustee. This is exactly the issue that was before the trial

² It should be noted that at trial, the Appellant testified that he had seen a check in the amount of \$105,000.00 that was made payable to the Jack and Naomi Margolis Revocable Trust. However, when presented with a copy of this check upon cross-examination, he conceded that the check was in fact made payable to the Jack Margolis Revocable Trust, and not the Naomi Margolis Revocable Trust. (T. 83-84; Ex. 63).

court. The trial court correctly found that given the evidence, the Appellant did not meet its burden of proof to show that the asset ever came into the hands of the trustee.

Appellant relies upon authority from other jurisdictions to support the proposition that the notes of the grantor are sufficient to show that the trust assets were actually transferred to the trust, or that the trustee is obligated to account for what happened to the asset in question. However, it is distinguished that there is no evidence in the record to support a determination that the notes were part of the trust agreement at its inception, and were meant to be a declaration of trust assets. Also, it is unclear that the Certificate of Deposit was an asset of the grantor individually, and that therefore, she would have the authority to transfer it into her trust. See, Bourgeois v. Hurley, 392 N.E.2d 1061, 1065 (1979); see also Samuel v. King, 186 Or.App. 684, 692, 64 P.3d 1206, 1210-11 (2003).

Regarding Samuel v. King, Appellant stated the holding as being “so long as the grantor actually transfers the titled assets to the trust, it was unnecessary to take further action formulating transferring title of those assets to the trust.” Id. Here, there is no evidence in the record to support a determination that the grantor “actually transferred” this asset to the trust, and as stated above that she had any control over these assets in the first place which would allow her to do so – namely that they were not her assets to begin with.

Finally, Appellant fails to recognize that the trial court did in fact address the issue of whether the notes of the grantor were sufficient to show that the asset ever came into the hands of the trustee. The determination of the trial court is more than

supported by the record and the trial court did not abuse its discretion in so finding. Appellant contends that Respondent's denial that the asset ever was in the trust is not credible. However, Appellant fails to recognize that the trial court did not rely upon Respondent's testimony on this issue, but rather on independent evidence including the weak probative value of the notes which Appellant relies upon, the independent documentary evidence before the court, and the testimony of the Margolis' accountant.

Appellant seems to contend that the trial court erred in finding that the \$100,000 Certificate of Deposit was not an asset of the trust for which the trustee was obligated to account for, because Respondent failed to explain what happened to this particular asset regardless of whether it was an asset of the trust. The Appellant has misapplied the burden of proof in his argument. In essence, Appellant has turned the burden of proof up-side-down by asserting that Respondent must prove that the asset did not come into his hands as trustee, in essence, to prove a negative. This, of course, is erroneous. The burden of proof requires that Appellant/beneficiary meet his burden to show that the asset did actually come into the hands of the trustee. As stated above, the trial court correctly weighed the evidence, and determined that Appellant failed to make the required showing.

In any event, it is understandable that Respondent may not have recalled exactly what became of this particular Certificate of Deposit from ten years ago. It is apparent from the record and undisputed that the Respondent had a plethora of accounts and investments during his lifetime and in particular during the period which is relevant to this case. What is imperative is that Respondent testified that he did not put the

Certificate of Deposit into the trust, and the trial court relied upon independent evidence in making its determinations on this issue.

III. **THE TRIAL COURT DID NOT ERR IN FAILING TO REQUIRE THE TRUSTEE TO MAKE RESTITUTION TO THE TRUST TO THE EXTENT REQUESTED BY THE APPELLANT.**

For all of the reasons stated above, the trial court did not abuse its discretion in denying Appellant's request for restitution beyond a reimbursement to the trust by Respondent in the amount of \$1,518.80.

Appellant, in his brief, while noting his request for restitution at the trial court level in an amount in excess of \$300,000.00, separately and specifically addressed two subjects, namely the allocation of \$29,263.25 in income from real estate partnership holdings after the death of the grantor, and the allocation of the \$10,987.00 Piper Jaffray account, which was transferred to the Jack Margolis Revocable Trust in 2001.

Appellant erroneously states that the trial court made no findings with respect to these allocations. In fact, the trial court did specifically make findings on both of these issues, as it did with all of the other issues before the court and raised on this appeal. These findings are found at paragraph 17 and 18 of the trial court's Findings of Fact as follows:

17. The trustee appropriately allocated the income of the partnership interest for the period of February 2004 to the end of 2004 (\$29,263.65) for reimbursement of accounts advanced by the trustee from his own funds at a time when the income from the trust was insufficient to cover the grantor's care at the Sholom Home.

18. The trustee appropriately allocated the \$10,987.00 Piper Jaffray proceeds for reimbursement of amounts advanced by the trustee from his own

funds at a time when the income from the trust was insufficient to cover the grantor's care at the Sholom Home.

These allocations were reflected in the trustee's account which was before the court.

It should be noted that no where in Appellant's brief does Appellant make reference to Paragraph 3.1 of the Trust Agreement which provides that on the death of the grantor, certain debts, reimbursements and obligations of the trust were to be paid by the trustee prior to any ultimate on death distributions to beneficiaries. The trial court did refer to Paragraph 3.1 of the Trust Agreement in its Findings of Fact, and that Respondent had claimed that the amount of \$29,263.65 was properly received by him as a valid reimbursement for nursing home expenditures he made from his own trust assets prior to Naomi Margolis' death when the income of the Naomi Margolis Trust was insufficient to cover the current ongoing bills at the nursing home. Furthermore, in the trial court's Conclusions of Law, the court stated that the allocations of trust assets were proper not only under Paragraph 2.2, but also Paragraph 3.1 of the Trust Agreement, and that the trustee therefore did not abuse his discretion in making those payments and allocations.

Thus, Appellant's arguments suggesting that the trial court did not address these issues is unfounded.

CONCLUSION

For all of the above stated reasons, the trial court did not abuse its discretion in allowing the trustee's account as amended, and denying Appellant's claim for restitution. The record supports the trial court's Findings and ultimate determination

that (1) the allocation of the trust assets by the Respondent pursuant to Paragraphs 2.2 and 3.1 of the Trust Agreement were valid and appropriate allocations of trust assets and income, and that the trustee did not abuse his discretion accordingly; and (2) Appellant failed to meet its burden of proof to show that the \$100,000 Norwest Certificate of Deposit ever came into the hands of the trustee, and that therefore, the trustee was not obligated to account for same. Accordingly, Respondent requests that this court affirm the trial court's Order and Order for Judgment in its entirety.

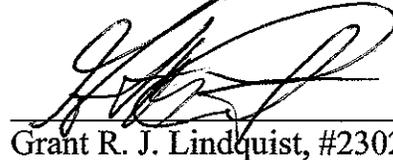
Dated:

8/22/2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

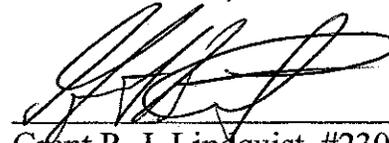
I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a monospaced font. The length of this brief is 1,092 lines. This brief was prepared using Microsoft Word.

Dated: 8/22/2006

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