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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 REPLY BRIEF

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ARGUMENT

The Trustee's Response and Reply Brief does not explain how language directing a trustee to pay "my legal debts" can justify a holding – as a matter of law – that legal debts (mortgages and margin-loan debt) should not be paid.[1] The Trustee ultimately argues that the pay "my legal debts" directive must be read out of the Trust instrument entirely, or construed to mean "pay my legal debts except for secured debts." But basic principles of trust construction require that every provision in a trust must be given meaning, and words cannot be added or substituted for the language chosen by the grantor. The Trustee fails to explain what legal meaning should be given to the "pay my legal debts" language here or in future cases, other than proposing that the language is meaningless.

The unusual facts of this case – the existence of both a will and a Trust containing substantive provisions for disposition of assets, the lack of a pour over will, and an extrinsic record showing that Pamela wanted her husband to be free of debt – all make this case a poor vehicle for this Court to accept the Trustee's invitation to articulate a judge-made rule of trust law that "pay my legal debts" does not mean – and can never mean – what it says. In fact, even the district court acknowledged that "the question nevertheless must be asked whether the Trust provisions of Section 3.1.1 (pay 'my legal

[1] The Trustee's Brief makes no attempt to differentiate between (1) the court of appeals' holding regarding payment of the Schwab margin loan debt, which is the subject of the Trustee's appeal; and (2) the holding regarding payment of mortgage debt, which is a cross-review issue. Accordingly, although Vernon aims to limit his reply to the cross-review issues, the "pay my legal debts" language governs both the mortgage debt and margin loan, and they are virtually intertwined in the Trustee's Response and Reply Brief.

debts') was Pamela Stisser's way of expressing a 'testator's intention' to have secured debts paid out of estate assets ..." (Add.32.) In resolving this question, this Court should affirm the settled proposition in *In re Trust Created by McLaughlin,* 361 N.W.2d 43, 44-45 (Minn. 1985), that a grantor's intent is determined pursuant to the four corners of the trust agreement, and that extrinsic evidence is examined on a case-by-case basis if the trust language is ambiguous. If this issue cannot be resolved in Vernon's favor by applying the plain meaning of the trust instrument, then the Court should remand for trial to determine what Pamela intended when she used this language.

The Trustee foreshadows the possibility of a trial as to Pamela's intent, stating that in light of the conflicting affidavits from Vernon and attorney Larry Koch, it might be appropriate for "the District Court to weigh the evidence and determine Stisser's credibility and the Grantor's intent." (Trustee Resp. Br. 19-20.) This Court should order such a resolution if it finds ambiguity in the "pay my legal debts" language, consistent with *McLaughlin,* 361 N.W.2d at 44-45. The one resolution that cannot stand is the district court's conclusion – as a matter of law – that "pay my legal debts" means nothing, and that the Trustee was entitled to summary judgment.

The Trust's directive that Pamela's fiduciaries "<u>shall</u> be entitled to reimbursement" is equally clear, and the district court's legal conclusion that the Trustee had discretion to deny fiduciary reimbursement <u>entirely</u> is reviewed *de novo* and was erroneous.

I. THE LANGUAGE "PAY MY LEGAL DEBTS" CANNOT BE READ OUT OF THE INSTRUMENT.

The Trustee correctly states that "the Court should strive to give effect to every provision of the Trust." (Trustee Resp. Br. 11.) But the Trustee then ignores his own directive by failing to give any meaning to the pay "my legal debts" language. The Trustee's fatal error in this appeal is the failure to articulate what effect should be given to the "pay my legal debts" language if it is not interpreted and applied as Vernon contends, or at the very least, left for trial. This omission and the Trustee's failure to articulate a proposed rule of law for this and future cases are glaring holes in the Trustee's theory of the case.

The Trustee's Response and Reply Brief does nothing to alter the conclusion that Section 3.1.1 must be interpreted consistent with the plain language and without regard to the Probate Code's non-exoneration statute. At the very least, there should have been a trial on whether Pamela intended for the Trust to pay mortgage (and other) debt.

A. Issues Involving Admissibility of Vernon's Affidavit and Whether He Was Acting As Personal Representative Are Not Before the Court.

As an initial matter, the Court should reject the Trustee's attempt to raise two issues not before the Court: (1) the "admissibility" of Vernon's affidavit testimony about his debt-payment expectations, and (2) whether Vernon was acting as the Estate's personal representative when he requested that the Trustee pay personal representative's compensation and administration expenses for attorney Laird Lile's fees. Neither issue is identified in the Trustee's Petition for Review; accordingly, neither issue is before the Court. *Anderly v. City of Minneapolis,* 552 N.W.2d 236, 239-40 (Minn. 1996) ("this

court may decline to hear an issue if it is not raised in either a petition for further review or a conditional petition for further review").

In addition, the Trustee raised both of these issues for the first time before this Court. The Trustee did not move to strike Vernon's affidavit in the district court; to the contrary, in response to Vernon's affidavit he submitted a Supplemental Affidavit of Larry A. Koch. (R.Add.10-11.) Nor did the Trustee argue in his summary judgment response or in the court of appeals that the affidavit should be excluded. Nor did he argue that Vernon's request for the Trustee to pay the mortgage debts (or Schwab margin loan) should be denied on the grounds that they were made in Vernon's personal capacity. The Trustee makes these arguments for the first time before this Court, which is improper. *Anderly*, 552 N.W.2d at 239-40; *see also Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

1. Vernon's Affidavit Was Submitted to Defeat Summary Judgment and Was Properly Before the District Court.

Vernon's affidavit (R.Add.1-7) was submitted as part of the parties' cross-motions for summary judgment. It does not contradict his prior deposition testimony (R.Add.12-14), and in fact, is consistent with his testimony that much of the debt in dispute was incurred at Pamela's request, and that she intended that her Trust pay these debts so that Vernon would be "debt free" if she were the first to die. Vernon explained that the purchase of the Florida residence was "Pam's wish, much more so than mine," and that Pamela's assets, including the Trust assets, enabled the couple to obtain a "zero down payment" mortgage. (R.Add.4.) Vernon further explained that he had been a senior

corporate executive, but left a high paying job in order to comply with Pamela's wish that he devote time to raising the couple's blended family. (*Id.*) He also described how the couple re-examined their estate planning in the spring of 2002, and how Pamela was "largely pleased" with a proposed third restatement of the Trust Agreement, "particularly with those newly clarified provisions regarding the Trust's obligation to provide for me." (R.Add.6.)

The Trustee contends that Vernon's affidavit is "inadmissible" and "irrelevant." (Trustee Resp. Br. 18-19.) But this affidavit was submitted in opposition to the Trustee's summary judgment motion, as Minn. R. Civ. P 56.01 specifically authorizes, and it is directly relevant to Vernon's argument that Pamela intended for Vernon to be free of real estate and other debt. The Trustee also contends that the Court cannot give "legal effect" to the affidavit because it is a "statement made after execution of a testamentary document." (Trustee Resp. Br. 19.) Vernon is not suggesting the Court give "legal effect" to the affidavit, but rather that if the Court finds ambiguity in the "pay my legal debts" language, it should (1) look outside the four corners of the Trust Agreement to hold Pamela intended for the Trust to pay real estate (and other) debt, or (2) remand for trial on that issue. This procedure and these outcomes are consistent with and authorized by *McLaughlin,* 361 N.W.2d at 44-45, which the Trustee ignores.

The Trustee also characterizes Vernon's affidavit as "inadmissible" because it is "self-serving." (Trustee Resp. Br. 18-19.) But virtually all evidence is self-serving. The rule the Trustee cites applies only when a party attempts to "create an issue for trial by directly contradicting prior sworn testimony with a later-filed self-serving affidavit."

Sampair v. Vill. of Birchwood, 784 N.W.2d 65, 75 n.9 (Minn. 2010). That's not what occurred here. Vernon's affidavit supported and did not contradict his prior sworn deposition testimony, excerpts of which are on Pages 12-14 of Respondent's Addendum.

Nevertheless, the Trustee quotes an excerpt from *Scott on Trusts* to claim that there is a broad rule that affidavit testimony is "ordinarily not admissible ... not only where it contradicts or is inconsistent with express provisions of the trust instrument, but also where it changes the legal effect of the instrument."[2] (Trustee Resp. Br. 18.) The Trustee claims that any conclusion consistent with Vernon's affidavit would be "directly contrary to Paragraph 12.4.5 of the Trust Agreement, in which the Grantor specifically omitted any provision for Stisser." (*Id.*) But the Trust Agreement's lack of "provisions" for Vernon has nothing to do with the plain language at issue in this appeal: the directive for the Trustee to "pay my legal debts." "[A] trustee has a duty to pay valid trust debts before distributing trust property." *Farm Credit Bank of Wichita v. Woodring*, 851 P.2d 532, 533 (Okla. 1993). The legal effect of this language is not changed by considering Vernon's affidavit; rather, the legal effect is supported by the affidavit.

Finally, the Trustee characterizes affidavit testimony from Larry Koch as the "[t]he only admissible extrinsic evidence in the record of Grantor's intent." (Trustee

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[2] The Trustee's excerpt from *Scott on Trusts* is incomplete because it ends in mid-sentence. The sentence continues by giving an example of when testimony might be inadmissible on grounds that it changes the legal effect: "that is, where if given effect it would lead to results that would not be reached in the absence of such evidence." IIA Scott & Fratcher, Scott on Trusts § 164.1, at 257–58 (4th ed.1987). That is not the case here. The Court need not even rely on Vernon's affidavit to reach the conclusion that "pay my legal debts" means what it says.

Resp. Br. 19.) But Koch's affidavit does not state that he drafted either the original "pay my legal debts" language in 1966 or the 2001 Restatement; rather, he states he "was the attorney responsible for overseeing the preparation" of the Restatement. (R.Add.8.) All Koch says in his affidavit is that "[t]o the best of my recollection and upon reviewing the file," Pamela did not express an intent that Vernon should be debt free after her death. (R.Add.8-11.) Koch does not deny that this was Pamela's intent, nor does he affirmatively attest to having any actual knowledge of her intent. Koch's affidavit really adds nothing to the controlling question of what Pamela intended.

At the very least, the Stisser affidavit demonstrates that there are – at a minimum – genuine issues of fact surrounding Pamela's intent. As described above, even the district court acknowledged in its summary judgment opinion that it had to question whether the pay "my legal debts" language was Pamela's way of expressing her intent to pay secured debts from the Trust. (Add.32.) When a "question must be asked" at the summary judgment stage, it should be answered only after trial. Accordingly, if the Court cannot determine that the "pay my legal debts" language applies to mortgage (and margin-loan) debt, it should remand for what Vernon requested in the first place: a trial on the issue of Pamela's intent.

2. Vernon Acted As Personal Representative at All Relevant Times.

The Trustee contends that Vernon "was not acting as personal representative in requesting payment of secured debts" and claims Vernon "does not respond" to this argument. (Trustee Resp. Br. 21-22.) The Trustee has overlooked Vernon's argument in his initial brief (Resp.'s Br. 22 n.3) where he explained that his petition expressly states

that it was filed in his capacity as personal representative of Pamela's estate (AA34), and furthermore that the district court's failure to make a finding on Vernon's status precludes this Court from reviewing any such issue. Vernon also cited to the Trustee's Response and Objections to Vernon's petition, wherein the Trustee admitted Vernon "is the Personal Representative of the Estate" and that "Stisser was appointed as Personal Representative of the Pamela Stisser Estate on February 11, 2004, by the Circuit Court of Collier County, Probate Division, Florida." (AA237 ¶ 9.) Against such an admission, the Trustee's submission of a portion of a summary judgment memorandum (ASA 9-12) is unpersuasive.

The Trustee contends that "this argument is directly responsive to the Court of Appeals' opinion." (Trustee Resp. Br. 22.) The court of appeals stated that Vernon "was not acting in his capacity" as personal representative by requesting payment of mortgage debt. (Add.8 (emphasis added).) This conclusion was part of the court of appeals' distinction between debts secured by probate assets (which the Trust was obligated to pay) and debts secured by non-probate assets (which the court held the Trust was not obligated to pay). (Add.8.) The court provided no legal authority for this distinction. Nor has the Trustee provided any.

The assets that passed via joint tenancy were subject to mortgages that were a joint obligation of Pamela and Vernon. They were as much Pamela's "legal debts" as they were Vernon's. (*See* Resp. Br. 43.) Moreover, the Trustee never suggested in the district court or in its court of appeals briefing that a distinction should be made between his obligation to pay the Schwab "legal debt" vs. the mortgage "legal debts." The issue was

simply not litigated. The court of appeals acted *sua sponte*, and this is a situation where "the court of appeals should not have raised and decided the issue." *State v. Glidden,* 455 N.W.2d 744, 747 (Minn. 1990). The Trustee's new contention that "the Court of Appeals should have found that Stisser was not acting as personal representative of the Estate in requesting payment of the Margin Loan" (Trustee Resp. Br. 22 (emphasis added)) ignores the simple fact that the court of appeals does not make "findings." Every pleading Vernon filed in this litigation was filed in his capacity as personal representative of Pamela's estate, and the district court's opinions all refer to his claims as arguments made in his capacity as "personal representative." (AA34; Add.19, 49, 52.)

B. The Trustee's Characterizations of "Pay My Legal Debts" As "Boilerplate" and "Technical" Language Are Contradictory and Unsupported.

The Trustee articulates two theories for how the "pay my legal debts" language should be interpreted and applied – or, more accurately, not applied at all. But the theories are inherently contradictory. On the one hand, the Trustee characterizes the plain language as "a boilerplate, general directive" that a court should ignore. (Trustee Resp. Br. 5.) On the other hand, he contends that "pay my legal debts" is so specialized and intricate that it consists of "technical words" with a "special meaning" that only a lawyer can interpret and decipher. (*Id.* 6.) The contradictory nature of these theories only highlights their substantive flaws.

1. The Record Contains No Evidence That "Pay My Legal Debts" Is "Technical" Jargon.

To support the "technicality" argument, the Trustee makes a number of pronouncements that are completely unsupported by any legal authority or citation to the record. For example, the Trustee states flatly that "[a] general directive to pay debts is not typically used by a trusts and estates attorney to express a grantor or testator's intent to exonerate secured debts." (Trustee Resp. Br. 10.) But this bald assertion contains no citation to the record. If Vernon's proffered plain-language interpretation truly is contrary to how trusts and estates lawyers practice and will create "significant confusion" (Trustee Resp. Br. 16), one would have expected *amicus curiae* participation in this appeal. *See, e.g., Enright v. Lehmann,* 735 N.W.2d 326 (Minn. 2007) (adopting position supported by Minnesota State Bar Association's Probate and Trust Section). But the trusts and estates bar has remained silent and there was no *amicus curiae* request to participate.

The Trustee further contends that interpreting "pay my legal debts" as a layperson would do "ignores the dominant intent of the Grantor – to leave trust assets to her children and step-children." (Trustee Resp. Br. 10.) Once again, the Trustee fails to support this contention with any citation to the record, other than arguing that paragraph 12.4.5 excludes Vernon as a beneficiary. However, Pamela's "dominant intent" was not left to be resolved at trial, but rather the district court sought to "infer" that intent based on its calculation of the date of death values of assets in the Trust and in the estate. (Add.35-36.) The Trustee's brief repeatedly makes these kind of broad statements of law

or fact based on what he would like the record to be – not based on precedent or what the record actually shows.

The Trustee cites 6A Kirsch, *Minnesota Practice* § 59.35 (3d ed. supp. 2010) for the proposition that "the debts referred to in the typical debt clause are unsecured obligations." But Kirsch goes on to state that where outstanding mortgages exist to secure obligations of the testator, "in order to avoid misunderstandings," it may be advisable to expressly state whether or not the direction applies to the debts secured by a mortgage. This authority is similar to the excerpt Vernon cited in his initial brief from the treatise authored by the Trustee's expert, Professor Hess, which makes it clear that a grantor who wants to exclude secured obligations from the directive to pay debts should do so explicitly. (*See*. Resp. Br. 26.)

The Trustee's legal authority for his "technicality" argument includes *In re Will of Patrick,* 259 Minn. 193, 195, 106 N.W.2d 888, 890 (1960), where this Court stated that it was an "obvious legal fiction" to presume testators know the law and "words of a will should be construed in accordance with precedents and statutes unless it is established by a preponderance of the evidence that a testator intended some other meaning." (Trustee Resp. Br. 9-10 (emphasis added).) But once again, the district court did not consider evidence as to whether Pamela understood the plain words, pay "my legal debts," because it ruled as a matter of law without reference to Vernon's affidavit and without taking any testimony as to Pamela's intent.

In *Will of Patrick*, the Court addressed whether a "putatively adopted son is a 'descendant' within the meaning of a will." *Id.* at 194, 106 N.W.2d at 889. The Court

held that an adopted child will be considered a descendant "unless there is a preponderance of evidence to the contrary." *Id.* at 199, 106 N.W.2d at 892. In *Will of Patrick* "there [was] no evidence to the contrary." *Id.* Here, in stark contrast, Vernon's deposition and affidavit testimony provide a preponderance of evidence directly contrary to the Trustee's proffered interpretation that the "pay my legal debts" language can be written out of the agreement and/or given a hyper-technical meaning with respect to mortgage debt.

To the degree *Will of Patrick* is even relevant authority in this appeal, it supports Vernon's argument that "pay my legal debts" means what it says. *See also In re Fiske's Trust,* 242 Minn. 452, 460, 565 N.W.2d 906, 910-11 (1954) ("It 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.").

2. The Trustee Provides Neither Authority Nor Reason for "Boilerplate" Language to Be Ignored.

The Trustee cites no authority to support his alternative argument that the language "pay my legal debts" is boilerplate language that can be ignored. Presumably the Trustee believes that a district court has authority to blue-pencil out plainly worded Trust language when it finds it disagreeable – without even a trial on the issue.

This Court, in fact, generally gives full effect to purported "boilerplate" language and accordingly requires district courts to do the same. For example, in *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.,* 320 N.W.2d 886 (Minn. 1982), the Court considered whether a "boilerplate" forum-selection clause was to be enforced in a

contract in which a Minnesota corporation agreed to purchase a "press brake" from a Florida corporation. The contract, which the seller drafted, identified Florida as the forum where disputes would be adjudicated. This Court acknowledged that the clause could be an unenforceable adhesion provision because "it could be argued that the forum selection clause is boilerplate language contained in a printed form contract prepared by respondent on a 'take-it-or-leave-it' basis." *Id.* at 891. But the Court held that even when there is boilerplate language, this is not determinative as to whether a Minnesota court has jurisdiction to adjudicate a dispute:

> However, these factors alone do not define adhesion contracts. Appellant has not shown, for example, a great disparity in bargaining power, that there was no opportunity for negotiation, or that the press brake could not have been obtained elsewhere. The clause in question <u>was not written in technical jargon</u> and was contained in an easily readable contract and consisting of only two pages. Appellant is not an unsophisticated individual, but a business corporation that presumably has personnel able to evaluate agreements such as that involved in this case.

Id. at 891 (emphasis added) (internal citations omitted).

These same factors resonate here and support a conclusion that even if the "pay my legal debts" language is boilerplate, it still must be given effect. The "pay my legal debts" language is not "technical jargon" but rather is even more "easily readable" than a forum-selection clause. Pamela had "opportunity" to alter this language when her Trust was restated, but she chose not to do so. Accordingly, even if "pay my legal debts" can be characterized as boilerplate, "it should be honored by the parties and enforced by the courts absent some compelling and countervailing reason." *Id.*

The Trustee provides no such "compelling and countervailing" reason. Presumably the Trustee agrees with the district court that it is improper to apply a trust agreement's plain language when doing so would result in smaller distributions to beneficiaries than the court subjectively believes is warranted. (AA35-36.) But this ignores the basic and agreed-to principle that courts must give force and effect to all language in a trust.

The Trustee has provided no authority demonstrating that a court may wholly ignore language such as the "pay my legal debts" provision, regardless of whether it is characterized as "boilerplate," "technical," or otherwise. At the very least, the matter should have been remanded for trial on Pamela's intentions with respect to the Trust's payment of mortgage (and other) debt.

C. The Trustee Provides No Basis for Concluding that the Probate Code's Nonexoneration Statute Provides Relevant "Guidance and Context" in This or Future Cases.

The Trustee has now explicitly abandoned any argument "that this case is directly controlled by the nonexoneration statute," Minn. Stat. § 524.2-607 of the Probate Code. (Trustee Resp. Br. 13.) That conclusion is mandated by the fact that the Probate Code applies only to wills. Accordingly, it is impossible for the Trustee to maintain that "[t]he Trust here is a will substitute" to which the Probate Code could directly apply. (*Id.* 15-16.)

The Trustee's argument is instead that "the nonexoneration statute and the common law rule of exoneration, respectively, provide guidance and context in interpreting the Trust's general directive to pay debts." (*Id.* 13.) It appears that the

Trustee is inviting this Court to adopt a judge-made rule of non-exoneration to govern trusts – patterned after the Probate Code provision – even though the legislature adopted such a rule in the Probate Code, but chose not to enact a similar provision in Minnesota's trust statute. The legislature certainly could have done so since it adopted the non-exoneration statute in 1975 and subsequently recodified the trust statute when it enacted Chapter 501B of Minnesota Statutes in 1989. It subsequently amended the non-exoneration statute in 1994, but did not add a non-exoneration provision to the trust statute.

Perhaps, alternatively, the Trustee is merely asking this Court to look to the Probate Code to give "guidance and context" as to what Pamela might have intended when she executed her trust; however, it does not make any sense to suggest that the language of the Probate Code has any bearing on what a grantor intended by directing her trustee to "pay my legal debts" in her Trust.

This is particularly true here because, as the Trustee acknowledges, the Probate Code's non-exoneration statute did not even exist until a decade after the "pay my legal debts" language was first included in the Trust. (Trustee Resp. Br. 14-15.) The Trustee dismisses this as irrelevant because the Trust was restated in 2001 and because "[t]he Trust Agreement designates Minnesota law as it existed in 2001 and beyond as governing construction of the trust." (*Id.*) The Trustee cites Paragraphs 12.3.1 and 13.11 of the Trust instrument, which state that Minnesota law on the date of death governs "the meaning and legal effect of this instrument" and define "Minnesota law" to include "any amendments and successor provisions." (AA27, 31.)

But any "amendments" to the Probate Code are irrelevant in light of the Trustee's concession that the Probate Code does not "directly control" the outcome. The "pay my legal debts" language is unchanged from 1966, and the Trustee provides no authority from any jurisdiction supporting an argument that a statute enacted after contractual or trust language was initially drafted can ever be relevant in showing the drafter's intent.

The Trustee's argument is akin to saying that Article 2 of the Uniform Commercial Code (governing transactions of goods) has some relevance on what parties to a services contract (not governed by the UCC) intended in a contract formed before the UCC was adopted. Such an argument would be rejected. Sales contracts and services contracts are both contracts, but they are controlled by separate bodies of statutory and common law. So too with wills and trusts – both of which can have testamentary provisions, but which are governed by separate bodies of law. The Trustee has provided neither reason nor authority for this Court to meld the two, since the legislature did not do so.

The Trustee continues to contend that law from other jurisdictions is relevant with respect to exoneration. (Trustee Resp. Br. 12.) But the authority cited applies to wills, not to trusts. Further, the foreign authority and common law demonstrate that giving effect to the plain "pay my legal debts" language would be consistent with any broad rule of "exoneration" that might exist. For example, the Trustee explained that "Iowa, like Minnesota, has now abrogated the common law with a nonexoneration statute." (*Id.*) But this only highlights the fact that in the absence of the Iowa non-exoneration statute, Iowa case law provided that "pay my debts" included both secured and unsecured debt.

In re Brackey's Estate, 147 N.W. 188 (Iowa 1914). The legislature abrogated the common law. The Minnesota legislature has not passed a non-exoneration statute for trusts.

The Trustee goes on to assert there "was never a presumption that the type of debts at issue here," including mortgage debt, was "subject to a common law presumption of exoneration." (Trustee Resp. Br. 13.) But it cannot be denied that there is a well-settled presumption that a Trust's plain language must be given legal effect, consistent with the "well-known principle that the entire instrument must be considered, aided by the surrounding circumstances, due weight being given to all its language, with some meaning being given, if possible, to all parts, expressions and words used, discarding and disregarding no parts as meaningless, if any meaning can be given them consistently with the rest of the instrument." *In re Watland,* 211 Minn. 84, 91, 300 N.W. 195, 198 (1941).

As argued in Vernon's initial brief, what is at issue here is not application of the doctrine of exoneration, but rather reconciling the dispositive provisions of Pamela's handwritten will that was executed in 1987 with a Trust that she restated 14 years later, and determining how the phrase "pay my legal debts" applies to both secured and unsecured debts, individual and joint debts, and probate and non-probate debts. (Resp. Br. 21.) All of this is further complicated by the factual record evidencing that many of the debts were incurred in the first place in reliance upon the Trust assets, and that Pamela told Vernon that the Trust would ensure that he was "debt free" in the event she predeceased him. (*Id.* 23.) Under the plain meaning of the Trust, this Court should hold

that the district court erred by not directing payment of mortgage (and margin-loan) debt or – at the very least – holding a trial on the issue of Pamela's intent.

II. THE TRUSTEE FAILS TO EXPLAIN HOW HE HAD DISCRETION TO ENTIRELY DENY REIMBURSEMENT FOR VERNON'S AND LILE'S SERVICES.

The parties agree that "Section 11.1 of the Trust Agreement governs the payment of fiduciary compensation." (Trustee Resp. Br. 28.) Section 11.1 states: "My fiduciaries shall be entitled to reimbursement for expenses and to receive compensation for their services." (AA14 (emphasis added).) The parties' disagreement centers on the word "shall" and whether the Section 11.1 directive left room for the Trustee to exercise any discretion by entirely denying reimbursement for Vernon's personal representative services and attorney Laird Lile's services, even while the Trustee paid expenses of other fiduciaries. This issue presents a question of law, not a finding of fact.

A. The District Court's Conclusions of Law are Reviewed *De Novo.*

The Trustee contends that a "clearly erroneous standard of review applies" to the district court's findings denying the Personal Representative compensation and reimbursement for administrative expenses. (Trustee Resp. Br. 25.) But the core issue involves interpretation of the Trust language "shall be entitled to reimbursement." In interpreting this language, the district court did not make a finding of fact, but rather concluded as a matter of law that "courts afford substantial deference to a trustee's reasonable and good faith judgment." (Add.77.)

This conclusion is reviewed *de novo* because, as with statutory interpretation, this Court independently reviews a district court's interpretation of trust language. *See, e.g.,*

McLaughlin, 361 N.W.2d at 44-45; *In re Fiske's Trust,* 242 Minn. at 460, 565 N.W.2d at 910-11; *see also In re Flygare,* 725 N.W.2d 114, 119-20 (Minn. Ct. App. 2006) ("Issues involving the interpretation of language in a statute or in a testamentary trust are issues of law that we review *de novo*.").

The Trustee cites *Schweich v. Ziegler, Inc.,* 463 N.W.2d 722, 729 (Minn. 1990) to argue that "a district court's findings in a bench trial will only be reversed if they are found to be clearly erroneous." (Trustee Resp. Br. 25.) But examining findings of fact constitutes only half the analysis. The *Schweich* Court went on to explain that even after a bench trial, this Court analyzes whether the court "erred in its conclusions of law." *Id.* (emphasis added). And that analysis is *de novo. Carlson v. Allstate Ins. Co.,* 749 N.W.2d 41, 45 (Minn. 2008).

Under any standard of review, it is error to conclude that the word "shall" denotes anything other than mandatory action. Minn. Stat. § 645.44, subd. 16 ("'Shall' is mandatory."). The Trustee ignores this basic proposition as well as Vernon's cited authority demonstrating that when a trust's terms require mandatory action, there is no deferential review. (Resp.'s Br. 47-48 (citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111 (1989); *Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105, 130-31 (2008) (Scalia, J., dissenting); *In re Flygare,* 725 N.W.2d at 119-20).

The Trustee deems it "meritless" for Vernon to suggest that "no court can deny his compensation and Lile's fees." (Trustree Resp. Br. 25-26.) But the question is not whether a court can ever deny compensation or fees; rather, in this case the district court did not itself make an independent analysis of entitlement to compensation and fees, but

instead applied a deferential standard of review to the Trustee's denial, even though the Trustee was acting under a mandatory provision and was himself conflicted. The Trustee and the District Court both ignored the Trust language stating that "[m]y fiduciaries shall be entitled to reimbursement for expenses and to receive compensation for their services."

B. A Purported "Dearth of Information" Did Not Provide a Basis for the Trustee's Denial of Any Personal Representative Compensation.

The Trustee contends that irrespective of the mandatory nature of Section 11.1, the district court and court of appeals properly affirmed the Trustee's denial of any compensation for Vernon's service as personal representative. The Trustee ignores the court of appeals' characterization of the denial as "harsh" and instead fixates on the district court's conclusion that "due to the dearth of information from the Personal Representative, any award is unsupportable in the record." (Trustee Resp. Br. 3, 29 (citing Add.98-99).) This conclusion was included among the district court's conclusions of law and was not a finding of fact, and therefore is reviewed *de novo*.

The Trustee provides a misleading picture of the record. (Trustee Resp. Br. 3.) Vernon testified at trial that he spent an average of 20 hours per week performing his services as personal representative. (Add.95.) He further testified that the reason time records were lacking was because he believed he would be reimbursed pursuant to a formula applicable in Florida. (Tr. IX 151.) For that reason, Vernon explained it was "burdensome to go back and try to reconstruct all that. When in fact, I said I was very happy to settle, or very happy to accept what the Florida courts allowed." (*Id.*) The

Trustee virtually ignores *In re Estate of Bush*, 304 Minn. 105, 230 N.W.2d 33 (1975), which demonstrates that even corporate fiduciaries do not need to keep written time records.

Further, as the Trustee explains, the district court's conclusion was based on the court of appeals' decision in *In re Estate of Meiners,* No. A07-0967, 2008 WL 2340695 (Minn. Ct. App. June 10, 2008). (Trustee Resp. Br. 29.) However, in *Estate of Meiners*, the court of appeals did not deny the personal representative's compensation. To the contrary, the court held that the district court erred by awarding only $28,000 of the personal representative's request for $120,599, and accordingly reversed and remanded for trial. The basis for the reversal was that the district court's order was "inadequately explained and rests on errors of law and conclusions that are not sustained by findings or the record." *Id.* at *1. The same is true here, where the courts' error of affording deference to the Trustee effectively tainted the district court's conclusions.

The court of appeals' opinion in *Estate of Meiners* continued in a way that parallels the circumstances of this case:

> In addition, the findings of fact recite criticisms of the personal representative, perhaps suggesting breach of his duties or reasons for his removal, but without any evidence or findings that these recitations bear upon the value of the services he gave or the reasonable fees for those services. In the same light, the order is wholly silent as to the fruits of [the personal representative's] services and the resources at the estate's disposal to pay the fees.

Id. at *2-*3. The same factors are present here, where the district court's criticisms of Vernon are irrelevant to the "value of the services he gave or the reasonable fees for those services." *See id.*

The district court's deference to the Trustee (and the court of appeals' deference to the district court) was particularly inappropriate here because of the admitted animosity between Vernon and the Trustee. The Trustee does not dispute the existence of that animosity, but argues that Vernon failed to provide "any authority" on why the animosity was relevant to the Trustee's purported "discretion" to deny any personal-representative compensation. (Trustee Resp. Br. 30.) This is not true. Vernon cited Restatement (Second) of Trusts § 187, which this Court previously has found instructive. *U.S. v. O'Shaughnessy,* 517 N.W.2d 574, 577 (Minn. 1994) (applying Restatement (Second) of Trusts § 187 comment). Comment g to § 187 states: "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."

Significant authority demonstrates that a trustee is given "less deference to a decision the more the trustees' impartiality can fairly be questioned." *Van Boxel v. Journal Co. Employees' Pension Trust,* 836 F.2d 1048, 1053 (7th Cir. 1987); *accord Brune v. Morse,* 475 F.2d 858, 860 n.2 (8th Cir. 1973) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, <u>except to prevent an abuse by the trustee of his discretion</u>." (citing Restatement (Second) of Trusts § 187 (1959)) (emphasis added).

C. The Trustee Also Had an Obligation to Provide Reimbursement for Expenses of Administration for Attorneys' Fees Incurred by the Estate's Counsel, Laird Lile.

The Trustee argues that he denied any reimbursement of administrative expenses for Laird Lile's $266,126.09 in fees because redacted and unredacted billing records were provided too late. However, once again, *de novo* review shows that the Trust Agreement made some reimbursement mandatory. The Trustee lacked discretion to deny reimbursement entirely, and once again, the district court simply deferred to the Trustee.

The record contains unredacted copies of Lile's billing records from which reimbursement can be – and could have been – determined and against which the Court can independently gauge how "heavy" the redactions really were.[3] Vernon provided the first 10 pages of the redacted bills as an exemplar (RA 28-37), mindful that Minn. R. Civ. App. P. 130.01, subd. 1 warns against "unnecessary reproduction" of the record because "the entire record is always available to the appellate court for reference or examination." In response, the Trustee handpicked redacted bills from January 2005 and December 2006, included them in a "Supplemental Appendix," and summarily characterizes the totality of the bills as "heavily redacted." (Trustee Resp. Br. 31.)

But by comparing the redacted and unredacted versions, the Court will find that the bills were not, on balance, "heavily redacted." A comparison shows that Vernon attempted to protect privileged information in a reasonable manner. The district court

[3] The district court invited appellate review of this issue, ordering that the unredacted bills be "sealed even from the court and maintained only for appellate purposes because I can see where a court of appeals might be interested in seeing what's in these bills or not." (Tr. III 227-28.)

stated in its Conclusions of Law that unredacted billing records should have been submitted to the Trustee during discovery (AA92), but the parties were engaged in contentious litigation, and the General Rules of Practice contemplate that under such circumstances, either *in camera* submission or redacted billing records may be allowed. *See* Minn. Gen. R. Prac. 119.04 advisory c'mte comment ("As an alternative to permitting in camera review by the trial judge, the court can permit submission of redacted copies, with privileged material removed from all copies.") (emphasis added); *In re Galloway Family Trusts,* Court File Nos. C1-04-200006 *et al.* (RA24-27).

Again, the discovery disputes and the Trustee's various attempts to discredit Vernon risk detracting from the fact that the Trust Agreement plainly directed the Trustee to provide some compensation for Lile's services. The Trustee lacked discretion to determine otherwise, and the district court and court of appeals erred by affirming the denial on an abuse-of-discretion standard.

CONCLUSION

For the reasons cited herein, and cited in the Brief and Addendum of Respondent/Cross-Appellant, Vernon Stisser respectfully requests that 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).

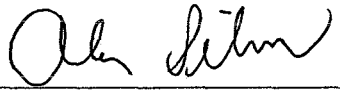
Accordingly, the Court should remand to the district court with instructions to enter judgment consistent with these determinations.

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

Dated: November 28, 2011

By 

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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 6,867 words. This brief was prepared using Microsoft Word 2003.

By_____
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