

No. A10-1646

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**State of Minnesota  
In Supreme Court**

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

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**APPELLANT/CROSS-RESPONDENT'S RESPONSE AND  
REPLY BRIEF AND SUPPLEMENTAL APPENDIX**

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

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There are four issues on appeal in this case. The first issue relates to the meaning of the general directive to pay debts in the Trust Agreement. The Trust Agreement makes clear that the beneficiaries of the Trust are the Grantor's children and step-children. The Trust Agreement expressly omits any provision for Stisser personally. Despite this clear language, Stisser claims that the Court should read boilerplate language in the Trust Agreement to express an intention by the Grantor that Trust assets be used to pay four large secured debts for Stisser's personal benefit. Similar boilerplate "pay my legal debts" language generally does not require payment of secured debts when it is contained in a will. The question here is whether the Court should read "pay my legal debts" to express a different intent when it is contained in a different testamentary instrument.

Stisser argues that the general directive to pay debts should be read in isolation as a lay person might understand it. Stisser completely disregards the fact that a general directive to pay debts in a will is not given the alleged "plain language" reading he advocates. To the contrary, courts require specific language of a decedent's intent in order to obligate an estate fiduciary to use estate assets to pay a secured debt rather than having the encumbered asset pass subject to the debt. Stisser does not explain why a directive to "pay my legal debts" should be read differently simply because the phrase is used in a trust, rather than a will. If Stisser's argument is accepted, Minnesota would be the first state in which a general directive to pay debts has a different meaning depending on the type of testamentary instrument in which it is found. Moreover, in interpreting

testamentary instruments, courts do not accept a “lay” interpretation if a word or phrase has a distinct legal meaning. The District Court correctly looked to existing law interpreting wills as guidance in construing the meaning of the phrase “pay my legal debts” and correctly held that the general directive to pay debts was not specific enough to establish that the Grantor intended to require the Trustee to pay her secured debts. The contrary decision of the Court of Appeals should be reversed.

The second issue raised by the Trustee’s appeal is whether Stisser requested payment of the Margin Loan debt in his capacity as personal representative. The Estate had no obligation to “exonerate” the Margin Loan debt – in other words, the Estate had no obligation to pay off the Margin Loan so that the Schwab account would pass free and clear of debt to the Estate beneficiary. Because the Estate was not obligated to pay the Margin Loan, Stisser was not seeking advancement or reimbursement of a debt the Estate was obligated to pay. Therefore, he was not acting as personal representative and is not entitled to payment from the Trust.

By his cross appeal, Stisser raises two additional issues: (1) whether the Trust Agreement requires the Trustee to pay debts secured by non-probate property – debts that a Florida estate would not be obligated to pay under Florida’s statutes and case law; and (2) whether the Court of Appeals erred by applying an abuse of discretion standard of review to the District Court’s findings of fact, following trial, that the Trustee was not obligated to pay Stisser compensation or the attorney fees of the Estate’s attorney, Laird Lile. The District Court correctly held that the Trust Agreement did not require the Trustee to pay debts secured by nonprobate property. Furthermore, the Court of Appeals

applied the correct standard of review and properly affirmed the District Court's ruling that, based upon the evidence presented at trial, Stisser was not entitled to payment from the Trust for compensation or for Lile's fees.

### **STATEMENT OF ADDITIONAL FACTS**

These facts pertain to Stisser's claims for payment of fiduciary compensation and for Estate attorney Lile's fees.

#### **Stisser's Claim for Fiduciary Compensation.**

Stisser kept no time records supporting his work as personal representative and refused in discovery to identify the specific work he performed or the hours it took to perform the work. (Tr. IX, 147, 150-151). At trial, Stisser estimated, for the first time, that he worked 20 hours per week as personal representative and was seeking \$160,000 in fiduciary compensation. (Tr. IX, 149, 157). Taking into account this "dearth of information from the Personal Representative" and expert testimony that trustees in this community would not pay Stisser's claim, (Tr. XIII, 41-44), the District Court concluded "any award [of fiduciary compensation] is unsupportable in the record." (Add.99).

Consistent with the Trust Agreement, the District Court also considered the results Stisser had obtained in administering the Estate and found that Stisser's administration, including his vexatious "dug in his heels" litigation strategy, had caused far more harm than good to the Estate. (Add.99, ¶ 63). The Trustee incorporates by reference the District Court's discussion of Stisser's litigation conduct, including:

- causing the unnecessary expense of the Illinois foreclosure litigation, the creation of two probate estates, the subsequent litigation between them, the MJP Farms litigation, and bringing petitions against the Trustees in Florida after Florida courts determined they lacked jurisdiction. (Add.59-62, Add.104-108).
- making known misstatements of fact to courts and the IRS to obtain the federal and state estate tax refunds that he knew belonged to the Trust and filing multiple duplicative and wasteful motions to delay the return of the refunds to the Trustee. (Add.21-22; AA.50, AA.70-86, AA.160; ASA.1-4).
- providing a “partial and slanted” recitation of the law in arguing a motion and engaging in “obstructionist” tactics. (AA. 109-111).
- making multiple baseless claims, refusing to comply with prior orders, attempting to introduce evidence at trial previously withheld in discovery, and recanting prior representations to the Court. (Add.40-41, Add.60, Add.70-71, Add.80-81, Add.94-95; Tr. II, 3-7; Tr. III, 227; Tr. IV, 5-6, 174).
- generating nearly \$2 million in attorney fees. (Add.99).

**Stisser’s Claim for Attorney Lile’s Fees.**

Lile was responsible for several unfounded positions taken by the Estate,

including:

- asserting that the Trustee must agree to pay claimed expenses without documentation, which the District Court found “unreasonable on its face.” (Add.90-91).
- attempting to mislead the IRS that Estate funds, instead of trust funds, were used to pay the estate taxes. (ASA.1-2; Tr. II, 21-22, 62-65, 68-69)).
- advancing the MJP Farms’ scheme. (AA.160; Add.104, 107; Tr. III at 209-210).

Stisser claimed the Trust should be responsible for paying more than \$266,000 in Lile’s attorney fees. Stisser chose not to provide the Trustee with Lile’s invoices until the close of discovery. (Add.90). When provided, Lile’s invoices contained heavy

redactions, did not identify the hours for each entry, and many time entries were so vague that no witness could testify about the work related to each entry. (Add.60, Tr. II at 18-25; 44-45; Tr. III at 190-92; Tr. VII, 36-37). Expert testimony confirmed that trustees in this community would not pay such invoices based upon the documentation provided. (Add.92). The District Court concluded that the Lile invoices contained insufficient information upon which to make an award. (Add. 91-92).

### ARGUMENT

#### **I. The Trust Agreement Does Not Show an Intent By the Grantor to Have Secured Debts Paid by the Trust.**

The parties agree that a primary issue in this case is whether the Grantor expressed an intent in the Trust Agreement to have the Trust pay her secured debts. The parties also agree that in interpreting the Trust Agreement, the Court's "highest dut[y] is to give effect to the Grantor's dominant intention as gathered from the instrument as a whole." (Stisser Br. 16, citing *In re Trusteeship Under Agreement with Mayo*, 259 Minn. 91, 105 N.W.2d 900 (1960) (emphasis added)). The dispute between the parties is whether, by including a boilerplate, general directive to pay debts in the Trust Agreement, the Grantor expressed an intent to have her secured debts exonerated using trust assets for Stisser's benefit.

#### **A. Stisser's "Plain Meaning" Argument is Flawed.**

Stisser argues that the boilerplate phrase, "pay my legal debts" should be read: (1) in isolation; (2) according to its "plain meaning," as a lay person might understand it and without regard to how it is interpreted in other contexts; and (3) to express an intent that

the Trustee pay all debts, whether secured or unsecured. (Stisser Br. 17). In contrast, the Trustee argues that the Court should look at the way general directives to pay debts are construed and interpreted in other testamentary instruments and should look to the Trust Agreement as a whole and, in particular, to the Grantor's statement that she "intentionally omitted from this instrument any provision for my spouse, VERN STISSER." (AA. 29). Stisser's "plain meaning" argument should be rejected because it ignores relevant authority construing general directives to pay debts, it reads trust language in isolation, and it contravenes the Grantor's dominant intention.

The canon of construction that words and phrases should be given their plain meaning does not apply when a phrase has a special meaning. *See* Minn. Stat. § 645.08 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981). "[I]t is to be presumed that the testator, in using . . . technical words . . . which have definite and long-accepted meaning, used them correctly and with the intent that they be interpreted in conformity with the law." *In re Davidson's Will*, 223 Minn. 268, 272, 26 N.W.2d 223, 225 (1947).

A general directive to pay debts is a boilerplate phrase that is commonly used in both wills and revocable trust agreements in Minnesota and other states. A general directive in a will to pay debts does not express a decedent's intention to have an estate pay secured debts, whether those debts are secured by probate property<sup>1</sup> or non-probate

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<sup>1</sup> *See* Minn. Stat. § 524.2-607 (2011); *In re Estate of Peterson*, 365 N.W.2d 300, 303-304 (Minn. Ct. App. 1985).

property.<sup>2</sup> “[T]he debts referred to in the typical debt clause are unsecured obligations.” 6A STEVEN J. KIRSCH, MINNESOTA PRACTICE § 59.35 (3d ed. Supp. 2010). According to legal commentaries, the reason a general directive to pay debts is included in a trust agreement is to help facilitate the payment of debts for which the estate would be responsible. GARY D. MCDOWELL ET AL., DRAFTING WILLS AND TRUST AGREEMENTS at 6-7 (6th ed. 2008). It is not included to express an intent to exonerate secured debts.

Stisser is wrong when he argues that this Court should not look to law governing wills for guidance in construing the trust’s general directive to “pay my legal debts.” Although wills and revocable trusts are different legal instruments, they both contain testamentary distributions. Both govern the disposition of a decedent’s property after death. In construing a trust instrument, Minnesota courts often look to the law of wills for guidance. *See, e.g., U.S. v. O’Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994); *In re Trusts Created by Agreement with Harrington*, 311 Minn. 403, 405, 250 N.W.2d 163, 165 (1977); *In re Will of Cargill*, 420 N.W.2d 268, 271 (Minn. Ct. App. 1988). Courts apply the same primary rule to interpret wills and trusts: “The citadel of will and trust construction, before which all other rules of construction must bow, is the elusive ‘intent of the trustor or testator.’” *See Harrington*, 311 Minn. at 405, 250 N.W.2d at 165.

Stisser cites to *U.S. v. O’Shaughnessy*, 517 N.W.2d 574, for the proposition that the Court should not “blur” the lines between estate and trust law. Stisser’s reliance on *O’Shaughnessy* is misplaced. In *O’Shaughnessy*, this Court considered whether a tax

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<sup>2</sup> *See, e.g., In re Estate of Zahn*, 702 A.2d 482, 487-88 (N.J. Super. Ct. App. Div. 1997); *Manders v. King*, 667 S.E.2d 59, 61 (Ga. 2008); *In re Estate of Vincent*, 98 S.W.3d 146, 149 (Tenn. 2003); *Bond v. Estate of Pylant*, 63 So. 3d 638, 647 (Ala. Civ. App. 2010).

levy could attach to a discretionary trust's undistributed trust principal or income before the trustees have exercised their discretionary powers of distribution. *Id.* at 578. Even though the Court found "little help" from Minnesota's probate code when interpreting the trust, the Court still engaged in the proper exercise of seeking assistance from the probate code to construe the terms of the trust. The *O'Shaughnessy* court even took this analysis one step further and looked to other states' probate and trust law for guidance. *Id.* Contrary to Stisser's argument, *O'Shaughnessy* stands for the proposition that courts may look to the law of wills for guidance in construing the terms of a trust.<sup>3</sup>

Although wills and trusts are used to achieve similar purposes at death and are administered in the same probate court, Stisser argues that they should be interpreted differently because they have different formation and execution requirements. (Stisser Br. 27, fn. 5). This difference should not lead the Court to read common testamentary provisions contained in the two types of instruments in a vacuum. Wills simply have a higher standard of formality for execution because the decedent's property is transferred under a will after death. By contrast, the decedent transferred property held in a revocable trust to the trust during life. *See* RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) § 7.2, cmt. a (2003). Moreover, the Trust Agreement here specifically mentions the probate code in one provision (AA.7, ¶ 4) and contains language taken from the probate code in another. (*Compare* AA.14 ¶ 11.1 *with*

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<sup>3</sup> Furthermore, the issue in *O'Shaughnessy* is distinguishable. *O'Shaughnessy* did not address the meaning of a boilerplate phrase used in both wills and trusts.

Minn. Stat. § 524.3-719 (2011)). The drafter of the Trust Agreement considered principles of wills to be relevant to the Trust.

Reading the general directive to pay debts to apply only to unsecured debts is consistent with Minnesota's nonexoneration statute, which states that a general directive to pay debts is not sufficiently specific to require an estate to pay a debt secured by devised property. Minn. Stat. § 524.2-607. It is also consistent with portions of Minnesota's probate code that provide a personal representative the authority to seek payment for only unsecured debts from a decedent's revocable trust. Minn. Stat. § 524.3-710 (2011) ("The property liable for the payment of unsecured debts of a decedent includes all property transferred by the decedent by any means which is in law void or voidable as against creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.") (Emphasis added). The personal representative's ability to collect trust assets for payment of only unsecured debts is based on the principle that assets in the trust should only be available for payment if the probate estate is insufficient to pay claims properly payable by the estate. RESTATEMENT OF PROPERTY § 328 (1940).<sup>4</sup>

Stisser argues that the general directive to pay debts should be interpreted as a lay person might understand it, but other testamentary instruments are not subject to such a "lay person reading:"

It has been said that in the construction of wills every testator is presumed to know the law. This is an obvious legal fiction although it may express a practical working rule. It would be more accurate to say that the words of a

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<sup>4</sup> The secured debts at issue here were not obligations of the Estate. *See Infra* Part II.

will should be construed in accordance with precedents and statutes unless it is established by a preponderance of evidence that a testator intended some other meaning.

*In re Will of Patrick*, 259 Minn. 193, 195, 106 N.W.2d 888, 890 (1960); *see also Davidson*, 223 Minn. at 272, 26 N.W.2d at 225. The 34 page Trust Agreement in question was drafted by a lawyer and contains many special terms of art and phrases that would not be understood by a lay person. (*See, e.g.*, AA.8 “Article 6, Administration of GST Exempt Trusts.”) In interpreting a sophisticated testamentary document such as this, the general directive to pay debts should be given the meaning commonly associated with the phrase in interpreting other testamentary documents. 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.

Stisser admits that words in a trust agreement should not be given their ordinary meaning if it appears that “they were otherwise used or that an unreasonable or absurd result will follow therefrom.” *In re Fiske’s Trust*, 242 Minn. 452, 460, 65 N.W.2d 906, 911 (1954); (Stisser Br. 18). Interpreting the Trust Agreement as Stisser advocates would lead to an unreasonable and absurd result. First, under Stisser’s argument, the same language “pay my legal debts” would be construed to have a different meaning depending upon whether it was contained in a will or a trust.

Second, Stisser’s argument ignores the dominant intent of the Grantor – to leave trust assets to her children and step-children. A trust agreement “must be construed to carry out the main object of the settlor as disclosed by its terms notwithstanding inaccuracies of expression, ineffectiveness of terms, or the presence of provisions therein

which on their face appear inconsistent therewith.” *Fiske*, 242 Minn. at 460, 65 N.W.2d at 911. Here, the Trust Agreement demonstrates that the Grantor’s main objective was to use Trust assets to provide for her children and step-children following her death and not to provide for Stisser through her Trust. (AA.29 §12.4.5). The reading Stisser advocates violates the main objective of the Grantor.

Stisser erroneously asserts that section 12.4.5 only governs the question of who is entitled to receive the proceeds of the trust after payment of debts and expenses of administration. (Stisser Br. 19). Section 12.4.5 is a general governing provision. (AA.26 “Article 12 General Governing Provisions.”) Under Minnesota law, provisions of testamentary instruments should not be read in isolation and the Court should strive to give effect to every provision of the Trust. *See In re Wyman*, 308 N.W.2d 311, 315 (Minn. 1981). Although the Trust is not to be distributed to the beneficiaries until after payment of taxes, administration expenses, and debts, the fact that the Grantor, by Section 12.4.5, “intentionally omitted” any provision for Stisser cannot be ignored when determining whether the general directive to pay debts in the Trust Agreement should be read to express her intent to have her secured debts paid for the benefit of her husband.<sup>5</sup> The Grantor demonstrated in Section 12.4.5 that she did not intend to benefit Stisser through Trust assets.

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<sup>5</sup> Stisser’s argument seems to be that Grantor only cared that the beneficiaries receive the “net” assets of the Trust (regardless of what those net assets might be after all of Stisser’s claims) and that her omission of Stisser can be ignored when considering whether he should get any of the “gross” assets. This is absurd.

**B. Significant Authority Establishes That a Decedent Must Use Specific Language of Intent to Require Exoneration of Secured Debts.**

Stisser acknowledges the vast authority cited by the Trustee that requires specific language in a testamentary instrument to exonerate secured debts. (Stisser Br. 29). Stisser claims, however, that several states have held the opposite and then misuses cases from three states to support his claim. *In re Brackey's Estate*, 147 N.W. 188 (Iowa 1914), followed the common law in 1914 requiring exoneration of debt encumbering property specifically devised in a will. Iowa, like Minnesota, has now abrogated the common law with a nonexoneration statute because the common law frustrated most grantors' intentions. Iowa Code § 633.278 (2011); see also *In re Estate of Miguet*, 185 N.W.2d 508, 517 (Iowa 1971). *Succession of Thoms*, 298 So. 2d 731 (La. 1974), similarly involved exoneration of a debt on property specifically devised in a will. The *Thoms* court determined that specific language in the debt payment clause – language not present in the Trust Agreement here – indicated an intent to “minimize the financial burden of the special legatees.” *Id.* at 732. Finally, Stisser cites *In re Miller's Estate*, 127 F. Supp. 23 (D.D.C. 1955), a case again involving a specific devise and circumstances under which Minnesota's nonexoneration statute would directly apply to prevent the result for which Stisser cites this case. Similarly, the A.L.R. article Stisser relies upon involves a “discussion of the so-called ‘doctrine of exoneration’” and “does not include cases which simply turn on the construction of the language in a will.” J. Kraut, *Right of Heir or Devisee to Have Realty Exonerated from Lien Thereon at Expense of Personal Estate*, 4 A.L.R.3d 1023 at §1a (1965 & Supp.).

**C. Stisser's Arguments Regarding the Application of the Common Law Presumption of Exoneration and the NonExoneration Statute are Confusing and Wrong.**

Stisser misconstrues the Trustee's arguments related to the presumption of exoneration and the nonexoneration statute. The Trustee has never argued that this case is directly controlled by the nonexoneration statute. Rather, the Trustee has consistently argued that the nonexoneration statute and common law rule of exoneration, respectively, provide guidance and context in interpreting the Trust's general directive to pay debts. Minnesota law requires something more than a general directive to pay debts to require exoneration of debt secured by realty devised under a will – a debt that was entitled to a presumption of exoneration at common law. Minn. Stat. § 524.2-607 (2011); *In re Estate of Peterson*, 365 N.W.2d 300, 303-304 (Minn. Ct. App. 1985). Therefore, the same “general directive” should not be read to express an intent to exonerate secured debts that were never subject to the common law presumption of exoneration in the first place.

Stisser confuses and misstates the common law doctrine of exoneration when he argues that requiring the Trustee to pay the secured debts at issue would be consistent with the common law doctrine of exoneration. There was never a presumption that the type of debts at issue here (a debt secured by personal property in the probate estate and debts secured by nonprobate property) would be subject to a common law presumption of exoneration. At common law, only debts secured by a devise of realty under a will were subject to the presumption of exoneration; other property passed subject to encumbrances. (Hess Report (AA.117-121)). Moreover, there has never been any kind of presumption that a secured debt would be paid at the expense of a trust. (*Id.*).

Even if the common law presumption of exoneration somehow supported Stisser's arguments, Minnesota has now abrogated the common law presumption of exoneration by statute. There is no reason for any court in Minnesota to expand the abrogated presumption of exoneration to debts secured by personal property in the probate estate, to debts secured by property passing outside of the probate estate, or to the law of trusts.<sup>6</sup>

Stisser claims that if the Grantor had intended her husband to "take the Charles Schwab account subject to significant debt when she died, she would and could have said so." (Stisser's Br. at 25). This argument completely disregards the law. In the context of a will, a decedent is required to use specific language if she wants an asset to pass free and clear of debt. Otherwise, the asset is presumed to pass subject to the encumbrance. A general directive to pay debts at death is not sufficient to require an estate to exonerate a secured debt. The same general rule should apply to trusts.<sup>7</sup>

Stisser argues that, if principles of exoneration are considered, the Trust would be subject to the law of wills as it existed in 1966, when the Trust was originally created, and Minnesota's nonexoneration statute, enacted in 1975, is irrelevant. (Stisser Br. 30–

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<sup>6</sup> Stisser seems to think the Legislature needs to act for the Court to interpret a general directive to pay debts in a trust the same way it would be interpreted in a will. (Stisser Br. 27-28). This is nonsensical. There is no reason for the Legislature to enact a nonexoneration provision in the trust code because there has never been a presumption that secured debts would be exonerated by a trust without specific instruction from the grantor.

<sup>7</sup> Stisser cites a form trust agreement from the treatise, *The Law of Trusts and Trustees*, for the proposition that this Grantor could have used more specific language if she did not intend the Trustee to pay her secured debts (Stisser Br. 26), but this is simply one form agreement. It does not demonstrate this Grantor's intent in this Trust Agreement. Other form agreements contain no such specific language. See GARY D. MCDOWELL ET AL., *DRAFTING WILLS AND TRUSTS AGREEMENTS* at 6-7 (6th ed. 2008).

33). Stisser is wrong. The Trust was restated in its entirety on June 6, 2001. (AA. 1). The Trust Agreement designates Minnesota law as it existed in 2001 and beyond as governing construction of the trust. (AA. 31, ¶ 13.11; AA.27 ¶ 12.3.1).

Furthermore, the Trustee is not relying on direct application of the nonexoneration statute for the conclusion that the Trustee should not pay secured debts. Instead, the Trustee relies on the lack of an express trust provision requiring payment of secured debts, the language of the Trust Agreement excluding Stisser as a beneficiary, and common law principles that secured debts like these are not exonerated absent specific language.

**D. The Same Rules of Construction that Apply to Wills Should Apply to Trusts that are Used as Will Substitutes.**

Stisser argues that probate concepts should not apply to the Trust because the Trust is not a will substitute as to Stisser. (Stisser Br. 32). He complains that there is no authority for the proposition that a decedent can properly dispose of an estate through both a will and a will substitute. This is plainly incorrect. The purpose of any will substitute is to dispose of a decedent's property at death. The Trust here is a will substitute as to the property held in the Trust at the time of Grantor's death. *See* RESTATEMENT (THIRD) OF PROPERTY §7.2, cmt. a (2003); JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 297-298 (7th ed. 2005) (identifying a revocable trust as a will substitute and explaining that will substitutes are "functionally indistinguishable from a will") (citation omitted).

Stisser claims that rules of construction are not “substantive statutory rules” and therefore should not apply to the interpretation of the trust terms. (Stisser Br. 33). The RESTATEMENT (THIRD) OF PROPERTY §7.2, cmt. a (2003), however, explains that “a will substitute is in reality a nonprobate will” and should be “subject to . . . rules of construction” applicable to wills because “rules of construction and other interpretive devices aid in determining and giving effect to the donor’s intention or probable intention and hence should apply generally to donative documents.” *Id.*

**E. The Court of Appeals’ Decision Creates Significant Confusion.**

Stisser ignores the Trustee’s argument that the Court of Appeals’ decision creates significant confusion as to how to properly interpret a general directive to pay debts in a testamentary instrument. (Stisser Br. 23). Stisser argues that, because there are allegedly unique facts in this case involving a revocable trust without a pour-over will, this case would have little or no impact on future cases. This naked assertion is unfounded. The Court of Appeals’ decision was not limited to cases without a pour over will. The Court of Appeals held that the general directive to pay debts in the Trust Agreement must be read to require payment of secured debts. To read the same “pay my debts” language in a trust to express an intent to pay secured debts, while reading the same language in a will to not express that intent, is inherently confusing. There is no reason a general directive to pay debts should be given a different meaning depending on whether it is found in a will or a trust.

**F. Extrinsic Evidence of Grantor's Intent Is Unnecessary, but if Considered, the Relevant Extrinsic Evidence Demonstrates That Paragraph 3.1.1 Was Not Intended to Require Payment of Secured Debts.**

The Trust Agreement unambiguously omits any specific language showing an intent by the Grantor to have the Trustee pay her secured debts. *See, e.g., Bond*, 63 So. 3d at 647 (“[Decedent’s] general directive in the will to pay his debts is not ambiguous – it unambiguously omits any provision for exoneration.”). Therefore, the Court does not need to look beyond the four corners of the Trust Agreement to determine that the Trustee has no obligation to pay Stisser for the Schwab Account Margin Loan or any other secured debt. However, if the Court believes the general directive to pay debts is ambiguous, the Court may consider extrinsic evidence. *In re Foley Trust*, 671 N.W.2d 206, 211 (Minn. Ct. App. 2003).

When the terms of a testamentary instrument are ambiguous, courts will admit testimony of the drafter of the instrument to ascertain the decedent’s intent. *See In re Estate of Cole*, 621 N.W.2d 816, 819-20 (Minn. Ct. App. 2001). Larry Koch, the attorney who oversaw the drafting of the Trust Agreement, testified by affidavit that his firm was not directed or instructed to include language in the Trust Agreement that would exonerate debts on the Grantor’s real or personal property. (R.Add.8-9, ¶¶ 4-5; R.Add.11). The language in Paragraph 3.1.1 was simply part of a form trust agreement Mr. Koch’s firm used. (R.Add.9 at ¶ 6). In inserting the form language of Paragraphs 3.1 and 3.1.1 into the Trust Agreement, Mr. Koch did not intend to express “a direction to the Trustee(s) to exonerate debts secured by real estate or personal property” nor did Mr.

Koch “understand that we were being asked to make such a direction by [the Grantor].” (*Id.* at ¶ 6). *See Davidson*, 223 Minn. at 272, 26 N.W.2d at 225.

Stisser has argued that the affidavit he submitted in conjunction with his summary judgment motion and his deposition testimony, in which he asserted that the Grantor intended to leave him debt-free, should be relied upon to show the Grantor’s intent. However, Stisser’s self-serving testimony is inadmissible for several reasons. First, “statements by the settlor as to [her] intention are ordinarily not admissible, whether the trust is created by will or by an instrument *inter vivos*. Such evidence is inadmissible 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.” AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *IIA SCOTT ON TRUSTS*, §164.1, 257-58 (1987); *see also In re Trust Known as Great N. Iron Ore Props.*, 263 N.W.2d 610, 618 (Minn. 1978) (“Extrinsic evidence may not be used to contradict or alter the terms of an unambiguous trust instrument.”). Stisser’s attempted affidavit testimony that the Grantor intended by the language of the Trust Agreement to leave him debt-free is directly contrary to Paragraph 12.4.5 of the Trust Agreement, in which the Grantor specifically omitted any provision for Stisser. Similarly, Stisser’s argument that the lenders loaned money to the Stissers based on an understanding that the Trust would pay the debts upon the Grantor’s death (Stisser Br. 34-35) is speculation and is contrary to the spendthrift provision of the Trust, which prohibited the Grantor from encumbering Trust assets. (AA.28 ¶ 12.4.3). This argument is also belied by the facts. The debts in question are secured debts,

meaning that the lenders demanded “security” for payment of the debts. Trust assets were not and could not be pledged as security for these debts.

Second, this testimony is irrelevant. The issue before the Court is to ascertain “the meaning of the words” in the Trust Agreement “as used by the [Grantor].” *In re Butler’s Trusts*, 223 Minn. 196, 201, 26 N.W.2d 204, 208 (Minn. 1947). Courts do not give legal effect to statements made after execution of a testamentary document. *In re Berge’s Estate*, 234 Minn. 31, 35, 47 N.W.2d 428, 430-431 (1951) (holding that decedent’s expressed intention of leaving everything to his stepdaughters was “evidence of his then existing state of mind,” but not evidence that he executed his intentions); *In re Estate of Zahn*, 702 A.2d at 488 (refusing to give effect to a joint tenant’s self-serving testimony regarding decedent’s stated intent to leave her “free and clear” of debts because, in part, the statement “relates solely to decedent’s intention at the time of the statement, not at the time of transfer”). Finally, this statement is self-serving hearsay. MINN. R. EVID. 801 – 802 (2011). At trial, the District Court heard Stisser contradict his prior sworn testimony and heard evidence of several false statements made by Stisser.<sup>8</sup> Stisser’s testimony as to the Grantor’s intent should not be accorded any credibility.

The only admissible extrinsic evidence in the record of Grantor’s intent is the affidavit of Larry Koch. If relevant and admissible extrinsic evidence is considered, it is the Koch affidavit and it supports a denial of Stisser’s claims for payment. Moreover, if the Court considers extrinsic evidence offered by Stisser, the issue should be remanded to

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<sup>8</sup> (See examples Add.104, ¶32 n.6; Tr. VII, 100-119; Tr. IX, 57-58; ASA.6-8).

the District Court to weigh the evidence and determine Stisser's credibility and the Grantor's intent.

Stisser also argues that the District Court erred in determining that "a testator's intent for exoneration cannot be inferred from the general 'pay my legal debts' language in the trust" because, according to Stisser, the District Court should not have inferred anything in the summary judgment context (Stisser's Br. 37). Contrary to Stisser's argument, the District Court did not make an inference of fact. The District Court properly found that the general directive to pay debts did not, as a matter of law, show an intent by the Grantor to have her secured debts paid by the Trust. (Add.34). Therefore, summary judgment in favor of the Trustee was appropriate. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. Ct. App. 1995) ("summary judgment should be affirmed if it can be sustained on any ground").

In addition to reading the language of Paragraph 3.1.1 alone, the District Court looked at the Trust Agreement as a whole to determine the Grantor's intent and looked at the potential effect of payment of Stisser's claimed secured debts by the Trustee. (Add.35). The Court noted that, if all of the secured debts claimed by Stisser (which were valued at over \$5.7 million) were paid from the Trust, the Beneficiaries would each receive 72% less than they would receive if the debts were not paid from the Trust. (Add.36).<sup>9</sup> The District Court pointed to Paragraph 12.4.5 of the Trust Agreement, and

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<sup>9</sup> In the District Court, Stisser did not object to the Trustee's argument that payment of Stisser's claimed secured debts would deplete the Trust by approximately two-thirds of its value. Stisser, therefore, cannot object on appeal to the District Court's consideration of this information. See *In re Trust A & B Created Under Last Will of Divine*, 672

held that the Grantor did not intend Stisser to receive such a windfall benefit at the expense of the Beneficiaries. (Add.35). The District Court correctly concluded that the Trust Agreement, when considered as a whole and read with the purpose of the Grantor in mind, did not show an intent by the Grantor to pay millions of dollars in secured debts as claimed by Stisser.

## **II. Stisser Was Not Acting As Personal Representative in Requesting Payment of Secured Debts.**

Stisser argues that the Court of Appeals erred by not applying the general directive to pay debts to debts secured by nonprobate property. Stisser misconstrues the Court of Appeals' decision. The Court of Appeals did not apply the general directive differently to probate and nonprobate property. Instead, the Court of Appeals held that Stisser was not acting as a personal representative of the Estate in requesting payment of debts secured by property that was not part of the Estate. (Add.8). The language of Paragraph 3.1 only applies if the request for payment comes from the legal representative of the Estate and is for payment by way of "advancement" or "reimbursement." (AA.5-6). Even Stisser admits that Paragraph 3.1 only "directs the Trustee to pay certain obligations of the [E]state." (Stisser Br. 20, *see also* Stisser Br. 22). The debts secured by real estate were not obligations of the Estate under Florida law, the law governing administration of the Estate. *Lopez v. Lopez*, 90 So. 2d 456 (Fla. 1956). Therefore, the Trustee was not obligated to "advance" or "reimburse" the Estate for these debts under Section 3.1.

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N.W.2d 912, 923 (Minn. Ct. App. 2004) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)).

Similarly, the Court of Appeals should have found that Stisser was not acting in his capacity as personal representative of the Estate in requesting payment of the Margin Loan. As a matter of Florida law, the Estate was not responsible for payment of such debt. Fla. Stat. § 733.803 (2011); (*see also* Trustee’s Br. at 44-48).

Stisser does not respond to the Trustee’s argument that Stisser was acting outside his capacity of personal representative in seeking payment of all of these debts except to allege that this is a new argument, “never argued in either the [D]istrict [C]ourt or the Court of Appeals.” (Stisser Br. 42). Stisser is wrong. The Trustee made this argument to the District Court in his opening summary judgment brief (ASA.14) and the issue of the Estate’s responsibility for debts was addressed at oral argument before the Court of Appeals. Moreover, this argument is directly responsive to the Court of Appeals’ opinion.

The decision of the Court of Appeals not to require payment of the debts secured by nonprobate property is also supported by probate cases in other states that have refused to interpret a general directive to pay debts in a will to require payment of debts secured by nonprobate property. *See, e.g., Manders*, 667 S.E.2d at 60; *In re Estate of Vincent*, 98 S.W.3d at 149-150; (*see also* Trustee’s Br. pp. 30-33). If a general directive in a will is insufficient to require payment of debts secured by nonprobate property, the same general directive in a trust should be read the same way.<sup>10</sup>

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<sup>10</sup> Stisser has previously relied on the case of *Dolby v. Dolby*, 694 S.E.2d 635 (Va. 2010), for the proposition that a general directive in a will requires payment of a decedent’s debts secured by nonprobate property. The *Dolby* case is distinguishable. In *Dolby*, the decedent’s debt was his sole debt but was “secured” by property held jointly

In the alternative, Stisser argues that the Trustee should pay half of the joint debts secured by real estate held outside the probate estate under the theory of “equitable contribution.” (Stisser Br. 44-45). Equitable contribution is an equitable doctrine adopted by a few states that allows a surviving spouse to seek payment from his or her spouse’s estate “in reimbursement of the payment by the survivor of more than his equitable share of their joint obligation, even though the debt is secured by real property which was held by them as tenants by the entirety.” C.C. Marvel, Annotation, *Right of Surviving Spouse to Contribution, Exoneration, or Other Reimbursement out of Decedent’s Estate Respecting Liens on Estate by Entirety or Joint Tenancy*, 76 A.L.R.2d 1004 § 2 (1961 & Cum. Supp.). The doctrine is intended to prevent unjust enrichment. *Mellor v. O’Connor*, 712 A.2d 375, 380 (R.I. 1998).

The District Court correctly rejected Stisser’s equitable contribution argument. (Add.39). A district court’s denial of equitable relief is reviewed for an abuse of discretion. *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 277 (Minn. 2010).

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by the decedent and his spouse as tenants by the entirety with right of survivorship. Under Virginia common law, real estate held as tenants by the entirety is exempt from creditors who do not have joint judgments against the husband and wife. *See Rogers v. Rogers*, 512 S.E.2d 821, 822 (Va. 1999). The lender in *Dolby*, therefore, could not foreclose on the property owned by the surviving spouse because the debt was not a joint debt. Thus, the debt was more akin to an “unsecured debt” than a secured debt. In contrast, the three debts secured by real property in this case were all joint debts and the lender could look to the security for payment of those debts. Similarly, Charles Schwab, and its successor, Raymond James, could – and in fact did – call the Margin Loan to assure payment of that debt. The cases cited at pages 30-33 of the Trustee’s opening brief, holding that general directives to pay debts in wills do not require exoneration of debts secured by nonprobate property, are more analogous to this case than is *Dolby*.

As Stisser concedes, Minnesota has not adopted the equitable contribution doctrine he advances. (Stisser Br. at 45). The District Court did not abuse its discretion in declining to adopt a new equitable remedy. Furthermore, the District Court correctly held that, even if Minnesota courts had adopted equitable contribution, it would not apply to Stisser's claims. The District Court noted that "even if allowable, contribution cannot be obtained until the surviving spouse has made payment in excess of his proper share." (Add.39 (citing Marvel, *supra*, § 2)). Stisser did not allege or prove that he had "made any payment, on any of the questioned properties 'in excess of his proper share.'" (Add.39). The District Court also observed that "the equitable contribution doctrine by its terms requires an assertion to repayment *from the estate of the deceased*." (*Id.*). Even if Stisser were entitled to contribution from the Estate, which he is not,<sup>11</sup> the District Court held that there is no equitable reason to apply the doctrine against the Trust here. The Trust has not been enriched by Stisser's obligation to pay the debt on these properties, but Stisser would be unjustly enriched if the Trust, which has no interest in the property securing the debts, were required to pay half of such debts. *See, e.g., Lopez*, 90 So. 2d at 459; *Mellor*, 712 A.2d at 380. Finally, the District Court correctly noted that application of equitable contribution would contradict the Grantor's intention to omit any provision for Stisser from the Trust. (Add.40).

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<sup>11</sup> Stisser would have no right to contribution from the Estate under the laws of either Florida or Illinois (the states where the real estate is located). *Lopez*, 90 So. 2d at 459; 755 Ill. Comp. Stat. 5/20-19(b) (2011). When confronted with *Lopez* by the Florida Administrator Ad Litem, Stisser declared that the Estate was "not seeking contribution." (AA.160).

**III. The District Court Did Not Err in Concluding That Stisser's Fiduciary Compensation and the Attorney Fees of Laird Lile Should Not Be Paid From the Trust.**

**A. Clearly Erroneous Standard of Review Applies.**

Stisser asserts that this Court should review the District Court's trial findings *de novo*. However, a district court's findings in a bench trial will only be reversed if they are found to be clearly erroneous. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). When reviewing a district court's findings, this Court views those findings in the light most favorable to the judgment of the district court. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). "On review, appellate courts evaluate the district court's findings concerning wills and trusts under a clearly erroneous standard and review conclusions of law *de novo*." *In re Trust Created Under Agreement with Lane*, 660 N.W.2d 421, 425-426 (Minn. Ct. App. 2003).

**B. Stisser's Claim that No Court Can Deny his Compensation and Lile's Fees is Meritless.**

It is a long standing precept of both trust and estate law that fiduciary compensation and attorneys' fees are not allowed "as a matter of right" and that courts have an "independent responsibility to protect trusts from unnecessary dissipation." *In re Great N. Iron Ore Props.*, 311 N.W.2d 488, 493-494 (Minn. 1981); *In re Estate of Simmons*, 214 Minn. 388, 398, 8 N.W.2d 222, 227 (1943). Payment of expenses from a trust must be reasonable and supported by evidence. *In re Trusteeship Created by the City of Sheridan*, 593 N.W.2d 702, 709 (Minn. Ct. App. 1999). Consistent with these precepts, Minnesota courts have long held that an award of fees and expenses to a

fiduciary “rests largely in the discretion of the probate court; and . . . the reasonable value of such services is a question of fact” even though the statute allowing these fees and expenses indicates they “shall” be awarded. *In re Estate of Baumgartner*, 144 N.W.2d 574, 580 (Minn. 1966) (upholding the discretion of lower court to determine attorneys’ fees under Minn. Stat §525.49)<sup>12</sup>; *In re Estate of Balafas*, 302 Minn. 512, 514, 225 N.W.2d 539, 541 (1975) (no abuse of discretion in denying special administrator’s compensation under same statute); *In re Estate of Anderson*, 654 N.W.2d 682, 689 (Minn. Ct. App. 2002) (no abuse of discretion under Minn. Stat. § 525.515 in denying beneficiaries’ fees); *In re Doyle*, 778 N.W.2d 342, 351 (Minn. Ct. App. 2010) (no abuse of discretion under Minn. Stat. §525.515 in disallowing fees and accounts if they are inaccurate and disorganized).

Courts do not become trustees when reviewing trustees’ decisions to pay or not pay expenses, but limit their review to evaluating the reasonableness of the trustees’ judgment. (Hess test. (Tr. VIII, 110-112)). Courts approve trustees’ actions so long as the trustees exercise reasonable judgment. (*Id.*); *In re Estate of King*, 668 N.W.2d 6, 9 (Minn. Ct. App. 2003). Critical to the trustees’ exercise of judgment is whether they have sufficient information upon which to determine the appropriateness and

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<sup>12</sup> Stisser attempts to distinguish *Baumgartner* by arguing that it involved “a discretionary award of attorneys’ fees” (Stisser Br. 56), but the statute in *Baumgartner* directed that compensation “shall” be allowed. Stisser also claims *Baumgartner* should not apply in a trust case, but *Baumgartner* is cited in trust and other cases on which Stisser relies. See *In re Estate of Bush*, 230 N.W.2d 33, 42 (Minn. 1975); *In re Trust Created by Voss*, 474 N.W.2d 199, 202 (Minn. Ct. App. 1991).

reasonableness of the expense, because trustees' duty of loyalty to the beneficiaries prevents payment without proper information. (Hess Test., Tr. VIII, 115, 124-25).

Stisser, as a potential creditor of the Trust, had the burden to prove that the Trustee's decisions were not a reasonable exercise of judgment. (Add.78; Hess Test., Tr. VIII, 110-112, 115, 124-25); *In re Estate of King*, 668 N.W.2d at 9. The District Court held that while the language used in Section 3.1.1 "may appear nondiscretionary," it does not mean Stisser's right to compensation and payment of fees is "automatic." (Add.85). After considering thirteen days of testimony, the District Court made detailed findings demonstrating why Stisser did not meet this burden with regard to his claims for payment of fiduciary compensation and Lile's fees.

Stisser essentially argues that his right to compensation and fees is "automatic" under the Trust Agreement. None of Stisser's authority or the word "shall" eliminates the Trustee's basic fiduciary duty to the Beneficiaries to exercise judgment in evaluating Stisser's claims. (Add.77); RESTATEMENT (SECOND) OF TRUSTS §174 cited in *In re Irrevocable Inter Vivos Trust of Kemske*, 305 N.W.2d 775, 761 (Minn. 1981); (Hess Test., Tr. VIII 115, 124-25). Before paying a claim of a creditor, a trustee must have sufficient information upon which to determine the appropriateness and reasonableness of the claimed expense. (*Id.*); RESTATEMENT (SECOND) OF TRUSTS §186, cmt. f (1959) ("Although a power is conferred upon the trustee, he cannot properly exercise the power under such circumstances or to such an extent or in such a manner as will involve a violation of his duties to the beneficiary.") Similarly, no authority of this Court has abolished the probate court's longstanding role of evaluating fiduciary compensation and

expense claims. See *In re Great N. Iron Ore Props.*, 311 N.W.2d at 493-494; *In re Trusteeship Created by the City of Sheridan*, 593 N.W.2d at 709.

The issue here is whether the District Court clearly erred in concluding that Stisser had not provided sufficient information to support his claims for fiduciary compensation and Lile's fees and in concluding that the Trustee had acted reasonably in denying Stisser's claims. The cases Stisser relies on are inapposite. (Stisser Br. 47-48). None involves a request for payment of expenses from a creditor of a trust and the sufficiency of information that must be provided to a trustee.<sup>13</sup>

**C. The District Court Did Not Clearly Err in Holding that the Trustee Was Not Required to Pay Stisser's Claimed Fiduciary Compensation.**

Section 11.1 of the Trust Agreement governs the payment of fiduciary compensation. It provides:

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

(AA.14).

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<sup>13</sup> The cases Stisser relies on consider issues such as whether a beneficiary's right to trust income allows the government to attach a tax lien (*O'Shaughnessy*, 517 N.W.2d at 578) or to deem trust assets "available" for purposes of medical assistance eligibility (*In re Flygare*, 725 N.W.2d 114, 119-120 (Minn. Ct. App. 2006)) or whether the trustees of ERISA plans have a discretionary power to determine who is a beneficiary. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

The District Court carefully evaluated Stisser's claim for compensation under Section 11.1. With regard to the principal "time and labor required" factor, Stisser did not keep any records of his time or work as personal representative. (Tr. IX, 147-154; AA.138-39). At trial, Stisser's sole testimony supporting his claim for fiduciary compensation was his new estimate that he worked 20 hours per week (an estimate that contradicted his deposition testimony). (Tr. IX, 147-149). Professional trustee Thomas Welch testified that Stisser's request for payment based on a complete absence of records was not in accord with accepted customs and practices in Minnesota even for non-attorney fiduciaries. (Tr. XIII at 41-43). The District Court determined that due to the "dearth of information from the Personal Representative, any award is unsupportable in the record." (Add.98-99 (citing *In re Estate of Meiners*, No. A07-0967, 2008 Minn. App. Unpub. LEXIS 693 (Minn. Ct. App. June 10, 2008)); ASA.30). "The Court cannot come up with some arbitrary number and call it 'reasonable.'" (Add.95).

The District Court also considered the "results obtained" for the Estate by Stisser and found that, "almost across the board" Stisser's actions were "of no benefit to the Estate" and "the results show harm to the Estate." (Add.99). Based on its findings, the District Court awarded no compensation to Stisser. The District Court's findings and its decision are supported by the record, are consistent with case law, and are not clearly erroneous.

Stisser argues that *In re Estate of Simmons*, 8 N.W.2d 222 (Minn. 1943) does not support the District Court's decision because that case involved an attorney acting a personal representative and the court awarded some fees instead of none. *Simmons*,

however, makes clear that Minnesota courts disapprove of fiduciaries who merely provide estimates of their time as support for a claim of compensation. *Id.* at 226. Further, nothing in *Simmons* limits its holding to attorneys or absolves Stisser of the responsibility to provide some “modicum” of records supporting his claim in compliance with Section 11.1 and custom and practice.<sup>14</sup>

Stisser finally argues, without any authority, that because the Trustee and Stisser have had disputes since the death of the Grantor, the Trustee should not be allowed to exercise judgment as to Stisser’s claims.<sup>15</sup> (Stisser’s Br. at 52). The District Court, however, independently determined that Stisser was not entitled to compensation. (Add.98-99). The District Court did not clearly err in denying Stisser’s claim for compensation, and the Court of Appeals correctly upheld the District Court’s decision. (Add.11); *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (the appellate court’s role is limited to determining whether those findings are supported by the record).

**D. The District Court Did Not Clearly Err in Holding that the Trustee Was Not Required to Reimburse Stisser for Attorney Lile’s Fees.**

In analyzing Stisser’s claim for Lile’s fees, the District Court primarily considered the Trustee’s fiduciary duty to satisfy himself that invoices submitted for payment were

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<sup>14</sup> *In re Estate of Bush*, 230 N.W.2d 33, 45 (1975), cited by Stisser, is distinguishable because there was substantial evidence there that the fiduciaries had benefitted the estate and no evidence contradicted the executor’s claim for compensation. (Add.97). Stisser does not address the District Court’s sound analysis distinguishing *Bush* or the expert testimony presented against awarding compensation to Stisser.

<sup>15</sup> The record shows that the Trustee attempted to resolve these disputes, but Stisser “dug in his heels.” (Add.53-56, 99).

properly payable by the Trust. (Add.90-91 (citing *In re Sheridan*, 593 N.W.2d at 708 and *In re Estate of Lee*, 9 N.W.2d 245, 250 (Minn. 1943); Hess test., Tr. VIII, 118-119) (paying claimed expense without sufficient information to demonstrate that the expense was reasonable and properly chargeable to the trust breaches trustee's duty to beneficiaries). The District Court found that the Trustee reasonably determined that he did not have sufficient information to pay the Lile invoices. (Add. 89-93).

The District Court's finding is well supported. The Trustee received no documentation supporting Lile's claimed fees for years, pursuant to Lile's demand that the Trustee agree to payment before seeing the invoices. (Add.90-91). The Court found Lile's position "unreasonable on its face."<sup>16</sup> When Lile's invoices were finally produced in discovery, they were heavily redacted. (Ex.1203). After discovery, some of the Lile invoices were reproduced with fewer, but still significant redactions, (ASA.20-24), and some were not reproduced at all. (ASA.13-19).<sup>17</sup> At trial, no witness could identify what information was redacted from Lile's invoices or why. (Tr. II, 18-25; Tr. VIII, 36-37). Further, the Lile invoices did not identify the hours for each entry and many of the time entries were admittedly vague. (Add.91; Tr. II, 44-45; Tr. III, 189-192). Expert testimony on the customs and practices of Minnesota trustees supported the Trustee's decision to not pay Lile's invoices. (Add.92).

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<sup>16</sup> Although the District Court did not reach the reasonableness of Lile's fees, the court disapproved of several aspects of Lile's work. (Add.67-68, Add.104, Add.107; AA.77, 160, ASA.1-2; Tr. II, 21-22, 62-65, 68-69; Tr. III at 209-210).

<sup>17</sup> Stisser claims Lile's redactions were minimal based on an exemplar from Ex. 1204. This assertion ignores that many invoices in Ex. 1204 are more heavily redacted, some invoices were not reproduced in Ex. 1204, and redactions in Ex. 1204 were made in white so they are difficult to locate. (ASA.23-29).

Stisser, for the first time, argues that an outdated version of Minnesota Rule of Civil Procedure 52.01 requires this Court to review redacted documents, like attorney bills, *de novo*. (Stisser Br. 53). Stisser is wrong. The current version of Rule 52.01 now extends the clearly erroneous standard to court findings based on “oral or documentary evidence.” MINN. R. CIV. P. 52.01 (2011). As such, the portion of *In re Trust Known as Great N. Iron Ore Props.*, 243 N.W.2d 302, 305 (Minn. 1976) cited by Stisser has been expressly overturned. See *First Trust Co. v. Union Depot Place Ltd. P'ship*, 476 N.W.2d 178, 181 (Minn. Ct. App. 1991).

Stisser also argues, without any authority, that this Court should disregard the District Court’s findings that the invoices are vague, lack sufficient information, and are not the type of invoice a trustee in this community would pay. Stisser seems to advocate that a trustee and a probate court blindly accept a creditor’s claims from a trust. This is not the standard in Minnesota. *In re Great N. Iron Ore Props.*, 311 N.W.2d at 493-494 (Minn. 1981). Stisser criticizes the District Court’s citation of the requirements of Minnesota General Rule of Practice 119.02, but the District Court’ reference to Rule 119.02 and to expert testimony in support of its finding that Lile’s invoices lacked sufficient information to warrant payment was not error.

Stisser skirts the District Court’s discovery ruling by arguing that the court erred in not accepting Lile’s invoices for *in camera* review. Evidentiary rulings are reviewed for an abuse of discretion. *State v. Johnson*, 568 N.W.2d 426, 432 (Minn. 1997). Stisser’s litigation strategy was to conceal the attorney invoices and their contents from the Trustee throughout discovery, only to try to produce previously undisclosed invoices

and offer clean copies of redacted invoices to the Court for *in camera* review during the middle of trial. The District Court held Stisser to his “back hip pocket” discovery strategy and only considered evidence presented to the Trustee when he made his decision to deny Lile’s fees. (Add.92; Tr. II, 3-7, 24-25; Tr. III, 227; Tr. IV, 5-6, 174).

Moreover, Stisser’s claim that the redactions to Lile’s invoices protected privileged information was never established at trial as no one could testify as to what was redacted. Further, the claim of privilege was waived by putting the reasonableness of the fees and expenses at issue. “[T]he attorney client privilege is waived when the client places otherwise privileged matters in controversy.” *Ideal Elec. Sec. Co. v. Int’l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) (citing 6 JAMES W. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 26.49[5] (3d. ed. 1997)). In *Ideal Electronic Security Co.*, the court held that by “offering the billing statements as evidence of the same, [Plaintiff] waived its attorney-client privilege with respect to the redacted portions of the billing statements and any other communications going to the reasonableness of the amount of the fee award.” 129 F.3d at 152; *see also Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731-32 (8th Cir. 2002). The Trustee’s expert, Amy Hess, testified that she was unaware of any case forcing a trustee to pay monies from trust assets based on a redacted attorney bill. (Tr. VIII at 119).<sup>18</sup> The District Court’s evidentiary ruling to limit

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<sup>18</sup> The Ramsey County District Court’s *In re Galloway Family Trusts* scheduling order cited by Stisser is distinguishable. (Stisser Br. 55, n.9). In that case, the beneficiary was limited to reviewing redacted bills of the trustee. Unlike beneficiaries, trustees have a fiduciary duty to decide whether a bill should be paid by a trust.

Stisser to only that information he made available to the Trustee is supported by the record and is not clear error.

Finally, Stisser argues he should receive payment on some of the Lile invoices. (Stisser Br. at 57). Stisser's demand for "something" ignores the requirement that a creditor must properly document the claim so that the trustee can determine if it is reasonable and properly payable out of the trust. Stisser failed to do that here. Moreover, Stisser received "something" – the District Court instructed the Trustee to pay certain other administration expenses that it determined were properly documented and reasonable. (Add.85-87, 93). The District Court's holding that Stisser failed to provide sufficient evidence to support his claim for payment of Lile's fees is supported by the record and is not clear error.

### CONCLUSION

The Trustee respectfully requests that this Court:

1. Reverse the decision of the Court of Appeals that the Trustee is obligated to pay the Schwab Margin Loan and enter judgment as a matter of law in favor of the Trustee with respect to this claim; and
2. Affirm the Court of Appeals as to all of the issues raised by Stisser in this appeal.

Dated: November 16, 2011

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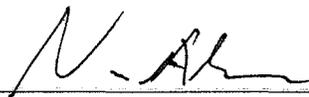
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**ACKNOWLEDGEMENT**

The Trustee, through his attorneys, acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211 (2011).

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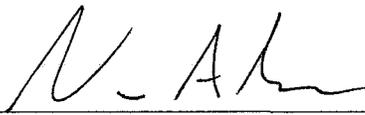
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 131 and Minn. R. Civ. App. P. 132 for a brief produced with proportional font and typeface in 13-point Times New Roman using Microsoft Word 2010.

The length of this brief is 9,933 words, excluding the Table of Contents and Table of Authorities.

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