STATE OF MINNESOTA

IN SUPREME COURT

A19-1814

Court of Appeals Moore, III, J.

In re the Trust of Lawrence B. Schwagerl Trust
Under Agreement Dated April 9, 1999.

Filed: October 27, 2021
Office of Appellate Courts

Joseph J. Cassioppi, Emily A. Unger, Fredrikson & Byron, P.A., Minneapolis, Minnesota, for appellant.

Joseph A. Gangi, Daniel J. Bellig, Farrish Johnson Law Office, Chtd., Mankato, Minnesota, for respondents.

S Y L L A B U S

1. The court of appeals correctly concluded based on the unambiguous language of the trust document in this case that the real estate assets were conveyed through the trust to the surviving spouse.

2. The court of appeals erred in concluding that certain trust assets were ineffectively transferred to a family trust.

3. The court of appeals erred in concluding that the record did not support the finding that one of the respondents accepted a role as a trustee by performing duties as a trustee.

4. The court of appeals erred in declining to determine whether the disposition of certain cash assets breached one trustee's fiduciary duties and failing to address the fiduciary duties of another trustee on the same issue.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

MOORE, III, Justice.

This case presents numerous issues arising out of a dispute between the children of Lawrence and Phyllis Schwagerl over the disposition of assets owned by Lawrence's trust (the "Lawrence Trust") before his death in 1999.[1] These assets include undivided half-interests in over 700 acres of farm real estate owned by the family, as well as the personal residence and surrounding yard of Lawrence and Phyllis. After a petition was filed to remove Phyllis as a trustee of the Lawrence Trust and for an accounting of its assets, the district court determined, among other things, that the Lawrence Trust agreement created a family trust upon Lawrence's death and that his undivided half-interest in the farm real estate was distributed to that family trust. The court further concluded that Phyllis, despite being entitled to Lawrence's undivided half-interest in the couple's personal residence at the time of his death, waived her right to that interest by intentionally leaving ownership of that property within the family trust.

[1] We refer to the Schwagerl family members involved in this case by their first name throughout this opinion because many of them share the same last name.

The court of appeals reversed. *In re Tr. of Lawrence B. Schwagerl Tr. Under Agreement Dated Apr. 9, 1999*, No. A19-1814, 2020 WL 5359409, at *1 (Minn. App. Sept. 8, 2020). It concluded that the Lawrence Trust agreement distributed Lawrence's interest in both the farm acreage and the couple's personal residence to Phyllis outright. *Id.* at *5. It then concluded that Phyllis's choice to leave Lawrence's share of the farm real estate in the family trust was an "ineffective transfer" of assets and, therefore, she retained outright ownership of Lawrence's share. *Id.* at *4–5.

Although we agree that the Lawrence Trust agreement distributed Lawrence's interest in the couple's farm real estate to Phyllis, we disagree with the conclusion that Phyllis's actions constituted an ineffective transfer of assets. We therefore affirm in part, reverse in part, and remand to the court of appeals to address the issues left undecided by that court.

FACTS

Lawrence and Phyllis Schwagerl were married for 53 years and resided on their family farm in Big Stone County. Over the course of their marriage, the couple accumulated 792.12 acres of real estate holdings comprising three adjacent farms. Their home and surrounding yard were located in the southeast corner of one of these farms. They had eight children, including appellant Barbara Higinbotham and two of the respondents, Jerome Schwagerl and Diana Miller.

In 1999, Lawrence was diagnosed with a terminal illness. To ensure the smooth disposition of Lawrence's assets upon his death, the couple created an estate plan that included pour-over wills and two revocable trusts—one for each spouse—the Lawrence

Trust and the Phyllis Trust. Lawrence and Phyllis transferred all their assets into the trusts, with each trust specifically receiving (among other things) an undivided half-interest in the couple's farm real estate and personal residence. Additionally, Lawrence and Phyllis were named trustees of each other's trusts.

The Lawrence Trust agreement contains nine articles; particularly relevant here are articles 3 through 7. Articles 3 through 6 relate to the administration of the Lawrence Trust's assets upon Lawrence's death. Specifically, article 3 initially provided[2] that upon Lawrence's death, his son Jerome would have an option to purchase Lawrence's half-interest in the farm real estate for its appraised value. If Jerome declined this option, the other seven children would each receive a similar option to buy Lawrence's half of the farm real estate for an appraised value. If none of the children exercised their option to buy the farm real estate, it would be sold and the proceeds would be distributed according to the remainder of the trust agreement. In addition, article 3.3.3 gave all of Lawrence's personal property to Phyllis and provided that Phyllis was to receive "[a]ll interests in property used . . . for residential purposes and in all real estate contiguous to or used in connection with such property." Finally, article 3 concluded that all remaining property was to be disposed of by mechanisms specified in article 4.

Article 4 divided property not distributed through article 3 into two shares: a marital share and a family share. The marital share and family share were to be composed of assets

[2] As discussed below, article 3 was immediately amended.

in a way that was intended to minimize the tax burden levied upon the estate. The mechanisms for distributing *these* shares were, in turn, found in articles 5 and 6.

Article 7 provided for trustee succession upon Lawrence's death: Jerome and one of the couple's other children (Janelle) would join Phyllis as co-trustees upon Lawrence's death if they accepted their role as such. Phyllis retained authority to add or remove trustees as she saw fit.

On the same day Lawrence executed the trust agreement, he also executed an amendment changing the terms of article 3. The amendment eliminated the option-to-purchase provision for Jerome and the other children but left the remainder of article 3 intact.

Four months after the Lawrence Trust was created, Lawrence died. Under the provisions of the Lawrence Trust, Phyllis became the sole trustee and could be joined by Jerome and Janelle if they chose to accept a trustee role. Phyllis also served as the personal representative of Lawrence's estate and hired both an attorney and an accountant to assist her in dividing the property owned by the Lawrence Trust.

In February 2000, Jerome delivered materials related to the Lawrence Trust's assets to Phyllis's accountant. Three months later, the accountant sent a letter to Phyllis "advising her of all the assets included in Lawrence's trust." He also instructed Phyllis to open separate bank accounts for a family trust that included the assets in the family share and to continue to use the federal tax identification number for the Lawrence Trust. She complied with the accountant's instructions.

On July 6, 2000, a tax return filed by Phyllis's accountant on behalf of the Lawrence Trust stated that the value of the Trust was $969,817. Of that amount, $319,663 was allocated to Phyllis outright and the remainder was specifically allocated to the family share. This division of property, however, was not in strict compliance with the terms of the Lawrence Trust agreement. Correspondence between Phyllis and her accountant, in fact, shows that this division was made strategically by Phyllis to secure favorable tax treatment. Among the assets allocated to the family share were Lawrence's half-interest in the farm acreage, Lawrence's half-interest in the couple's personal residence, grain, equipment, machinery, and other farm-related assets, even though some of these assets could have been distributed directly to Phyllis under the language of the Lawrence Trust agreement.

When deciding how to allocate the Lawrence Trust assets, both Jerome and Janelle participated in Phyllis's meetings with her accountant and attorney. After the estate was settled, Phyllis thanked her accountant for his assistance in allocating the trust assets "on behalf of herself, Janelle, and Jerome." It does not appear, however, that either Jerome or Janelle ever formally accepted a role as trustee in writing.

In 2008, Jerome signed a federal Farm Service Agency form on behalf of the Lawrence Trust. Next to his signature, Jerome was designated as "trustee" of the Lawrence Trust. At trial, Jerome testified that he never submitted any false information to the federal government and remained adamant that he was never a trustee of the Lawrence Trust.

In 2011, Phyllis, in her capacity as trustee of both her trust and the Lawrence Trust, sold all 792.12 acres of the farm real estate on a contract for deed to Schwagerl Family

Farm, LLC. This LLC was owned by Jerome and his wife. The contract, which was later filed with the Big Stone County Recorder, permitted Phyllis to retain her right to use the house and garage. The sale price for all the real estate was $574,500, which was substantially less than the fair market value of the land. The LLC paid roughly $50,000 up front and was to pay an additional $50,000 plus interest annually until the price was paid in full.

In 2013, respondent Barbara Higinbotham and two other Schwagerl daughters began asking Phyllis about the management of the Lawrence Trust, particularly the disposition of family share trust assets. Among other things, the daughters objected to Phyllis's sale of the farm to Jerome at a substantial discount. They requested copies of the Lawrence Trust agreement and other related financial information. Instead of providing the information, however, Phyllis, through her attorney, wrote her daughters a letter threatening to penalize them if they continued to engage in "inappropriate behavior" and saying that she was "distressed by the attitude and behavior" of her children.

Thereafter, Barbara filed a petition in district court, seeking removal of the trustees and an accounting of the Lawrence Trust assets. Once the petition was filed, Phyllis amended her own trust to remove Barbara and the two other daughters who had inquired about the management of the Lawrence Trust as beneficiaries of the Phyllis Trust.

In 2016, Jerome signed a form entitled "Declination of Appointment as Successor Co-trustee of the Lawrence Trust." At the same time, Phyllis named one of her other daughters, Diana Miller, as a co-trustee of the Lawrence Trust.

In May 2016, while the petition in this case was pending in district court, Phyllis and Diana transferred all of the cash assets out of the family trust, comprised of eight certificates of deposit (CD) which totaled over $410,000. They deposited six of eight CDs into the Phyllis Trust, and Phyllis closed the remaining two CDs and paid the proceeds directly to herself. Neither Phyllis nor Diana disclosed these transactions to anyone else and they were not discovered until a later investigation conducted by a court-appointed trustee.

Following the cash transfers, the only remaining asset in the Lawrence Trust was the undivided half-interest in the real estate subject to the contract for deed with Schwagerl Family Farm (that is, Jerome's LLC). Jerome, however, has not made payments to the Lawrence Trust on this contract for years, instead directing all payments on the contract to the Phyllis Trust.

In February 2017, Phyllis died. Later that year, the parties agreed to the district court's appointment of a neutral trustee "to investigate, report, and account for the assets of the Family Share" created under the Lawrence Trust. The neutral trustee conducted a thorough investigation and issued a report with numerous factual findings which were later adopted by the district court as the findings of the court itself.

After reviewing the neutral trustee's report, the district court made additional factual findings and reached legal conclusions regarding the Lawrence Trust. First, the district court found that the family share of the Lawrence Trust became a "family trust" after Lawrence's death, to be administered according to the terms of article 6 of the Lawrence Trust with net income from the family trust going to Phyllis and the remainder going to

Lawrence's children. Second, the court determined that article 3.3.3 of the Lawrence Trust agreement was unambiguous and provided that all real estate went into the family trust upon Lawrence's death. In reaching this determination, the court relied on the language of the pre-amendment trust agreement and other extrinsic evidence. The district court then concluded that Phyllis waived her right to a property distribution for the personal residence and surrounding curtilage by leaving it in the family trust. Fourth, the court determined that Jerome had accepted his role as trustee of the Lawrence Trust—and thus the family trust—by "performing duties as trustee" including delivering trust records, attending meetings, and holding himself out as a trustee.

Then, the district court concluded Phyllis, Jerome, and Diana all breached their fiduciary duties related to the family trust by selling the farm real estate at below market value and depleting the family trust of its cash assets. Based on these conclusions, the court removed Diana as trustee and appointed the neutral trustee as a continuing trustee to pursue recovery of improperly distributed family trust assets.

After trial, Jerome and Diana moved for amended factual findings while Jerome's LLC and the Phyllis Trust filed a motion to intervene and for a new trial. The district court denied these motions but amended its factual findings slightly. Changing its analysis, the district court now reasoned that article 3.3.3 of the Lawrence Trust agreement was ambiguous but reaffirmed its conclusion that the agreement gave Lawrence's share of the farm real estate to the family trust. Jerome, Diana, and Jerome's LLC appealed.

The court of appeals reversed. *In re Tr. of Lawrence B. Schwagerl Tr. Under Agreement Dated Apr. 9, 1999*, No. 19-1814, 2020 WL 5359409 at *1 (Minn. App. Sept.

8, 2020). The court of appeals first concluded that the Lawrence Trust agreement was unambiguous and that it distributed Lawrence's share of the farm real estate and personal residence to Phyllis directly. *Id.* at *4–5. The court then held that Phyllis had "ineffectively transferred" those assets to the family trust, thus retaining them in her personal capacity. *Id.* at *5. And because Phyllis held those assets in her personal capacity it was impossible for her, Jerome, or Diana to breach their fiduciary duties by selling the assets for below fairmarket value. *Id.* The court also opined that even if Phyllis had transferred the assets into the family trust, her authority as trustee permitted her to treat the assets as if she owned them outright. *Id.* at *5, n.2. The court also declined to decide whether Phyllis waived her right to a property distribution, *id*., and did not address respondents' argument that the neutral trustee was not impartial and thus was appointed in error. Finally, the court concluded that the district court committed clear error by finding that Jerome was a trustee of the Lawrence Trust. *Id.* at *5–6. We granted Barbara's petition for review.[3]

ANALYSIS

Barbara asserts the court of appeals committed four errors in this case. First, she contends that the court erred by concluding that Phyllis received Lawrence's share of the farm real estate in her personal capacity. Second, Barbara claims that the court of appeals erred by concluding that Phyllis "ineffectively transferred" her real estate interests to the family trust. Third, she asserts the court erroneously rejected the district court's conclusion

[3] The respondents argue that we should reverse our decision to grant Barbara's petition and dismiss this case as improvidently granted. *See generally* Minn. R. App. P. 117, subd.1(b). We decline to do so.

that Jerome accepted appointment as trustee. Fourth and finally, Barbara asserts that the court of appeals erred by failing to address whether Diana and Phyllis breached their fiduciary duties by removing the cash assets from the family trust. We address each of these arguments in turn.

I.

We begin by interpreting the Lawrence Trust agreement itself, particularly article 3.3.3, to determine how and where Lawrence's share of the farm real estate was distributed—and specifically, whether it was allocated to one of the trusts or to Phyllis individually. We review de novo a district court's interpretation of a trust agreement. *In re Pamela Andreas Stisser Grantor Tr.*, 818 N.W.2d 495, 502 (Minn. 2012). "[I]n construing a trust agreement," we attempt "to ascertain and give effect to the grantor's intent." *Id.*; *In re Tr. Created under Agreement with McLaughlin dated Dec. 17, 1969*, 361 N.W.2d 43, 44–45 (Minn. 1985) (explaining that "the first step in the analysis of a trust instrument is to determine the intent of the settlor from the plain language of the instrument"). We determine the grantor's intent by looking at the document as a whole and not its individual sections in isolation. *In re Stisser Grantor Tr.*, 818 N.W.2d at 502; *see also In re Fiske's Tr.*, 65 N.W.2d 906, 910 (Minn. 1954) (explaining that trusts "must be construed to carry out the main object of the [grantor] 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").

If a trust agreement is unambiguous, we "will ascertain the grantor's intent from the plain language of the agreement, without resort to extrinsic evidence." *In re Stisser*

Grantor Tr., 818 N.W.2d at 502. This means that prior versions of trust agreements are generally "inadmissible absent a prior finding of ambiguity." *In re Trs. Created by Will of Hartman*, 347 N.W.2d 480, 483 (Minn. 1984). And writings are considered ambiguous only if their "language is reasonably susceptible of more than one interpretation." *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

Article 3.3.3 of the Lawrence Trust agreement provides that Phyllis was to receive "[a]ll interests in property used . . . for residential purposes and in all real estate contiguous to or used in connection with such property." Barbara argues that the language of article 3.3.3 of the Lawrence Trust agreement gave the farm real estate to the family trust.[4] In support of her interpretation, Barbara points to the language of the Lawrence Trust agreement before Lawrence amended article 3 and asserts that the word "contiguous" only refers to the couple's personal residence and surrounding curtilage. The respondents counter by arguing that the Lawrence Trust agreement gave Phyllis the farm real estate in her personal capacity and that we should not rely on the pre-amendment version of the Lawrence Trust agreement in ascertaining the meaning of the final trust agreement. According to the respondents, the word "contiguous" refers to all of the farm real estate

[4] Barbara asserted at oral argument that we do not have to address the interpretation of the Lawrence Trust agreement because Phyllis's decision to allocate the farmland to the family trust precludes a need to decide where the trust agreement allocated the land initially. This argument, however, is absent from her briefing. We therefore deem it to be forfeited and will not address it. *Louden v. Louden*, 22 N.W.2d 164, 166 (Minn. 1946) ("An assignment of error based on mere assertion and not supported by any argument or authorities in [a party's] brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

because one is able to walk from the personal residence to the entirety of the farm real estate without ever leaving Schwagerl-owned real estate.

"Contiguous" is left undefined by the trust document and we therefore look to dictionaries to understand its plain meaning. *See In re Stisser Grantor Tr.*, 818 N.W.2d at 502 (using dictionary definitions to interpret the language of a trust agreement). The word has a number of similar definitions. It can mean "being in actual contact: touching along a boundary or at a point." *Merriam-Webster Collegiate Dictionary* 270 (11th ed. 2014); *see also Contiguous*, *Black's Law Dictionary* (11th ed. 2019) (defining contiguous to mean "[t]ouching at a point or along a boundary"). It can also mean "touching or connected throughout an unbroken sequence." *Merriam-Webster Collegiate Dictionary*, *supra*, at 270.

In this case, we conclude that the term "contiguous" is unambiguous within the meaning of article 3.3.3 of the Lawrence Trust agreement. That article gave Phyllis "all interests in property . . . contiguous to" the residential land. Because all of the farm real estate is either "touching" the personal residence or is "connected" through "an unbroken sequence" of land, we agree with the court of appeals that the Lawrence Trust agreement unambiguously gave Lawrence's share of the couple's farm real estate to Phyllis.

In reaching this conclusion, we reject Barbara's argument that we are permitted to rely on the pre-amended trust agreement regardless of an ambiguity finding. If we find a term or language to be unambiguous, we are not permitted to look at extrinsic evidence to create ambiguity within a document. *In re Stisser Grantor Tr.*, 818 N.W.2d at 502. And extrinsic evidence is defined to include "evidence relating to the trust instrument but not

appearing in the instrument's plain language because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement." *Id.* at 506 n.8 (citation omitted) (internal quotation marks omitted). Here, the pre-amended version of the trust document is extrinsic evidence because it does not appear within the instrument's plain language. We are therefore prohibited from relying on it to define "contiguous" or to create ambiguity within the Lawrence Trust agreement.

Based on the unambiguous language of article 3.3.3 of the Lawrence Trust agreement, we affirm the decision of the court of appeals that the farm real estate belonged to Phyllis.

II.

Next, we turn to the determination by the court of appeals that Phyllis's choice to leave the Lawrence Trust's share of the couple's farm real estate and personal residence in the family trust was an "ineffective transfer" of assets. *In re Tr. of Lawrence B. Schwagerl*, 2020 WL 5359409, at *4–5. Barbara asserts this determination was error because it was not raised by either of the parties and has no support in our precedent or the governing statutes. The respondents counter by asserting that Barbara's argument is based on the faulty premise that the Lawrence Trust agreement created a family trust. Additionally, the respondents assert that the Lawrence Trust did not permit Phyllis to transfer the assets into a family trust if one existed.

We begin by addressing the respondents' argument about the existence of a family trust in this case. The district court found that the family trust was created with real estate assets, certain personal property assets, and other funds. Barbara asserts that the district

court correctly found the existence of a family trust based on evidence in the record, pointing to letters from Phyllis's accountant discussing a family trust, various tax documents, a letter from Phyllis discussing a family trust, and testimony from Janelle at trial. The respondents assert that the plain language of the Lawrence Trust agreement does not create a family trust and that the district court erred in finding that one was created. The court of appeals appeared to agree with Barbara, though without a separate legal analysis, because it referenced a family trust throughout its opinion.

We review the district court's findings of fact for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). Under this standard, findings of fact may be set aside only if there is no reasonable evidence in the record to support those findings, *id.*, and we are left with a "definite and firm conviction that a mistake has been made." *In re Stisser Grantor Tr.*, 818 N.W.2d at 507 (citation omitted) (internal quotation marks omitted).

At trial, Barbara presented substantial evidence that supports the district court's finding that a family trust was created out of the assets in the family share. First, Phyllis's accountant advised Phyllis that assets were placed within "the family trust" including the undivided half-interest in the farm real estate. Second, a letter from Phyllis to her accountant specifically asked whether it was possible "to put more into the family trust." Third, Janelle testified that, after her father's death, she discussed with Phyllis and Jerome which specific assets to place in the "family trust." Fourth, tax records show that the Lawrence Trust was maintained in accordance with article 6 of the Lawrence Trust agreement, which governed the family share, instead of being maintained under the broader

provisions of the trust agreement. This "reasonable evidence in the record" leads us to conclude that we do not have a "definite and firm conviction that a mistake has been made." *Rasmussen*, 832 N.W.2d at 797 (citation omitted) (internal quotation marks omitted). There is ample support in the record for the district court's finding that a family trust was created out of the assets placed in the family share of the Lawrence Trust agreement.

We now turn to the court of appeals' ineffective-transfer theory. In considering whether Phyllis could sell the farm real estate to Jerome's LLC, the court of appeals considered whether there was an "ineffective" or "effective" transfer of assets to the family trust. *In re Tr. of Lawrence B. Schwagerl Tr.*, 2020 WL 5354909, at *4. Notably, neither party argued to either the district court or the court of appeals that Phyllis's actions in transferring assets into the family trust amounted to an "ineffective transfer of assets." We have said that appellate courts ordinarily should "confine their review to issues that . . . were presented and considered by the lower court." *Leuthard v. Indep. Sch. Dist. 912*, 958 N.W.2d 640, 649 (Minn. 2021) (also explaining that appellate courts "decide only questions presented by the parties" (citation omitted) (internal quotation marks omitted)). And because neither party argued that a theory of ineffective transfer should apply, it was error for the court of appeals to raise this theory sua sponte as a basis for reversal.

Second, even if we were to address this issue substantively, neither the decision of the court of appeals nor the briefs of the parties refer to precedent or otherwise offer support for an ineffective transfer of property or assets received by a trust beneficiary in her individual capacity, either in Minnesota law or in that of any other jurisdiction. Thus, the

court of appeals erred by reversing the district court based on a theory not raised by the parties and unsupported by precedent.

We have concluded above that under the plain language of article 3.3.3 of the Lawrence Trust, both Lawrence's share of the couple's personal residence and the farm real estate initially were to be distributed to Phyllis in her personal capacity rather than as a trustee. But the district court determined that Phyllis waived her right to any property distribution that she received from the Lawrence Trust in her personal capacity that was later contributed to the family trust. The court of appeals then declined to decide whether Phyllis waived her right to ownership of the assets placed in the family trust because it relied on the ineffective-transfer theory that we have now rejected.

Thus, on remand, the court of appeals must determine whether the district court erred in finding that Phyllis waived her right to require the Lawrence Trust's interest in the real estate be distributed to her in her personal capacity by placing that interest within the family trust. If the court of appeals agrees with the district court that Phyllis waived her right to these assets, then it must also address whether Phyllis's sale of the farm real estate and residence and her transfer of all cash assets out of the family trust constituted a breach of her fiduciary duties.[5]

We address one final point on this issue. The court of appeals opined that Phyllis could treat the farm real estate and residence as if she owned them outright even if those

[5] If Phyllis did breach her fiduciary duties by either selling the farm real estate at a discount or by transferring the cash assets out of the family trust, the court of appeals will then be required to address the challenge raised by the respondents regarding the partiality of the neutral trustee.

assets were located within the family trust. *In re Tr. of Lawrence B. Schwagerl Tr.*, 2020 WL 5354909, at *5. We disagree.

A trustee is required to "exercise a discretionary power in good faith . . . and, in the best interests of the beneficiaries." Minn. Stat. § 501C.0814(a) (2020). A trustee is not permitted to disregard fiduciary duties and treat trust assets as their own even if a trust document gives the trustee broad authority. *Restatement (Second) of Trusts* § 186, cmt. f (Am. Law Inst. 1959). "Although a power is conferred upon the trustee, he cannot properly exercise the power" if it constitutes "a violation of any of his duties to the beneficiary." *Id.* Indeed, "although a power of sale is conferred upon the trustee, he will be liable to the beneficiary if he does not exercise reasonable care and skill in making the sale." *Id.* Therefore, on remand, the court of appeals must address Phyllis's sale of the assets in light of a trustee's fiduciary duties.

III.

Next, we must decide whether the court of appeals erred when it reversed the district court's determination that Jerome accepted his trusteeship of the Lawrence Trust by performing duties as trustee. Barbara asserts that the district court's finding was correct because the record shows that Jerome delivered materials related to the family trust to Phyllis's accountant, participated in family trust meetings, and signed a Farm Service Agency form as "trustee." Barbara also points to the fact that Phyllis expressed gratitude to her accountant for helping her, Jerome, and Janelle in settling the Lawrence Trust. The respondents assert that the court of appeals correctly rejected this conclusion because

Jerome never formally accepted his role as trustee and only performed "trivial" tasks that could not constitute acceptance of a trustee role.

As noted, we review findings of fact for clear error. *Rasmussen*, 832 N.W.2d at 797. Thus, we may set aside a finding of fact only when there is no "reasonable evidence in the record to support the court's findings" and we are left with a "definite and firm conviction that a mistake has been made." *Id.* (citation omitted) (internal quotation marks omitted).

As a preliminary matter, the parties disagree over whether Minn. Stat. § 501C.0701 (2020), governs Jerome's actions in this case. This statute provides different methods for how a trustee might accept the role. *Id.* The respondents assert that section 501C.0701 does not apply to activities before January 1, 2016. *See* Minn. Stat. § 501C.1304 (2020) (applying section 501C.0701 to trusts and judicial proceedings on various dates). Barbara, however, asserts that the statute applies because the respondents relied upon it in their argument to the trial court. We agree with Barbara.

We have said that we will not "consider the applicability" of a statute "if it was not passed on by the trial court." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Further, issues not raised to the district court are deemed forfeited on appeal. *Id.* Here, the respondents initially argued before the district court that section 501C.0701 *did* apply; then, in a post-trial motion, argued that section 501C.0701 *did not* apply. The district court declined to consider respondents' new theory—that the statute does not apply—because they did not assert that theory at trial or in their post-trial brief. This conclusion finds support in our case law. *See, e.g.*, *Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 883

N.W.2d 236, 248 (Minn. 2016) (explaining that a party cannot advance one position successfully then "assume a contrary position" thereafter "simply because his interests have changed"); *Moquist v. Chapel*, 64 N.W. 567, 568 (Minn. 1895) (stating that when a party presents a claim "upon one theory of the law," the party "cannot complain if it is correctly decided according to that theory"). On appeal, respondents have argued that the statute does not apply, but they have also argued that even if it does apply, the district court erred in finding that Jerome was a trustee. We will therefore address this issue by assuming that section 501C.0701 applies in this case.

Under section 501C.0701, a person may accept the role as trustee in one of two different ways. First, the person can "substantially" comply "with a method of acceptance provided in the terms of the trust." Minn. Stat. § 501C.0701(a). Second, "if the terms of the trust do not provide a method, or the method provided in the terms is not expressly made exclusive," a person can accept the role by acting as a trustee. *Id.*[6] Furthermore, the statute provides that a "designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship." Minn. Stat. § 501C.0701(b). The district court concluded that Jerome accepted his role as trustee by "delivering trust records" to Phyllis's attorney, "attending meetings" with her accountant and attorney, and "holding himself out as a trustee to the federal government." The court of appeals rejected this finding, concluding that Jerome

[6] The respondents argue that section 9.17 of the Lawrence Trust provides a method for a trustee to accept the trusteeship that was expressly exclusive. But because they did not make this argument to the district court, it was forfeited. *Thiele*, 425 N.W.2d at 582.

"performed only trivial tasks" and "did not accept appointment as a trustee" under the terms of the trust agreement. *In re Tr. of Lawrence B. Schwagerl Tr.*, 2020 WL 5359409, at *6.[7]

Evidence in the record shows that Jerome attended meetings with Phyllis's accountant and attorney after Lawrence's death that the other Schwagerl children did not attend. There is also evidence that he signed the FSA document in his capacity as trustee. Reasonable evidence in the record supports the district court's finding and conclusion regarding Jerome's acceptance of his trustee role. We therefore conclude that the district court did not err in finding that Jerome accepted a role as a trustee and, accordingly, we reverse the court of appeals' decision to the contrary. *Rasmussen*, 832 N.W.2d at 797.

IV.

The final alleged error is the decision of the court of appeals to decline to address whether the trustees breached their fiduciary duty by removing cash assets from the family trust and transferring those assets into the Phyllis Trust or to Phyllis individually. Barbara argues that the court of appeals erred by failing to address this issue because it was plainly

---

[7] In addition to concluding that Jerome did not accept the trustee appointment, the court of appeals stated that "[i]n fact, the record shows that prior to the litigation, Phyllis acted as the sole trustee and Jerome formally rejected acceptance." *Id.* The portion of this comment regarding the timing of Jerome's decision to reject acceptance is not supported by the record, and Jerome did not make this argument on appeal. The original petition in this case was filed by Barbara on December 17, 2015, commencing the litigation. Jerome executed a "Declination of Appointment as Successor Co-trustee of the Lawrence Trust" on April 19, 2016. Additionally, Minn. Stat. § 501C.0701(c) allows a person designated as trustee to take actions to preserve the trust property without accepting the trusteeship if the person sends a rejection of a trusteeship within a "reasonable time" to the settlor (or qualified beneficiary if the settlor is deceased). The district court's finding that Jerome accepted his trusteeship by "performing duties as trustee" was based on acts taken many years before his formal declination of the trusteeship, including signing the federal FSA-211 form on September 15, 2008.

before the court. The respondents argue that the court of appeals correctly found that Phyllis could treat any family trust assets as if they were her own and therefore the court had no need to address the disposition of cash assets formerly held in the family trust.

The district court found that Phyllis, Diana, and Jerome—in addition to breaching their fiduciary duties by selling Lawrence's share of the real estate at a discounted value—also violated their fiduciary duties by transferring all cash assets out of the family trust by depositing six CDs into the Phyllis Trust and cashing out two of the certificates and paying them to Phyllis individually. Before the court of appeals, respondents (the appellants in that court) argued that Phyllis, Jerome, and Diana did not breach their fiduciary duties because they relied upon the advice of counsel in transferring the financial assets out of the family trust. Barbara argued that the district court correctly found a breach of fiduciary duties and that respondents' advice of counsel defense failed as a matter of law.

The court of appeals did not decide whether Phyllis and Diana breached their fiduciary duties by depleting the family trust of its cash assets; rather, the court decided that it did not need to reach the advice-of-counsel defense—though only as to Phyllis—because it had concluded that Phyllis "appropriately exercised her authority granted by the Trust." *In re Tr. of Lawrence B. Schwagerl Tr.*, 2020 WL 5359409, at *6. The court of appeals' conclusion that Phyllis could treat any family trust assets as if she owned them was (1) related to her capacity to convey Lawrence's land interests and (2) unrelated to whether she breached her fiduciary duties. As explained above, this conclusion was incorrect. In addition, the court did not address Diana's fiduciary duties. Accordingly, on

remand, the court of appeals must decide whether Phyllis and Diana breached their fiduciary duties by depleting the family trust of its cash assets.

In summary, we affirm the holding of the court of appeals that the Lawrence Trust agreement unambiguously gave the Lawrence Trust's farm real estate to Phyllis in her personal capacity. But we reverse the court of appeals' decision that Phyllis's decision to place assets within the family trust constituted an "ineffective transfer" of assets, as well as its decision that Jerome was not a trustee of the Lawrence Trust. Because we reverse the court of appeals' decision on these issues, we remand to that court to determine whether the district court erred when it found that Phyllis waived her right to the assets in the family trust. Finally, the court of appeals must decide whether Diana and Phyllis breached their fiduciary duties in selling the farm real estate and removing the cash assets from the family trust.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals in part, reverse in part, and remand to that court for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.