

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0908**

In the Matter of The Leora L. Buerkle Irrevocable Insurance Trust
dated September 17, 1993.

**Filed May 3, 2021
Reversed and remanded
Johnson, Judge**

Hennepin County District Court
File No. 27-TR-CV-19-77

John D. Reddall, James J. Kretsch, Jr., Kretsch Law Office, P.L.L.C., Lakeville, Minnesota
(for appellant/cross-respondent Paul Gray)

John G. Westrick, Savage Westrick, P.L.L.P., Bloomington, Minnesota (for
respondents/cross-appellants)

Jesse C. Beier, Joseph J. Cassioppi, Fredrikson & Byron, P.A., Minneapolis, Minnesota
(for respondent Union Bank and Trust Company)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

The trustee of a trust distributed trust income to the sole heir of a beneficiary who had died. Other interested persons objected. The district court determined that the deceased beneficiary's heir is not entitled to the deceased beneficiary's share of trust income on the ground that the deceased beneficiary had only a life interest in trust income, not a fee interest that could be devised by will. We conclude that the district court erred

by determining that the trust agreement granted the deceased beneficiary only a life interest in trust income rather than a fee interest. We further conclude that the heir of the deceased beneficiary is entitled to trust income if he can prove on remand that the deceased beneficiary inherited her mother's share of trust income. We further conclude that, if the district court were to conclude that the heir was not entitled to the trust income that the trustee paid to him, the district court should reconsider the trustee's request for approval of its accounting. Therefore, we reverse and remand for further proceedings.

FACTS

Leora L. Buerkle died in 1998. Approximately five years before her death, she established the Leora L. Buerkle Irrevocable Insurance Trust. She named the Union Bank & Trust Company of Minneapolis as trustee.

The trust agreement provides that, after Leora's death, trust income shall be distributed, in specified shares, to ten identified donees, all of whom are or were Leora's siblings or siblings-in-law. The trust agreement provides that, after the deaths of the ninth and tenth donees (who died in 2008 and 2017, respectively), their shares shall be redistributed to the other eight donees. For each of the first eight donees, the trust agreement provides for distribution of trust income with uniform language but in different percentages. For the second beneficiary, the trust agreement provides for distributions of trust income to "Lorna Drill, Leora L. Buerkle's sister, a 5% share thereof with right of representation." For the third beneficiary, the trust agreement provides for distributions of trust income to "Carl Drill, Leora L. Buerkle's brother-in-law, a 5% share thereof with right of representation." The trust agreement further provides that, upon the deaths of all

original donees, “all remaining trust assets shall be distributed to the then current income recipients pro rata.” At the time of the district court proceedings, three of the ten original donees were still living.¹

Carl Drill and Lorna Drill died in 1996 and 2003, respectively. During their lifetimes, they had two children: a son, Lynn, and a daughter, Brenda. Lynn Drill died in 1970. Lynn Drill was the biological father of Paul Gray, who was adopted at birth by unrelated persons. After Leora Buerkle (Brenda Drill’s grandmother) died in 1998, the trustee began distributing Carl Drill’s 10-percent share of trust income to Brenda Drill. After Lorna Drill (Brenda Drill’s mother) died in 2003, the trustee began distributing Lorna Drill’s 10-percent share of trust income to Brenda Drill.

Brenda Drill died in 2007 with no surviving spouse, children, siblings, or parents. Shortly thereafter, Gray petitioned the Sibley County District Court for the probate of Brenda Drill’s will, which named him as her sole heir. At approximately the same time, Gray wrote to the trustee of Leora Buerkle’s trust to request distributions of Carl Drill’s and Lorna Drill’s shares of trust income. Gray’s letter stated that he survived Lynn Drill and that Brenda Drill had no children. The trustee then began distributing 20 percent of trust income to Gray.

¹Attached to this opinion is a chart resembling a family tree, which was prepared by the trustee and filed in the district court. The chart depicts the ten original donees of the trust and, with respect to those among the first eight donees who have died, their children or heirs. Consequently, the chart identifies all beneficiaries who were receiving distributions of trust income at the time of district court proceedings.

In December 2018, the trustee was informed that Gray had been adopted at birth by persons not in the Buerkle or Drill families. In April 2019, the trustee petitioned the district court for a determination “as to whether Paul Gray has an interest in the income or principal of the Trust and the nature and extent of his interest by right of representation as to the original beneficial interest of Lorna Drill and Carl Drill, or whether that interest should be reallocated to the remaining beneficiaries in accordance with the terms of the Trust.” The trustee stated that, between 2007 and April 1, 2019, Gray had received \$28,047 in distributions of trust income. The trustee also submitted an accounting and requested that the district court approve it and approve all of the trustee’s actions during the accounting period. In addition, the trustee requested an order approving the payment of its costs and attorney fees from trust assets.

The district court scheduled a hearing on the trustee’s petition for mid-July 2019. Shortly before the hearing, an objection was filed by various interested persons, including one original donee and other persons who presently are income beneficiaries or descendants of original donees. The objectors alleged that Gray has no interest in trust income, that the trustee should be charged for distributions of trust income to Gray, that the trustee’s request for costs and attorney fees should be denied, and that the objectors should be reimbursed for their costs and attorney fees.

It appears from the limited record that the mid-July hearing did not occur. In early January 2020, Gray served and filed a motion in which he requested that the district court “determin[e] the vesting date of the beneficial interests of” the beneficiaries of the trust. Gray and the objectors filed memoranda of law on that issue. The district court conducted

a hearing in late January 2020. In April 2020, the district court filed an order in which it concluded that Gray is not entitled to trust income but is not required to return the money previously distributed to him. The district court also approved the trustee's accounting and ruled that the trustee could use trust assets to pay its costs and attorney fees related to the proceeding.

The objectors requested reconsideration of the district court's approval of the trustee's accounting and the trustee's request for costs and attorney fees. Gray joined in the objectors' request and also requested reconsideration of the district court's ruling on his interest in trust income, arguing that the district court went beyond the scope of his motion for a determination of a vesting date. The district court denied both requests for reconsideration.

Gray filed a notice of appeal, and the objectors filed a notice of related appeal.

DECISION

I. Gray's Appeal

Gray makes two arguments in his principal brief. First, he argues that the district court erred by ruling on the entirety of the trustee's petition rather than only his motion for a determination of a vesting date, which is the specific issue that he identified in his notice of motion and motion. Second, he argues that the district court erred by determining that he does not have an interest in trust income. We begin by considering his second argument.

In interpreting a trust agreement, a court should seek "to ascertain and give effect to the grantor's intent." *In re Stisser Grantor Trust*, 818 N.W.2d 495, 502 (Minn. 2012). "A court should seek out the grantor's dominant intention by construing the trust agreement in

its entirety.” *In re Van Dusen Marital Trust*, 834 N.W.2d 514, 520 (Minn. App. 2013), review denied (Minn. June 26, 2013). A trust instrument is to be construed “to give effect to the [grantor’s] intent as expressed in [its] plain language.” *In re Kischel*, 299 N.W.2d 920, 923 (Minn. 1980). Accordingly, “[i]f the trust agreement is unambiguous, a court should look to the language of the agreement to discern the grantor’s intent and not consider extrinsic evidence.” *Van Dusen*, 834 N.W.2d at 520; see also *In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 44-45 (Minn. 1985). “Under all circumstances [the trust] 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.” *In re Fiske’s Trust*, 65 N.W.2d 906, 910 (Minn. 1954). “This court applies a *de novo* standard of review to a district court’s interpretation of a trust agreement.” *Van Dusen*, 834 N.W.2d at 520.

In this case, the parties’ dispute is focused on the trust agreement’s use of the phrase “with right of representation” in the two paragraphs concerning Lorna Drill’s and Carl Drill’s interests in trust income. The question is whether, in light of that language, Gray presently has a right to Lorna Drill’s and Carl Drill’s interests in distributions of trust income. The district court answered that question in the negative, reasoning that “Leora Buerkle’s intent was to give the original income beneficiaries a vested life interest, with the remainder to their heirs.” The district court reasoned that such an intent was evident in four provisions of the trust agreement:

First, Article IV, Sections 2.1.1-2.1.8 grant each beneficiary a specified share “thereof with right of representation.” Second, Article IV, Section 2.2 says that “upon the death of all original donees, all remaining trust assets shall be distributed to the then current income recipients pro rata.” Third, Article V provides that if, at the death of Leora Buerkle, none of the donees of Leora Buerkle are then living, the remaining Trust principal should be distributed to persons who would have been Leora Buerkle’s intestate heirs. Fourth, Article VII, Section 1(G) contains a spendthrift provision, which provides that “the interest of each beneficiary . . . shall not be capable of anticipation or assignment by the beneficiary.”

Gray contends that the district court erred by reasoning that Brenda Drill received only life interests in trust income. He notes that there is no language in the trust agreement expressly indicating an intention to create a life interest, “such as ‘to x for life’ or ‘to x, and then upon x’s death to y.’” He further contends that the words “by right of representation” are “words of substitution” that are intended to ensure that the grantor’s gift to an original donee does not lapse if the original donee were to die before Leora Buerkle’s death, which is the date on which the rights to trust income vest. Gray asserts that the words of substitution “ceased to have any ongoing function” for original donees who survived Leora Buerkle.

Accordingly, Gray contends that, upon Carl Drill’s death (which preceded the death of Leora Buerkle), his interest in trust income passed to Brenda Drill, his representative, because she was his issue. *Cf. In re Holden’s Trust*, 291 N.W. 104, 105-07 (Minn. 1940). Gray further contends that, upon Lorna Drill’s death, her interest in trust income passed to Brenda Drill if she was Lorna Drill’s sole heir. Gray contends further that Brenda Drill took a fee interest in her parents’ shares of trust income. In response, the objectors argue

that both Carl Drill's share and Lorna Drill's share passed to Brenda Drill "by right of representation" and that Brenda Drill has only a life interest in those shares such that the remainder interest may pass only to the issue of Carl Drill and Lorna Drill, not to the heir identified in Brenda Drill's will.

In a prior case that raised the question whether an interest in a trust passed from a beneficiary to the beneficiary's child, the supreme court stated, "Minnesota favors the vesting of estates unless the interest is manifestly contingent." *Kischel*, 299 N.W.2d at 922. In that case, the supreme court held that the interest was contingent and that the testator "did not intend to give his grandson any interest in the trust property unless he survived his mother," the primary beneficiary. *Id.* at 923. That was so because the testator's will expressly provided for it. *See id.* at 922.

The facts of this case, however, are more similar to those of *First & American National Bank v. Higgins*, 293 N.W. 585 (Minn. 1940), in which the income from two trusts—a living trust and a testamentary trust—was to be distributed "to the following named persons, described herein as beneficiaries, in the following proportions or fractional amounts, and to their heirs at law *by right of representation*." *Id.* at 588 (emphasis added). A brother of the grantor and testator was entitled to one-seventh of the income of the first trust and one-fifth of the income of the second trust. *Id.* After the brother died, his estate sought to establish that the brother's beneficial interests in the two trusts passed to the brother's estate. *Id.* at 589. The supreme court began its analysis by stating, "Words of inheritance are not necessary to pass an absolute interest in personalty." *Id.* at 590. The supreme court continued, "Where an absolute interest passes without words of inheritance,

a life or some lesser estate can be created only by language restraining and qualifying the grant or gift to the interest intended.” *Id.* In other words, “A bequest or devise of an absolute interest can be cut down to a lesser interest by subsequent language only when the latter is as clear, plain and unequivocal as the language showing the passing of a fee.” *Id.* The supreme court applied those principles to the facts of the case by stating, “The words of inheritance in the instant case do not show an intention to cut down the fee to some lesser estate” but, rather, are “expressive of an intention to pass a fee.” *Id.* Specifically, the supreme court reasoned that the phrase “by *right of representation*” was “not inconsistent with the passing of a fee and [did] not indicate an intention to pass a life estate of some kind.” *Id.* (emphasis added). The supreme court further reasoned that a beneficiary “may devise and bequeath his interest in a trust, if it does not terminate at his death, . . . the same as any other property.” *Id.* at 596. Accordingly, the supreme court concluded that the brother “took absolute and vested interests in the . . . trusts which he could devise and bequeath.” *Id.* at 598.

In light of *Higgins*, Brenda Drill had a fee interest, not a mere life interest, in trust income. The trust agreement provides that the interest of an original donee who dies before Leora Buerkle passes by “right of representation,” which the supreme court has said is “not inconsistent with the passing of a fee and does not indicate an intention to pass a life estate of some kind.” *See id.* at 590. In that event, the interest in trust income that is received by the representative of the original donee is limited only by the death of the last original donee because there is no language in the trust agreement that would limit it in any other way. At Leora Buerkle’s death, all then-living original donees receive an interest in trust

income. The trust agreement does not prevent an original donee who dies after Leora Buerkle from devising the interest because there is no language in the trust agreement that operates to “cut down to a lesser interest by subsequent language” that is “as clear, plain and unequivocal as the language showing the passing of a fee.” *See id.* Thus, either a representative of an original donee, an original donee himself or herself, or an heir of an original donee may devise his or her interest in trust income to another person by will, so long as the interest in trust income has not lapsed due to the deaths of all original donees.

The district court’s interpretation of the trust agreement is inconsistent with *Higgins*. In addition, the district court’s four reasons for its interpretation of the trust agreement are not persuasive. The district court’s first reason, that the trust agreement “grant[s] each beneficiary a specified share ‘thereof with right of representation,’” does not answer the key question but simply begs it. The district court’s second reason, that the trust agreement requires the distribution of all trust assets upon the death of all original donees, does place an outer limit on the duration of an interest in trust income but does not prevent the passing of such an interest before the death of the last original donee. The district court’s third reason, that the trust agreement provides for the situation in which none of the original donees survive Leora Buerkle, is irrelevant because that situation has not yet arisen. And the district court’s fourth reason, that the trust agreement includes a spendthrift provision that prevents attachment by creditors and assignments, has no bearing on the devisability of a person’s interest in trust income. *See Morrison v. Doyle*, 582 N.W.2d 237, 240-41 (Minn. 1998); *In re Moulton’s Estate*, 46 N.W.2d 667, 670 (Minn. 1951).

Consequently, Brenda Drill received Carl Drill's interest in trust income as his representative because he died before Leora Buerkle's death. Brenda Drill may have received Lorna Drill's interest upon her death. One might presume that Brenda Drill did so because the trustee paid Lorna Drill's share of trust income to Brenda Drill without any apparent objection during Brenda Drill's lifetime. But at oral argument, Gray's attorney candidly stated that there is a lack of evidence on the factual issue of whether Brenda Drill received Lorna Drill's share of trust income. He represented that Lorna Drill died without a will and that Brenda Drill would have received Lorna Drill's interest under the intestacy statute, but he asserted that there is no evidence of that fact in the district court record because the parties had not expected the district court to rule on the ultimate issue of Gray's interest in trust income. He further states that such evidence is necessary for a determination of the question whether Brenda Drill received Lorna Drill's 10-percent share and, thus, necessary to a complete resolution of the question whether Gray has a right to receive all of Brenda Drill's 20-percent share of trust income.

Thus, the district court erred by determining that Brenda Drill had only a life interest, not a fee interest, in trust income. Brenda Drill had at least a 10-percent share of trust income because she was Carl Drill's representative. Thus, Gray's right to at least 10 percent of trust income is established. Gray may establish his right to Lorna Drill's interest in 10 percent of trust income if he can prove that Brenda Drill inherited it. Accordingly, we remand for further proceedings in the district court, which shall be limited to the question whether Brenda Drill inherited Lorna Drill's 10-percent share in trust income after Lorna Drill's death.

As stated above, Gray's first argument is that the district court erred by not limiting its ruling to the determination of a vesting date. We note that Gray's motion requested a determination of a vesting date and "any other relief the Court deems just and equitable." We also note that there is no dispute about the vesting date between the parties to this appeal. In any event, because we have ruled in Gray's favor on his second argument and have granted him all the appellate relief he requested, it is unnecessary to resolve his first argument.

II. Objectors' Appeal

In their cross-appeal, the objectors argue that the district court erred by approving the trustee's accounting and by approving the trustee's actions during the accounting period. Specifically, the objectors argue that the district court resolved the trustee's requests without any notice, that the district court shifted the burden of proof from the trustee to the objectors, that the trustee introduced no evidence that its accounting was correct, and that the trustee breached its fiduciary duty by paying income to Gray. The objectors do not challenge the district court's grant of the trustee's request for costs and attorney fees.

In response, the trustee argues that it gave notice to all other parties by serving notice of the hearing that was scheduled for July 2019; that the objectors bore the burden of proving a breach of fiduciary duty; that the objectors waived their right to challenge the accounting by not asserting timely objections to the trustee's annual reports, as required by the trust agreement and by statute, *see* Minn. Stat. § 501C.1005(a) (2020); that the district court was permitted to consider all issues raised by the trustee's petition; and that the

district court did not abuse its discretion by approving the accounting and by approving the trustee's actions. In reply, the objectors challenge the trustee's argument that they waived their right to challenge the accounting by not asserting timely objections to the trustee's annual reports.

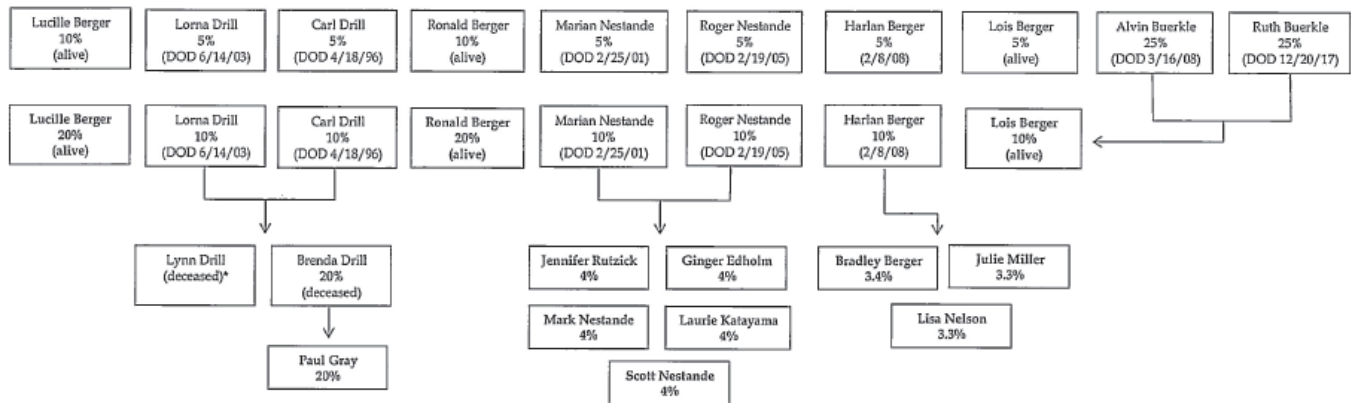
All of the objectors' challenges to the district court's ruling are based on the premise that the trustee improperly distributed \$28,047 of trust income to Gray. The objectors do not take issue with anything else in the trustee's accounting. Accordingly, the objectors' arguments that the district court committed procedural error would be moot if Gray were entitled to the trust income he has received. We have concluded that Gray was and is entitled to 20 percent of trust income if he can prove that Brenda Drill actually received Lorna Drill's 10-percent share of trust income after Lorna Drill's death. *See supra* part I. If Gray proves that fact on remand, there will be no basis for concluding that the trustee breached its fiduciary duty by distributing income to Gray. In that event, the objectors would have no basis for challenging the district court's approval of the trustee's petition because any procedural error by the district court would be a harmless error. *See Minn. R. Civ. P. 61.*

On remand, the district court shall first determine the issue identified in our resolution of Gray's appeal. *See supra* part I. If the district court concludes that Gray was not entitled to the trust income that has been paid to him, the district court shall reconsider the trustee's request for approval of its accounting and its actions during the accounting

period, after giving all parties an opportunity to present any evidence and arguments relevant to the trustee's requests.

Reversed and remanded.

A handwritten signature in cursive script, appearing to read "Matthew Johnson". The signature is written in dark ink on a white background.

Exhibit B**Leora L. Buerkle Irrevocable Insurance Trust dated September 17, 1993
Distribution Chart**

*Upon information and belief, Lynn Drill is the biological father of Paul Gray. Paul Gray was adopted at birth. Lynn Drill predeceased the creation of the Trust.