STATE OF MINNESOTA
IN COURT OF APPEALS
A10-45

In the Matter of the 2005 Complete Restatement of the
Revocable Trust of Polly F. Shank dated December 9, 2005,
Bank of America, N. A., petitioner,
Respondent,

vs.

John M. Shank, intervenor,
Appellant,

Lawrence C. Shank, intervenor,
Respondent.

Filed August 17, 2010
Reversed and remanded
Collins, Judge[*]

Hennepin County District Court
File No. 27-TR-CV-09-33

Alison J. Midden, Neal T. Buethe, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondent Bank of America, N.A.)

Willim M. Bradt, Hansen, Dordell, Bradt, Odlaug & Bradt, P.L.L.P., St. Paul, Minnesota (for appellant John M. Shank)

Martin V. Aydelott, Lawrence R. Commers, Mackall, Crounse & Moore, PLC, Minneapolis, Minnesota (for respondent Lawrence C. Shank)

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Shumaker, Presiding Judge; Larkin, Judge; and Collins, Judge.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Appellant John M. Shank Jr. challenges the district court's grant of summary judgment in favor of respondent Lawrence C. Shank based on the determination that the disputed provision in the Revocable Trust of Polly F. Shank was unambiguous. Because we conclude that the trust provision is ambiguous, we reverse and remand.

FACTS

The instrument at issue is the 2005 Complete Restatement of the Revocable Trust of Polly F. Shank. The trust contains the following provision:

> Allocation of remaining trust assets – The remaining trust assets both principal and income not effectively disposed of under the preceding provisions of this instrument (such remaining trust assets being hereinafter referred to as the "trust fund") shall be distributed in equal shares to my sons, John M. Shank, Jr., and Lawrence C. Shank, outright and free of trust. If either son does not survive me, his share shall be held in trust and administered in accordance with the provisions of Section 9 and subsequent sections. Notwithstanding the forgoing, *I intend my children to be treated essentially equally as to advancements and loans received during my lifetime or assets of my estate received at my death. If, at my death, either child of mine is indebted to me on a Promissory Note or Mortgage, I direct that the outstanding principal balance and accrued interest of the indebtedness be considered an advancement to such child from my estate and be deducted from the share of the residue due my child* (or any share for the then living descendant or descendants, collectively, by right of representation, of my child if he is then dead leaving a descendant or descendants then living), thus reducing his share of other assets of my

> estate accordingly. The amount of said outstanding principal balance and accrued interest shall be determined by my trustees based upon my records or the trustees' records. Such indebtedness is to be considered an asset of my estate for the purposes of computing the value of said estate.

(Emphasis added.)

Polly Shank died on January 2, 2008, and respondent Bank of America, N.A., as one of the appointed trustees, petitioned the district court under Minn. Stat. § 501B.16(3), (4) (2008), requesting that the district court "(1) construe and interpret the terms of the Trust pertaining to loans and advancements; (2) determine the nature and extent of John M. Shank, Jr. and Lawrence C. Shank's interest in the income and principal of the trust; and (3) instruct the Petitioner accordingly." Polly Shank's estate included two obligations of Lawrence Shank that he admitted were documented by promissory notes: (1) an April 15, 2005 "demand note" having a date-of-death value of $6,015.93; and (2) a promissory note dated October, 2002, in the original amount of $65,000, revised to $90,000 on May 24, 2007, having a date-of-death value of $92,731.75. Bank records indicated that Polly Shank wrote checks to Lawrence Shank for additional sums that were not memorialized in a promissory note or mortgage.

Lawrence Shank moved for summary judgment based on the clear and unambiguous language of the trust that only debt evidenced by a promissory note or a mortgage should be considered advancements on his share of the estate. Following the hearing, a district court referee concluded that there was no ambiguity in the disputed provision in the trust and that "[o]nly advances documented by a note or a mortgage are to be deducted." The referee noted that this conclusion was "consistent with the

deposition testimony of the scrivener of the trust instrument." The district court confirmed the summary judgment order as recommended by the referee. John Shank filed a notice of review of the summary judgment order asserting the referee erred in concluding that the disputed provision was unambiguous and in calculating the total debt evidenced by promissory notes. The district court reviewed the record in its entirety and stated that "the trust language in question is not ambiguous and that only advances documented by a note or a mortgage are to be deducted from the share of the residue due the child." The district court amended the summary judgment order to include Lawrence Shank's admitted "demand note" obligation of $6,015.93, stating: "The amount of $98,747.68 is the total advance from Polly Shank to Lawrence Shank." This appeal followed.

D E C I S I O N

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from a grant of summary judgment, reviewing courts ask whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The evidence is viewed in the light most favorable to the party against whom judgment was granted. *Fabio*, 504 N.W.2d at 761. Whether a genuine issue of material fact exists and whether the district court erred in its application of the law is reviewed de novo. *STAR*

Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002). It is generally recognized that summary judgment is not appropriate when the terms of a written instrument are at issue or if any of its provisions are ambiguous or unclear. *Donnay v. Boulware*, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966) (reviewing the terms of a contract).

"The primary function of the court in exercising jurisdiction over trusts is to preserve them and to secure their administration according to their terms." *In re Campbell's Trusts*, 258 N.W.2d 856, 868 (Minn. 1977). When the language of the trust instrument is unambiguous, there is no need to resort to extrinsic evidence of intent. *In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 44-45 (Minn. 1985). In the case of an unambiguous written instrument, intent is determined from the plain language of the instrument. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). "[W]hether a written instrument is ambiguous is a question of law subject to de novo review." *Mollico v. Mollico*, 628 N.W.2d 637, 641 (Minn. App. 2001) (citing *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997)).

John Shank argues that the district court erred in concluding that the language of the trust dealing with advancements was unambiguous. The specific disputed provision of the trust reads:

> I intend my children to be treated essentially equally as to advancements and loans received during my lifetime or assets of my estate received at my death. If, at my death, either child of mine is indebted to me on a Promissory Note or Mortgage, I direct that the outstanding principal balance and

> accrued interest of the indebtedness be considered an advancement to such child from my estate and be deducted from the share of the residue due my child.

Thus, though indebtedness evidenced by a promissory note or a mortgage is expressly an advancement, no language in the trust limits the meaning of "advancements" to only such indebtedness evidenced by a promissory note or a mortgage

Generally an advancement is an inter vivos transfer made with the intention that the transfer represent part or the whole of the donor's estate to which the donee would be entitled. *See In re Beier's Estate*, 205 Minn. 43, 46-47, 284 N.W. 833, 835 (1939). Minnesota law identifies those inter vivos transfers that are to be considered advancements in the case of intestacy. Minn. Stat. § 524.2-109 (2008). In the case of intestacy, an inter vivos transfer will only be considered an advancement if "the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement" or if "the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate." *Id*. The criteria set out in section 524.2-109 used to evaluate whether an inter vivos transfer was intended to be an advancement applies only in the case of intestacy but, in the absence of clear language from the testator, provides one standard for guidance in determining the intent behind an inter vivos transfer.

Here, the express language of the trust provides that promissory notes and mortgages shall be treated as advancements against future interest in the trust, even if there is no contemporaneous writing indicating that the transfer was intended as an

advancement. There is nothing in the trust language indicating that only transfers evidenced by a promissory note or a mortgage are to be considered advancements. While it is possible that Polly Shank intended indebtedness on promissory notes and mortgages to be the exclusive transfers to be considered advancements, the plain language of the trust document does not compel such a narrow reading in light of the proviso that Polly Shank intended her children to be treated equally regarding "advancements and loans." Further, John Shank has presented extrinsic evidence that, he contends, demonstrates that Polly Shank made a number of transfers that were intended to be advancements but were not memorialized in a promissory note or a mortgage.

Because the disputed provision language of the trust is susceptible of multiple meanings and we cannot determine as a matter of law what Polly Shank intended to be considered an advancement from the four corners of the trust, we conclude there remained a genuine issue of material fact as to Polly Shank's intent. Summary judgment is inappropriate where there remains an issue of fact regarding the selttor's intent and we therefore reverse the district court's grant of summary judgment. *See Donnay*, 275 Minn. at 44, 144 N.W.2d at 716 (providing that when contract language is ambiguous, the court may look to extrinsic evidence and "construction then becomes a question of fact unless such evidence is conclusive"); *see also Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979) ("[When] there is ambiguity and construction depends upon extrinsic evidence . . . there is a question of fact for the jury").

Reversed and remanded.