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CONCLUSION

For the foregoing reasons, we reverse the portion of the trial court's order dealing with inverse condemnation as it pertains to the Hendersons and to the assignors with residences downstream of the 26th Avenue lift station who suffered sewage backups and flooding. However, the trial court found that the homes of two families among the homeowners, the Muellers and the Eltons, were not connected to the 26th Avenue lift station, and the Hendersons concede that two homeowner families, the Muellers and the Stubberts, are not properly in the lawsuit. After our review of the record and the briefing, it is unclear exactly which of these three homeowner families should be excluded from the damage aspect of the suit. Therefore, upon remand, the trial court should clarify this aspect of the case. We remand the cause for the appropriate proceedings on the damage aspect of all of the proper claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE TRUST OF O'DONNELL.
JUNE O. BEACHLER, APPELLANT, V.
DEBORAH A. SANWICK, APPELLEE.

815 N.W.2d 640

Filed April 3, 2012. No. A-11-069.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
2. **Equity: Reformation.** A proceeding to reform a written instrument is an equity action.
3. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
4. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
5. **Evidence: Proof.** Evidence may be clear and convincing despite the fact that other evidence may contradict it.

6. **Trusts.** A document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of Neb. Rev. Stat. § 30-3841 (Reissue 2008).
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Affirmed.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellant.

Deborah A. Sanwick, pro se.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

June O. Beachler appeals from an order of the county court for Douglas County, which determined that Deborah A. Sanwick was entitled to the remaining funds in two testamentary trusts set up by Eileen S. O'Donnell, deceased, as opposed to Beachler, the purported residuary beneficiary of O'Donnell's estate. On our de novo review, we find that the county court did not err in reforming the trust provisions of O'Donnell's will and we affirm the decision of the county court.

BACKGROUND

Sanwick and her brother, John M. Morrissey (John), were O'Donnell's first cousins once removed on their father's side. Their father and O'Donnell were the only children of two sisters who had a close relationship, and they grew up together in the same neighborhood. John and Sanwick's mother was Ruby Morrissey (Ruby). Sanwick's family stayed in contact with O'Donnell throughout her life, although Sanwick did not spend a lot of time around O'Donnell other than at various family functions. Beachler was not a relative, but was a close, personal friend of O'Donnell.

O'Donnell died on October 9, 2004, at the age of 84. She wrote her own will, which is a one-page, typed document dated July 25, 2001. O'Donnell possessed no legal training or expertise. All evidence shows that she was competent, knew

what her assets were, and wanted to dispose of them pursuant to a will.

O'Donnell's will states, in relevant part:

> 1. To John . . . fifty thousand dollars to be put in a trust fund, administered by Great Western Bank, to be disbursed at no more than four hundred dollars per month. In the event of his predeceasing me, to his sister [Sanwick].
>
> 2. To Ruby . . . fifty thousand dollars to be put in a trust fund, administered by Great Western Bank, to be dis[bu]rsed at no more than four hundred dollars per month. In the event of her predeceasing me, to her daughter [Sanwick].
>
> . . . .
>
> 6. To . . . Sanwick fifty thousand dollars. In the event of her predeceasing me, to her daughter . . . .
>
> . . . .
>
> 9. To . . . Beachler all remaining monies. In the event of her predeceasing me, to her children . . . equally.

O'Donnell's will also made a number of other monetary bequests to individuals not relevant to this case, with the provision that if these individuals predeceased O'Donnell, then the money went to O'Donnell's estate. Finally, the will distributed certain personal property and nominated Beachler as personal representative of the estate.

O'Donnell's will was admitted to formal probate in Douglas County in December 2004. The short-form inventory filed by Beachler, in her capacity as personal representative of the estate, indicates that O'Donnell's estate was worth $967,811.58 and consisted of a large amount of financial assets and about $3,000 in other personal property. The estate was closed informally by Beachler in December 2005. Both John and Ruby died after the will was probated, leaving money in the trusts totaling approximately $49,000.

John died on August 14, 2008. Sanwick filed a petition for a trust administration proceeding, relative to John's trust, seeking to have the county court determine the distribution of funds remaining in John's trust. In her operative responsive pleading, Beachler agreed that the court should determine the distribution rights to the remaining funds in John's trust and

she asserted that she was entitled to the funds as the residuary devisee under O'Donnell's will. The parties' pleadings contained additional allegations regarding the existence of a residuary clause or residuary devisee in O'Donnell's will, which we need not discuss further.

Ruby died on June 1, 2009. Thereafter, Beachler filed a petition under another docket number, seeking a declaratory judgment regarding entitlement to the funds remaining in Ruby's trust. Beachler asserted that O'Donnell's will did not specify how the trust corpus was to pass in the event Ruby died before exhaustion of the trust corpus and that the fact there was money remaining in the trust at the time of Ruby's death resulted in a failure of trust. Beachler asserted that a resulting trust arose in favor of O'Donnell and that because Beachler was the sole residuary devisee of the estate, she was entitled to the funds remaining in Ruby's trust. Sanwick filed an answer and a cross-petition for a trust administration proceeding relative to Ruby's trust, setting forth allegations in her cross-petition similar to those she alleged in connection with John's trust.

The two cases were consolidated at the request of Sanwick, and a trial was held before the county court on October 6, 2010. The court received various documentary exhibits into evidence and heard testimony from a representative of Great Western Bank, Beachler, an attorney who created a draft of a will for O'Donnell, and Sanwick.

Sanwick is an attorney admitted to practice in Nebraska and is a cousin of O'Donnell. Sanwick testified that O'Donnell contacted her sometime in 1999 about preparing her will. Sanwick told O'Donnell that she would be uncomfortable drafting the will if she were to receive any bequests and suggested finding another attorney to prepare O'Donnell's will. Sanwick approached Chris Arps, who had his office in the same building as Sanwick at that time, and Arps agreed to prepare a will for O'Donnell. According to Sanwick, she and Arps met with O'Donnell at an extended care facility for that purpose. Sanwick stated that she remained in the room during the meeting while O'Donnell told Arps what she owned and how she wanted her property disposed of in her will. Sanwick

recalled that O'Donnell wanted to leave $50,000 each to John, Ruby, and Sanwick. Sanwick stated that she suggested to O'Donnell the testamentary trusts for John and Ruby because of John's irresponsible nature and his ability to manipulate Ruby. According to Sanwick, Arps asked O'Donnell what she wanted to happen to the money in the trusts if either John or Ruby died before the money was paid out, and O'Donnell replied that the money should go to Sanwick.

Arps confirmed that Sanwick approached him sometime in 1999 about preparing a will for O'Donnell. Although he did not specifically recall the meeting with O'Donnell, Arps prepared a draft of a will for O'Donnell, based on information from either O'Donnell or Sanwick. Arps' records show that the draft will was prepared on or about January 27, 1999, but do not indicate whether he sent a copy of the draft to O'Donnell. Arps did not set up a specific file for O'Donnell or send her a bill. Rather, the draft will was contained in a miscellaneous file maintained by Arps for people who contacted him but did not return.

The Arps draft contains provisions for a trust for Ruby and a trust for John, although Arps mistakenly used the name "Jack," which was a nickname for "John." Specifically, the draft will prepared by Arps for O'Donnell stated in article XI, "I give, devise and bequeath the sum of $50,000.00 in Trust, to my Trustee hereinafter named, said Trust to be known as 'RUBY MORISSEY TRUST.'" The draft provided for $500 per month to be paid to Ruby and directed the trustee to distribute the remaining principal and income of the trust to Sanwick upon Ruby's death. Article XIII of the draft contains an identical provision setting up a trust for John and, again, providing that the remaining principal and income be distributed to Sanwick upon John's death. The draft also contained a bequest of $50,000 to Sanwick and a number of other specific monetary bequests, some of which are similar if not identical to the monetary bequests found in the will written by O'Donnell; named Beachler as trustee of the two trusts and as personal representative of the estate; stated that certain items of personal property might be distributed by a separate writing; and devised the remainder of her property to Beachler.

Sanwick testified that the Arps draft accurately reflected what O'Donnell told Arps when they met. Sanwick recalled a subsequent conversation with Arps in which he informed Sanwick that O'Donnell had not contacted him and needed to do so. Sanwick called and left a telephone message at some point reminding O'Donnell to contact Arps and also letting her know that if she did not want to retain Arps, Sanwick could recommend another attorney. According to Sanwick, O'Donnell did not return that specific telephone call, and although they spoke a few more times before O'Donnell's death, they never again discussed her will. Sanwick was not aware that O'Donnell had a will until after O'Donnell's death.

Beachler testified that O'Donnell called her sometime in 2001 to ask whether she would be O'Donnell's personal representative. According to Beachler, O'Donnell said that she was going to prepare her own will and that she would send Beachler a copy in the mail. According to Beachler, O'Donnell had a computer and told Beachler she was going to use the Internet to make her will. Beachler recalled that approximately 2½ years earlier, after O'Donnell returned home from a stay in the hospital, O'Donnell told Beachler that she had contacted Sanwick to prepare her will. O'Donnell told Beachler that Sanwick and "some other gentleman" visited her when she was in the hospital to prepare her will and that "they were supposed to come to her apartment and finish it and no one showed up." Beachler did not ever have any specific discussions with O'Donnell regarding the provisions of O'Donnell's will, how O'Donnell wanted to dispose of her estate, or the extent or nature of O'Donnell's assets. Beachler did receive the 2001 will from O'Donnell and held it until her death.

On December 28, 2010, the county court entered an order ruling on the consolidated cases. The court did not find any ambiguity in the terms of the two trusts but noted that the will did not address disposition of any money that might remain in the trusts if one or more of the beneficiaries died after O'Donnell did. In addressing O'Donnell's intent regarding disposition of the money remaining in the trusts, the court referred to Neb. Rev. Stat. § 30-3841 (Reissue 2008), which allows a court to reform the terms of a trust, even if unambiguous, to

conform to the settlor's intent. In examining what the evidence showed of O'Donnell's intent, the court found that paragraphs 1 and 2 of the will clearly showed that O'Donnell intended for Sanwick to have the money if either John or Ruby died before O'Donnell did, which the court took as an indication that O'Donnell intended for Sanwick to receive the money, and not the will's residuary beneficiary. The court reviewed the evidence presented at trial and concluded that the evidence clearly and convincingly showed O'Donnell intended for the remaining moneys in the two trusts to be disbursed to Sanwick upon the death of John and Ruby and that all other issues were moot. Beachler subsequently perfected her appeal to this court.

ASSIGNMENTS OF ERROR

Beachler asserts that the county court erred in (1) reforming the two testamentary trusts at issue, determining that O'Donnell's intent and the terms of the trusts were affected by a mistake of fact or law, whether in expression or inducement, and that clear and convincing evidence existed to support this determination and (2) not determining that a failure of trust occurred and not declaring that a resulting trust arose in favor of the estate and Beachler in her capacity as sole residuary beneficiary of O'Donnell's will.

STANDARD OF REVIEW

[1-3] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). A proceeding to reform a written instrument is an equity action. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue. *In re Margaret Mastny Revocable Trust, supra*.

ANALYSIS

The county court found the terms of the two trusts unambiguous but found clear and convincing evidence that O'Donnell

intended for money remaining in the trusts upon John's and Ruby's deaths to pass to Sanwick and reformed the trusts accordingly.

[4,5] The statute at issue in this appeal is § 30-3841, which provides:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011). Evidence may be clear and convincing despite the fact that other evidence may contradict it. *In re Trust Created by Isvik, supra*.

The Nebraska Supreme Court interpreted § 30-3841 in *In re Trust Created by Isvik, supra*, where the court considered whether the trial court erred in reforming a particular term of trust to conform to what it perceived as the intent of the settlor, LaVohn Isvik. Isvik had created a trust and appointed a bank as trustee. At the time of the events in question, Isvik was dissatisfied with the performance of the bank serving as trustee. Isvik and her daughter met with representatives of the bank, and after the meeting, the daughter understood that Isvik wanted to revoke her trust, while the bank representatives were left with the impression that Isvik wished only to remove the bank as trustee. The month after the meeting, Isvik prepared a letter to the bank which stated that she was revoking her trust. Isvik's daughter testified about a telephone conversation in which Isvik told her that she had sent a letter to the bank revoking her trust. A representative of the bank called Isvik to clarify her intent, and understood after their conversation that Isvik simply wanted to act as her own trustee. Isvik's attorney spoke with Isvik about the letter after receiving a copy. The attorney initially thought that Isvik wanted to revoke the trust, but, after further discussion, concluded that Isvik wanted only

to remove the bank as trustee, and he agreed to prepare the necessary legal documents to name new trustees. Isvik died approximately 1½ weeks after sending the letter to the bank and before she had a chance to review or sign the documents drafted by the attorney naming new trustees.

After Isvik's death, the bank filed a petition for trust administration and sought an order from the county court declaring whether the trust had been revoked or whether the letter should be reformed to effect only a change in trustee. The county court conducted an evidentiary hearing, received the unsigned documents prepared by Isvik's attorney into evidence, and found clear and convincing evidence that Isvik's use of the term "revoke" in the letter was a mistake and was only an attempt to change the trustee. The court further concluded that because the letter did not revoke the trust and no formal change of trustee occurred before Isvik's death, the bank remained the trustee.

[6] On appeal, the Nebraska Supreme Court first considered whether Isvik's letter was a "term of trust" subject to reformation under § 30-3841. Based on its review of the Nebraska Uniform Trust Code and the language of Isvik's trust, the court concluded that a document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of § 30-3841. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

The Nebraska Supreme Court next considered whether extrinsic evidence of Isvik's intent could be considered in determining whether terms of the trust were affected by mistake of fact or law and thus subject to reformation under § 30-3841. The court noted that § 30-3841 is taken directly from § 415 of the Uniform Trust Code and relied upon the following comment section to § 415 regarding reformation:

> "Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument,

> or the deletion of language that may appear clear on its face, *reliance on extrinsic evidence is essential*. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required."

In re Trust Created by Isvik, 274 Neb. at 534, 741 N.W.2d at 646, quoting Unif. Trust Code § 415, 7C U.L.A. 514, comment (2006) (emphasis supplied). Based on the comment to § 415 and the court's prior holdings concerning the receipt of extrinsic evidence in equitable actions to reform written instruments, the court concluded that the lower court properly received extrinsic evidence of Isvik's intent.

Finally, the Nebraska Supreme Court considered whether there was clear and convincing evidence that Isvik's true intent at the time she sent the letter was to maintain the trust but to discharge the bank as trustee. The court noted the conflicting evidence of Isvik's intent at the time she sent the letter, which supported both the inference that Isvik intended to revoke the trust and the inference that she, instead, intended to maintain the trust and discharge the bank as trustee. In its de novo review, the court found that the evidence of Isvik's intent at the time she sent the letter was evenly balanced, and the court was unable to reach a firm belief or conviction that Isvik mistakenly expressed her true intent in the letter. Accordingly, the court concluded that the lower court erred in reforming the letter and that thus, the trust was revoked and ceased to exist prior to Isvik's death.

In the present case, we are called upon to determine whether reformation of the trust provisions in O'Donnell's will is necessary to conform the terms of the trust to her intention. In making this decision, we must decide whether there is clear and convincing evidence that O'Donnell's intent and the terms of the trust were affected by a mistake of fact or law. The evidence shows that O'Donnell was competent, knew what her assets were, and wanted to dispose of them through a will. There is no dispute that O'Donnell contacted Sanwick about creating a will; that Sanwick involved Arps in the drafting of a will for O'Donnell; that O'Donnell wanted to leave money to John, Ruby, and Sanwick; and that Sanwick suggested

creation of the trusts for John and Ruby. The evidence also supports the inference that O'Donnell expressed her intent that if John or Ruby died before exhausting the funds in the trusts, she wanted any remaining money to go to Sanwick. Such terms are reflected in the draft prepared by Arps, which Sanwick testified accurately reflected what O'Donnell told Arps during the meeting. Although O'Donnell did not execute the Arps will, 2 years later O'Donnell drafted her own will, which contained many of the same provisions as the Arps draft. As in the Arps draft, the will created by O'Donnell left $50,000 directly to Sanwick and set up trusts for John and Ruby. While O'Donnell's will states that the money intended for John and Ruby should go to Sanwick if John or Ruby died before O'Donnell, the will does not address what was to happen if John or Ruby died after O'Donnell without exhausting the funds in the trusts. In our de novo review, we conclude that such failure is a mistake of fact or law, particularly given the fact that O'Donnell, who had no legal training or expertise, drafted the will herself.

When examining O'Donnell's will as a whole, it is apparent that she intended for some of her bequests to remain in particular families if the beneficiaries predeceased her, while other bequests appear to have been specific to that beneficiary only. For example, O'Donnell wrote in her will that if John or Ruby predeceased her, the money intended for them should go to Sanwick, and that if Sanwick predeceased her, the money intended for Sanwick should go to Sanwick's daughter. O'Donnell also wrote that if Beachler predeceased her, the money intended for Beachler, her longtime friend, should go to Beachler's children. In contrast, O'Donnell provided that money intended for other individuals should go to her estate if those individuals predeceased her. O'Donnell clearly intended that money bequeathed to the family of her cousin, who was Ruby's husband and John and Sanwick's father, should remain in the family if any of those individuals predeceased her. And, the extrinsic evidence supports the conclusion that it was O'Donnell's intent that should trust proceeds remain at the time of John's and Ruby's deaths, such proceeds should go to Sanwick.

Beachler argues that because the meeting between Arps, Sanwick, and O'Donnell occurred and the Arps draft was created 2 years prior to the time O'Donnell drafted her own will, this evidence is not indicative of O'Donnell's intent at the time she drafted her will. However, Beachler has not presented any conflicting evidence concerning O'Donnell's intention. No evidence was adduced to support an inference that O'Donnell's intent was for any remaining funds in the trusts to go to her estate, or to Beachler as the purported residuary beneficiary. In fact, Beachler admitted that she did not have any discussions with O'Donnell regarding the provisions in her will, how she wanted to dispose of her estate, or the nature and extent of her assets.

[7] After our de novo review of the record, we are left with a firm belief or conviction that O'Donnell mistakenly expressed her true intent in the trust provisions of the will. Accordingly, upon our de novo review, we conclude that the county court did not err in reforming the unambiguous trust provisions of O'Donnell's will. We note that we have been called upon to consider only whether the county court erred in reforming paragraphs 1 and 2 of the will, which created the trusts for John and Ruby, respectively, and need not consider any further issues raised by the parties in their briefs. In fact, the county court, after deciding the reformation issue, stated that all other issues were moot. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011).

CONCLUSION

The county court did not err in reforming the trust provisions of O'Donnell's will.

AFFIRMED.