STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1344

In the Matter of the RIJ Revocable Trust Agreement Dated March 16, 2006, as Amended by First Amendment to the RIJ Revocable Trust Agreement Dated September 21, 2007

Filed July 11, 2016
Affirmed; motion granted in part and denied in part
Connolly, Judge

Hennepin County District Court
File No. 27-TR-CV-12-186

Kay Nord Hunt, Phillip A. Cole, Bryan R. Feldhaus, Lommen Abdo, P.A., Minneapolis, Minnesota (for appellant Anna MacCormick)

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Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Kirk, Judge.

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

CONNOLLY, Judge

Appellant, the daughter of a deceased trust settlor, challenges the district court's conclusion that the settlor's revocation of the trust was void and its judgment against appellant in favor of respondent, the settlor's ex-wife. Respondent challenges the prejudgment award of costs and the denial of her motion to amend her application for costs;

she also moves to strike parts or all of appellant's briefs. Because we see no error of law in the conclusion that the revocation was void or in the judgment against appellant and no abuse of discretion in the award of costs to respondent, we affirm; because some of the parts of appellant's briefs to which respondent objects concerned issues not presented to the district court, we grant in part and deny in part the motion to strike.

FACTS

Decedent Robert Janssen (RIJ), 1921-2010, had three children with his first wife: Craig Janssen (CJ), Susan Carlson (SC), and appellant Anna MacCormick (AM). At the relevant time, AM was both RIJ's attorney-in-fact and his health care agent.

In 1992, RIJ married his second wife, respondent Elfi Janssen (EJ). They were divorced in 1994, when RIJ was 73 and EJ was 54. The dissolution judgment provided that EJ would receive $36,154 in annual spousal maintenance, funded by an irrevocable trust established by RIJ for that purpose. EJ was also given COLA adjustments and tax payments, and, to fund them, RIJ in 2006 established a revocable trust (the trust) that is the subject of this appeal.[1]

RIJ was the sole trustee and retained the sole right to amend or revoke the trust, specifically excluding his attorney in fact and "any person other than [him]self." The trust provided that, at his death, EJ and AM would become co-trustees; at EJ's death, 40% of

[1] The trust has also been the subject of three other appeals. *See In re the Matter of the RIJ Revocable Trust*, No. A15-0591 (Minn. App. Apr. 28, 2015) (order); *Janssen v. Lommen, Abdo, Cole, King & Stageberg, P.A. et al.*, No. A14-0452, (Minn. App. Dec. 22, 2014), *review denied* (Minn. Mar. 17, 2015); *In re RIJ Revocable Trust Agreement*, No. A13-1305, (Minn. App. Feb. 24, 2014).

the assets would be distributed to AM and 20% to each of her three children. The trust was to be funded by four income-generating bonds, collectively valued at $522,361.

In September 2007, RIJ amended the trust. He changed the residual beneficiaries from AM and her children to Twin Cities Public Television (TCPT). He also removed AM as EJ's co-trustee after his death and replaced her with the Associated Trust Company. The Associated Trust Company resigned, leaving EJ as the sole trustee after RIJ's death.

During December 2007 and early January 2008, RIJ met with his attorney concerning his will. He told the attorney that he wanted to disinherit CJ and SC and to leave his entire estate to AM, or to her children if she predeceased him. On January 2, RIJ went to the attorney's office and executed the will and also a second amendment to the trust. The second amendment added EJ as a trustee during RIJ's lifetime, retained TCPT as the residual beneficiary, and included the following language:

> Monthly payments for alimony and cost of living adjustment shall be made directly to [EJ]'s bank account from the Trust. . . .
> . . . .
> . . . Annual income tax payments required by the Janssen Divorce Decree are made directly to the state and federal government on behalf of [EJ] at the direction of [RIJ]'s accounting firm.
> . . . .
> . . . The procedures explained in this document are thought to be sufficient to maintain a consistent cash income to pay [EJ]'s Alimony, [COLA] and income tax payments as described above.
> . . . .
> At the time of [RIJ]'s death the Trust becomes irrevocable. Principal and income shall be held and distributed for the sole benefit of [EJ] during her lifetime as specified in Article One.

The second amendment did not alter RIJ's sole right, exclusive of his attorney-in-fact or any other person, to amend or revoke the trust. No family members were with RIJ at the attorney's office when he executed the will and the second amendment to the trust.[2]

At 4:44 p.m. on January 17, 2008, RIJ faxed his attorney some handwritten changes to the second amendment. The only significant change was replacing EJ as a trustee with AM; TCPT remained the residual beneficiary. At about 6:00 p.m., RIJ fell and broke his hip. On January 18, AM drove him to the hospital; on January 19 he had surgery.

On January 21, the hospitalist called a psychiatrist to evaluate RIJ because he was confused and agitated. The psychiatrist who examined RIJ testified that he was suffering from dementia and delirium, his memory and concentration were poor, his cognition was impaired, and he could not make rational decisions. AM was present for all or part of the examination. That same day, AM met with RIJ's case manager to discuss his discharge to a transitional care unit (TCU). The case manager noted that the barriers to discharge were that RIJ "continues to require acute medical care – He is on a 1:1 [i.e., he requires someone in his room at all times]" and that his anticipated discharge plan was a "TCU that handles dementia patients." The case manager also stated that "[AM] agrees [RIJ] needs TCU for rehab and to manage the dementia."

Also on January 21, AM called RIJ's attorney to ask for instructions on revoking the trust. She went to RIJ's home, found the trust, and, with her daughter, took it to the hospital, where they witnessed RIJ's revocation of it. On January 22, AM called RIJ's

[2] Although litigation on the trust began in October 2010, a copy of the executed second amendment was not provided to the district court until April 2015.

investment advisor to ask how she could transfer the bonds that had funded the trust to RIJ's transfer-on-death (TOD) account, of which she would be the sole payee after RIJ's death. Using that information, AM drafted a letter authorizing the transfer, took it to the hospital, gave it to RIJ to sign, and faxed it to the investment advisor. The trust assets transferred were then worth about $507,823.

RIJ was discharged from the hospital on January 25; by February 7, a report from the TCU indicated that he showed "significant improvement in overall cognitive and functional performance." A file memo drafted by his attorney on March 31, 2008, indicates that, during February, the attorney had received from AM a copy of the trust agreement "with revocation language at the bottom." The attorney spoke to AM and expressed his concern that the revocation was not notarized and that the two witnesses, AM and her daughter, were interested parties. The attorney noted that AM continued to handle all of RIJ's affairs and did "not feel as though he is well enough at this time [i.e., March 31] to sign and understand any more formal revocation." The attorney also noted that AM had "transferred ownership of the [trust] bonds back . . . to RIJ's name individually [i.e., to his TOD account]" and "asked [the attorney] to take no further action on this matter at this time."

In February 2010, AM, using her power of attorney, sold one of the four bonds to pay RIJ's expenses until his death in July 2010. Shortly after his death, AM transferred the former trust assets from the TOD account to a new account in her own name.

In October 2010, RIJ's other children, CJ and SC, brought an action to determine the validity of RIJ's will and of the revocation of the trust. AM opposed this action; EJ

filed a petition as an interested person with a property right against RIJ's estate, alleging that RIJ lacked capacity to revoke the trust and had been unduly influenced by AM.

Following trial on the issues of RIJ's testamentary capacity and undue influence, the district court determined that RIJ's will was valid but his revocation of the trust was void and ordered AM to transfer back to the trust all the assets she had transferred from it. During the litigation, AM transferred to a limited liability company (LLC), of which she owned 97% and each of her three children owned 1%, all the assets which had been in the trust and the TOD account, thus retaining control over the trust assets. AM also encumbered two of the bonds in exchange for cash. AM did not disclose these transactions and claimed to have no personal assets.

In May 2013, the district court reformed the terms of the trust, appointing EJ as the sole trustee. In October 2014, the district court, pursuant to this court's directive in *In re RIJ Revocable Trust Agreement*, No. A13-1305, (Minn. App. Feb. 24, 2014), issued an order identifying five issues to be determined: (1) valuation date of the trust assets; (2) value of the trust assets as of that date; (3) whether liens, transfers or other dispositions of trust assets should be declared void; (4) amount of income lost to the trust due to AM's transfer of assets; and (5) whether, and to what extent, judgment should be entered against AM for her failure to return the trust assets.

In February 2015, the district court filed an order (1) granting the trust summary judgment against AM for $249,041.67 for lost interest, (2) directing EJ as trustee to provide documentation of the value of the bond that was sold so a further judgment for its value could be issued against AM, (3) declaring null and void any encumbrances on and transfers

of the other bonds, (4) declaring the other bonds to be the property of the trust, (5) directing AM to sign all documents necessary to transfer bonds to the trust, and (6) providing that the order would itself transfer title to the bonds if AM failed to effect the transfer. On March 3, 2015, judgment was entered on this order. AM appealed from that judgment; this court dismissed her appeal as premature because the judgment she appealed from was not a final judgment. *In re the Matter of the RIJ Revocable Trust*, No. A15-0591 (Minn. App. Apr. 28, 2015) (order).

In April 2015, the district court received a copy of the signed second amendment to the trust. In June 2015, the district court filed an order amending its February 2015 order, noting that, when it issued the February order, the evidence before it did not include an executed copy of the second amendment. In its June 2015 order, the district court concluded that, because AM said she made transfers of trust assets through use of her power of attorney for RIJ and the trust explicitly reserved to RIJ personally the sole power to amend or revoke it, AM's "removal of [RIJ] Trust assets on January 22, 2008, and all subsequent transactions involving the RIJ Trust assets are void *ab initio*." The order amended the award by adding the $100,000 principal of the bond that had been sold, so the award for the trust against AM became $349,041.67. Judgment on the order was entered in July 2015. In August 2015, AM filed a notice of appeal.

In April 2015, EJ filed an application for costs and disbursements of $12,245.60 incurred prior to the February 2015 order; AM objected. In May 2015, the district court ordered AM to pay EJ $5,823.84 in costs and disbursements. In June, EJ filed a motion to amend her application for costs and disbursements; a referee denied the order. EJ filed a

notice of review with the district court, which, in September 2015, affirmed the referee's denial. In October 2015, EJ filed a notice of related appeal challenging the denial of her motion to amend and the amount of the award.

On appeal, AM argues that the district court erred in concluding that RIJ's revocation of the trust was void because of lack of testamentary capacity and undue influence and that the summary judgment against her was based on an error of law. EJ argues that the district court erred in awarding costs before the entry of a final judgment and abused its discretion in denying her motion to amend her application and in awarding costs and disbursements; she also moves to strike AM's briefs in whole or in part.

D E C I S I O N

AM's Issues

I. Revocation of the trust

Those challenging a will or, by extension, a deceased settlor's revocation of a trust, have the burden of proving lack of testamentary capacity and undue influence. *See* Minn. Stat. § 524.3-407 (2014). A probate court's findings of fact will be disturbed only if clearly erroneous, and a finding is clearly erroneous if this court is left with the definite and firm conviction that a mistake has been made. *In re Estate of Torgerson*, 711 N.W.2d 545, 550 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

A. Lack of testamentary capacity

"Testamentary capacity exists if the testator knows the nature, situation, and extent of [his] property and the claims of others on [his] bounty . . . and [he] must be able to hold

these things in [his] mind long enough to form a rational judgment concerning them." *Id.* at 552 (quotation omitted).

The first of the four factors to be considered in determining testamentary capacity is the reasonableness of the property disposition. *Id*. By revoking the trust he had created to provide for EJ throughout her life, RIJ deprived EJ of what she was entitled to under their dissolution judgment, and by revoking a trust he had twice amended to benefit TCPT after he and EJ died, he deprived TCPT of that benefit and enriched AM, whom RIJ had removed as residual beneficiary of the trust and who was already the sole beneficiary under RIJ's will. Given his explicit and repeated recitation of his intent to provide for EJ and to benefit TCPT, as well as his testamentary provision for AM, this was not a reasonable disposition of his property.

The second factor is the testator's conduct within a reasonable time before and after executing the will. *Id.* RIJ's conduct three days before the revocation reflected his intent to amend, not to revoke, the trust: he faxed handwritten changes to his attorney, an act completely inconsistent with revocation. On the day of the revocation and for several days thereafter, he was confused, incoherent, and unable to make a rational decision.

The third factor is a prior adjudication of the testator's mental capacity. *Id*. Here, the evidence shows that, two weeks before RIJ's fall, after conferring with his attorney, he executed a will and the second amendment to the trust at a meeting in the attorney's office he arranged himself. Evidence also shows that, two hours prior to his fall, RIJ was able to read, annotate, and fax to his attorney a copy of the amendment. But the fall on January 17, the hospitalization on January 18, and the surgery on January 19 led to confusion and

agitation that resulted in a psychiatric evaluation and a psychiatrist's conclusion that, on January 21 when he revoked the trust, RIJ was suffering from delirium and dementia, was incoherent, and was unable to make a rational decision.

Finally, the fourth factor is expert testimony about the testator's physical and mental condition. *Id.* Both expert testimony and medical records indicate that, on the day he revoked the trust, RIJ lacked testamentary capacity. Because he was confused and agitated, a psychiatrist examined him for 45 to 60 minutes on the morning of January 21. The psychiatrist administered a mental-status exam. *Id.* She testified that RIJ was rambling about things unrelated to her questions; was incoherent and unorganized; thought at one point that a nurse was his daughter; was disoriented as to time, date, and place; had poor short-term memory and concentration; had impaired cognition; and was unable to make a rational decision. She testified further that the fact that RIJ had had surgery with anesthesia and narcotic medication two days earlier could have caused his delirium, that his dementia could have made him more vulnerable to delirium, and that he had been confused and disoriented throughout the day.[3]

AM argues that RIJ's mental disability on January 21 was transitory; she claims that the fact that he was disoriented and incapable of making a rational decision when the psychiatrist evaluated him in the morning did not preclude him from being able to make an

[3] The psychiatrist was also asked about a nurse's report that, on the Glasgow Coma Assessment, a verbal assessment that ranks patients from 1 to 5, with 5 being the best score, RIJ scored a 4 on the morning of January 21. The psychiatrist said that she did not use the Glasgow Coma Assessment, which was used "for people who come in with trauma to see if they are conscious or unconscious," and that she probably had not reviewed the nurse's report before examining RIJ.

intelligent, informed decision to revoke the trust at another time on that same day. But this argument ignores two facts. First, AM herself, when meeting with RIJ's case manager on the day of the revocation, agreed that RIJ needed to be discharged to a facility that could deal with his dementia. If his mental deterioration was only transitory, such a move would not have been necessary.

Second, even after RIJ's condition had improved significantly, as shown by medical notes from the facility where he went after discharge from the hospital, AM told his attorney that, although the revocation had not been notarized and had been witnessed only by two people whom it would benefit significantly, she did "not feel as though [RIJ was] well enough at this time to sign and understand any more formal revocation." If, after significant improvement in his mental condition, RIJ could not understand that his signature on a legal document needed to be notarized and to be witnessed by two people who were not major beneficiaries of the revocation, it is hard to see that, at the height of his mental disturbance, he did not lack testamentary capacity.

The district court's finding that, when RIJ revoked the trust, he lacked testamentary capacity, is not clearly erroneous.

B. Undue Influence[4]

A finding of undue influence requires a showing "that another person exercised influence at the time the testator executed the will to the degree that the [revocation] reflects

[4] AM argues that lack of testamentary capacity and undue influence are mutually exclusive, i.e., that those who lack testamentary capacity cannot be subject to undue influence. This argument ignores the facts that both lack of testamentary capacity and undue influence are matters of degree, not bright-line distinctions, that there is no statutory indication that they

the other person's intent instead of the testator's intent." *Id.* at 550. "Undue influence might be inferred from a disposition of property in favor of the ones who had an opportunity to influence, while others who would be the natural recipients of a share in the property were ignored." *Norlander v. Cronk*, 300 Minn. 471, 476, 221 N.W.2d 108, 112 (1974).

When determining whether undue influence existed, courts consider:

> (1) an opportunity to exercise influence; (2) the existence of a confidential relationship between the [settlor] and the person claimed to have influenced the [settlor]; (3) active participation by the alleged influencer in preparing the [revocation document]; (4) an unexpected disinheritance or an unreasonable disposition; (5) the singularity of [revocation] provisions; and (6) inducement of the [settlor] to make the [revocation.]

Torgerson, 711 N.W.2d at 551. All six factors indicate that the revocation of the trust was the result of AM's undue influence of RIJ.

1. Opportunity

On January 2, 2008, RIJ, in his attorney's office without any member of his family present, executed the second amendment to the trust. It provided that EJ would receive cost-of-living adjustments and tax payments throughout her life and that the residual beneficiary was TCPT. On January 17, 2008, RIJ faxed to his attorney a copy of the second

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are mutually exclusive, *see* Minn. Stat. § 524.3-407 (listing both of them as among the things on which those contesting the will have the burden of proof), and that there is a long history of finding that they coexist. *See, e.g.*, *In re Lawrence's Estate*, 129 Minn. 460, 463-64, 152 N.W. 872, 874 (Minn. 1915). In any event, although we affirm the determination that RIJ lacked testamentary capacity at the time he revoked the trust, we also separately address whether he was subject to undue influence even if he did have testamentary capacity in the interest of completeness.

amendment with handwritten changes and handwritten instructions. Neither of these events indicated that he had any intention to revoke the trust later that month.

About 75 minutes after faxing the annotated second amendment to his attorney, RIJ fell and broke his hip. For the remainder of January, it is undisputed that AM, and only AM, had the opportunity to influence RIJ. She was the only family member to take him to the hospital on January 18 or to visit him while he was there, and she did not notify any family members except her own daughter that RIJ had been hospitalized, was having surgery, or was experiencing dementia. The revocation occurred on January 21, two days after RIJ's surgery and three days after his admission to the hospital. AM had the opportunity to exert undue influence on him.

2. Confidential Relationship

The relationship between AM and RIJ, while confidential in that she had his power of attorney and attended some of his meetings with his attorney and his financial advisor, was devoid of the affection and closeness that generally mark a familial relationship. AM testified that she and RIJ did not have a close, personal relationship. Because their relationship was confidential without being intimate or affectionate, it supports rather than disproves undue influence. *See In re Estate of Rechtzigel*, 385 N.W.2d 827, 832 (Minn. App. 1986) (noting that evidence of intimacy and affection in a family relationship "negatives" undue influence).

3. Active Participation

AM actively participated in the revocation. On January 21, while RIJ was experiencing dementia in the hospital, she called his attorney and asked how to revoke the

trust. Neither RIJ nor anyone else except AM ever spoke with the attorney concerning the revocation. AM went to RIJ's residence, found a copy of the trust, took it to the hospital, and had him revoke it. AM and her daughter were the only witnesses, and both had a significant interest in the revocation.

Medical records from February 2008 indicate that RIJ's dementia receded and he made a significant improvement cognitively and functionally. AM nevertheless told the attorney that she did not feel RIJ was "well enough at this time to sign and understand a more formal revocation" and asked the attorney not to proceed any further in investigating the revocation.

AM also participated in the next step of the revocation, the transfer of the trust's assets, by calling RIJ's investment advisor on January 22 to find out how to transfer the bonds to the TOD account of which she was the sole payee after RIJ's death. The advisor provided the account numbers needed for a letter from RIJ that would transfer the bonds; AM drafted, typed, and printed the letter at her office, took it to the hospital and had RIJ sign it, returned to her office, and faxed the letter to the investment advisor. He, like RIJ's attorney, never spoke with RIJ about the revocation. Not only did AM participate actively in the revocation; without her instigation and involvement, it could not have happened.

4. Unexpected Disinheritance

The purpose of the trust was to provide for EJ in accord with the terms of the marriage dissolution. RIJ's affection for EJ, even after their divorce, was attested to by AM and her daughter, among others. Shortly before RIJ fell, he faxed his attorney changes to a second amendment to the trust, which was to be used solely for EJ's benefit if she

survived him. Thus, his revocation of the trust established to provide for EJ until her death was unexpected and conflicted with his expressed intent to provide for her and his generous treatment of her throughout their marital and post-marital relationship. It was also in conflict with his decision, made in his first amendment to the trust and affirmed in the second, to have TCPT, not AM or her children, as the residual beneficiary of the trust.

5. Benefit to the Alleged Influencer

The RIJ trust was established to benefit EJ during her lifetime, then to benefit AM and her children, the residual beneficiaries. But RIJ's first amendment changed the residual beneficiary to TCPT, and the second amendment retained this change. Thus, although RIJ deliberately removed AM as the residual beneficiary of the trust after the deaths of both EJ and himself, the result of the revocation was that AM received all the assets of the trust before their deaths.

6. Exercise of Influence or Persuasion to Induce the Revocation

At the time of the revocation, January 21, 2008, RIJ was hospitalized, 48 hours post-surgery, suffering from dementia, and unable to make decisions for himself or act in his own interests, according to medical evaluations. Both his attorney and his investment advisor provided information to and followed instructions from AM without attempting to contact RIJ himself, even though nothing in their past dealings with RIJ was consistent with revoking a trust he had recently amended and which had as its purpose providing for EJ until her death, then benefitting TCPT. No one except AM exerted any influence on RIJ to revoke the trust, or on his attorney and his financial advisor to effectuate the revocation.

The finding that AM unduly influenced RIJ to revoke the trust is not clearly erroneous.

II. The Summary Judgment Against AM

This court reviews a grant of summary judgment de novo, determining whether the district court properly applied the law and whether any genuine issue of material fact precludes summary judgment. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "Equity allows recovery of the lost value of an asset, [of] the profit of which a beneficiary was deprived, or any improper financial gains made by the fiduciary. Equity seeks to restore the plaintiff to the position he or she occupied before the breach or to claim the defendant's ill-gotten profits for the plaintiff." *R.E.R. v. J.G.*, 552 N.W.2d 27, 30 (Minn. App. 1996) (citations omitted).

The district court noted that "[t]he purpose of the [c]ourt's order is to make the RIJ Trust whole, as if there were no revocation, and as if the bonds had stayed in the RIJ Trust, and continued to pay interest" and granted EJ summary judgment of $349,041.67, comprised of (1) $243,250[5] for lost interest on the four bonds from 2008, when the trust was revoked, through 2014; (2) prorated income for two months of 2015, $5,791.67; and (3) $100,000 for the principal of the bond AM sold, which matured in 2013 after the sale.

AM argues that the award was error because, until RIJ's death in July 2010, RIJ, not AM, owned the assets moved from the trust into the TOD account, so AM is not liable for what happened to the income from those assets prior to RIJ's death. She also argues

[5] The amount of annual interest was $34,750; and 7 x $34,750 = $243,250.

that some of the income the trust earned from the bonds was used to pay RIJ's expenses, including COLA and tax payments for EJ, and those payments should be deducted from the award.

EJ argues that what would have happened to money the trust would have earned had it not been revoked is irrelevant: the point of this action is restoring the trust to the position it would have been in had AM not influenced RIJ to revoke it. We agree. EJ also acknowledges that, once the trust has been restored, it will pay legitimate claims against it to RIJ's estate for interest payments RIJ would have received had the trust not been revoked and to the entities that made payments the trust would have made had it not been revoked.

The grant of summary judgment was not precluded by a genuine issue of material fact or based on an incorrect application of the law.

EJ's Issues

III. Awarding of Costs Prior to Final Judgment

The district court entered a judgment on March 3, 2015. EJ filed an application for costs and disbursements 42 days later, on April 14, 2015, and AM filed an objection to the application three days after that, on April 17, 2015. On April 28, 2015, this court filed an order dismissing AM's appeal from the March 3 judgment because it was not a final judgment. On June 4, over five weeks after this court's order, EJ moved to amend the pleadings, findings and order for costs and disbursements. Her motion did not mention this court's decision that no final judgment had yet been entered.

To argue that the district court erred in partially granting her application for an award of costs and disbursements, EJ relies on Minn. R. Civ. P. 54.04(b), providing that a

detailed application for costs and disbursements must be served and filed "not later than 45 days after entry of a final judgment" but not specifying the date before which an application may not be filed, i.e., a "not earlier than" date. Contrary to EJ's implied argument, the rule does not say that an application must not be served and filed before a final judgment, or that costs and fees may not be awarded before a final judgment.

The district court found that EJ "failed to assert this argument [that Minn. R. Civ. P. 54.04(b) precluded the award] in her [June 4] motion to the Court, which resulted in the June 24, 2015 order" and that EJ "acted as though the [March 3] Order was a final judgment by filing the Application for Costs and Disbursements. This further bars [EJ] from using this argument." The district court did not abuse its discretion by rejecting EJ's argument that the award was untimely because the March 3 judgment was not final when she had previously sought to amend the award she now tries to vacate as untimely.

IV. Denial of EJ's Motion to Amend Pleadings, Findings, and Order for Costs

The district court also found that EJ's motion to amend was untimely because EJ "waited until the order was issued" to move to amend the pleadings. The district court noted that the information in the motion to amend should have been included either in the original application, to meet the requirement for "a detailed application" of Minn. R. Civ. P. 54.04(b), or in a motion to amend filed before the order was issued. EJ claims the motion should have been granted because it was made to correct "scrivener's errors," but the district court concluded that EJ "did not include enough detail in the original application, though the information was readily available to her, causing denial of certain fees requested." Failure to include sufficient detail to justify a fee is not a scrivener's error and

does not entitle a party to submit another appropriately detailed application either after the order has been issued or after a final judgment has been entered.[6]

V. The Award of Costs

Generally, an award of costs and disbursements is a matter within the district court's sound discretion and will not be disturbed absent an abuse of that discretion. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 482 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). EJ argues that the award was an abuse of discretion because, in the action brought against AM by her siblings, AM did not provide evidence as to why certain motions were necessary but received costs, and EJ was denied costs for those motions on the ground that she had not provided sufficient evidence. But EJ cites no support for the view that it is an abuse of discretion not to allow fees for a party when the opposing party has been allowed those fees in another action or that district courts are required to review the fees allowed and disallowed in other actions before making their determinations.

Similarly, EJ argues that, because AM was allowed expert-witness fees for RIJ's attorney in the other action, it is "law of the case that [the attorney] is an expert witness" and the fact that EJ's attorney mislabeled RIJ's attorney as a nonexpert witness should not prevent EJ from recovering expert-witness fees for him and two others who were also mislabeled as nonexpert witnesses. But, as the district court noted, a party "cannot simply

[6] In arguing that the award was an abuse of discretion, EJ explains that some expert witnesses were mislabeled as nonexpert witnesses in the original application. Presumably, this is the scrivener's error to which she refers here.

request to fix what should have been done the first time by filing an Amended Application after the Court has issued an Order indicating the insufficiency of [the party's] pleading." Neither the district court nor the referee were obliged to discover on their own whether every witness listed as nonexpert had in fact been granted expert-witness fees in a related action and therefore, despite being listed as nonexpert by the party seeking fees, was actually an expert by virtue of law of the case. The district court did not abuse its discretion in denying the motion to amend the award.

VI. Motion to Strike All or Parts of AM's Briefs

EJ moves to strike AM's briefs, in whole or in part, on the ground that AM raises issues on appeal that were not raised to the district court. In her motion, EJ specifies four issues. As a threshold matter, we note that there is obviously no basis to strike the other parts of AM's briefs.

The first issue allegedly not raised to the district court is AM's contention that the determination that RIJ both lacked testamentary capacity and was subject to undue influence is perverse, because the two are mutually exclusive. AM claims that the issue was not raised earlier in these proceedings because it did not arise until after trial, when the district court concluded that RIJ *both* lacked capacity to revoke the trust *and* was unduly influenced to do so. The record supports the view that, prior to the district court's order, testamentary capacity and undue influence were regarded as mutually exclusive alternatives by the parties and the district court. Therefore, the issue of whether they are mutually exclusive did not arise until the district court's order and could not have been presented to the district court. This court may review such an issue under Minn. R. Civ.

App. P. 103.04 (providing that appellate courts "may review any other matter as the interest if justice may require"), and we have reviewed it. *See* footnote four above. EJ's motion to strike is denied with respect to this issue.

The other issues allegedly not raised to the district court are whether the principle of undue influence has "[a] place in determining whether a competent settlor's revocation of his evocable trust is valid," whether there can be undue influence where the trust assets return to the settlor, and whether "the [district] court consider[ed] the fact that when a settlor revokes his revocable trust all that occurs is legal title to the trust res returns to him." These arguments do not appear to have been raised to or addressed by the district court and EJ's motion to strike is granted with respect to them.

In summary, we affirm the district court's determinations that (1) RIJ's revocation of the trust was void because of lack of testamentary capacity and/or undue influence; (2) EJ was entitled to the summary judgment to put the trust in the same state it would have been if it had not been revoked; (3) EJ's motion to amend the pleadings, findings, and order for the taxation of costs and disbursements was properly denied; and (4) the award of costs and disbursements was not premature and was not an abuse of discretion; we grant in part and deny in part EJ's motion to strike AM's briefs.

Affirmed; motion granted in part and denied in part.