In re Margaret Mastny Revocable Trust. Lynnette Schellpeper et al., appellants and cross-appellees, v. Ernie Mastny, appellee and cross-appellant, and Elkhorn Valley Bank & Trust, Trustee, appellee.

In re Emil Mastny Revocable Trust. Lynnette Schellpeper et al., appellants and cross-appellees, v. Ernie Mastny, appellee and cross-appellant, and Elkhorn Valley Bank & Trust, Trustee, appellee.

794 N.W.2d 700

Filed March 4, 2011. Nos. S-10-431, S-10-432.

1. **Judgments: Collateral Estoppel.** The applicability of the doctrine of collateral estoppel is a question of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **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.
4. **Trusts: Equity: Debtors and Creditors.** A trustee's right of retainer lies in equity.
5. **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.
6. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.
7. ____: ____. Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
8. **Trusts: Equity: Debtors and Creditors.** The equitable remedy of retainer in the context of trust administration is based upon the principle that if a testator leaves property in trust and a beneficiary of the trust was indebted to the testator, the interest of the beneficiary in the trust estate is subject to a charge for the amount of his indebtedness, unless the testator manifested an intention to discharge the debt, or manifested an intention that the beneficiary should be entitled to enjoy his interest even though he should fail to pay his indebtedness.
9. **Actions: Equity: Unjust Enrichment.** An action in assumpsit for money had and received may be brought where a party has received money which in equity

and good conscience should be repaid to another. In such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.

10. **Actions: Proof.** In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.
11. **Limitations of Actions: Pleadings.** The statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it.
12. **Limitations of Actions: Waiver.** The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.

Appeals from the County Court for Madison County: RICHARD W. KREPELA, Judge. Affirmed in part, and in part reversed and remanded with directions.

David A. Domina and Anneliese M. Wright, of Domina Law Group, P.C., L.L.O., for appellants.

Cassidy V. Chapman for appellee Ernie Mastny.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

These consolidated appeals involve a dispute between three sisters and their brother regarding assets held by trusts created by their now-deceased parents. The sisters alleged that their brother was indebted to their parents at the time of the parents' deaths and that the trustee should be required to retain the amount of the debt from the trust assets to be distributed to their brother. The brother, who farmed with his parents, denied that he was indebted to them. The county court for Madison County concluded that there was insufficient evidence of a debt and ordered the trustee to distribute the trust assets in accordance with the terms of the trust instruments. The sisters appeal.

FACTS AND PROCEDURAL BACKGROUND

In 1993, Emil Mastny and Margaret Mastny, husband and wife, created separate inter vivos revocable trusts. Emil was

the settlor and original trustee of the Emil Mastny Revocable Trust, and Margaret was the settlor and original trustee of the Margaret Mastny Revocable Trust. The actual trust instruments are not included in our record. Elkhorn Valley Bank & Trust is the successor trustee for both trusts and commenced the trust administration proceedings which are the subject of these appeals. Ernie Mastny, Lynnette Schellpeper, Merrily Van Buren, and Lori Suchan are the adult children of Emil and Margaret and the beneficiaries of the trusts. For most of his adult life, Ernie participated with Emil in a farming operation on approximately 700 acres of land owned by his parents and located in Stanton County.

Margaret died testate on March 20, 2007. At the time of her death, she was domiciled in Stanton County. Ernie and Schellpeper were originally appointed as copersonal representatives of Margaret's estate. Upon their resignations, Elkhorn Valley Bank & Trust became the personal representative. An inventory filed in the estate proceedings in the county court for Stanton County on March 13, 2008, showed that at the time of her death, Margaret owned certain personal property and an undivided one-half interest in several parcels of real property in Stanton County totaling approximately 700 acres.

On June 19, 2008, the county court entered an order formally settling Margaret's estate. In its order, the court noted that the personal representative had sought instructions on how to treat certain "'notebooks'" that contained financial records kept by Emil and Margaret. Specifically, the notebooks contained entries stating that "loan[s]" had been made to their son, Ernie, or noting that "Ernie owe[d]" them certain sums of money on various dates. The court found that there was insufficient evidence to proceed against Ernie for any alleged indebtedness and therefore instructed the personal representative to take no further action with respect to the notebooks.

In June 2007, the trustee filed a "Petition for Trust Administration" with respect to Margaret's trust in the county court for Madison County. The petition alleged that the trust assets included the undivided one-half interest in real property listed on the inventory previously filed in Margaret's estate. The trustee requested instruction from the court with regard

to certain disputes with Ernie regarding farming operations on the land during the 2007 crop year. Subsequently, the trustee requested instructions regarding similar disputes involving the 2008 crop year. Most of these issues were resolved, and they are not directly involved in these appeals.

In June 2008, the trustee filed a "Petition for Trust Administration" with respect to Emil's trust. The petition was filed in the county court for Madison County and requested instruction from the court on several issues, including whether Ernie was indebted to his parents based upon the notebooks referred to above. The petition alleged that Ernie had denied any indebtedness. The petition refers to an accounting filed by the trustee, but the accounting does not appear in the record of the trust administration proceeding involving Emil's trust. On July 2, the three sisters filed an "Objection to Trustee's Accounting" in which they alleged that the accounting was incomplete because it did not include Ernie's indebtedness to his parents as reflected in the notebooks.

On July 18, 2008, the court entered an order in the trust administration proceeding involving Emil's trust in which it resolved some of the issues on which the trustee sought instruction and set a hearing as to another of the issues. The order specifically left open the question of whether Ernie was indebted to his parents. A similar order was entered on August 6 in the trust administration proceedings involving Margaret's trust.

Emil died on September 20, 2008. As we have noted, the trust instruments are not included in the record, but the parties generally agree that the assets in Margaret's trust included one-half of the approximately 700 acres of real estate and that the assets in Emil's trust included one-half of the same real estate. According to a summary of trust terms which is included in the record, each of the beneficiaries is to receive one tract of the land in his or her own name and another tract is to be conveyed jointly to Ernie, Schellpeper, and Van Buren. Ernie was given a right of first refusal in the event that any of the sisters wished to sell their interests during his lifetime, and he was also given a right to force a sale of any of the property subject to certain conditions.

The two trust administration proceedings were apparently consolidated by the county court sometime between September and November 2008. On November 7, the court conducted an evidentiary hearing in both cases at which it considered several pending matters. The court first considered a motion for partial summary judgment filed by Ernie on November 4 in the case involving the administration of Margaret's trust. In this motion, Ernie sought to establish the preclusive effect of the order entered in the probate proceedings for Margaret's estate in which the court found that the notebooks were insufficient to establish a debt owed by Ernie to his parents. The court overruled the motion.

Next, the sisters testified and presented documentary evidence with regard to their claim that Ernie owed a debt to his parents which should be deducted from his trust distribution. The documentary evidence consisted primarily of the notebooks containing the parents' handwritten financial records of the farming operation. Generally, the notebooks show that Emil and Margaret documented every expense paid in the farming operation and allocated 50 percent of those expenses to themselves and 50 percent to Ernie. The notebooks also document amounts Emil and Margaret paid for Ernie's personal expenses and allocate 100 percent of those amounts to Ernie. In addition, the notebooks contain a number of entries indicating that Emil and Margaret made a "loan" to Ernie and that they allocated 100 percent of that amount to Ernie. The notebooks credit Ernie with 50 percent of the profit generated by the farming operation and for any payments made on the farm's behalf. Generally, the notebooks treat Emil and Margaret's dealings with Ernie as a continuous account and carry forward from year to year the overall running balance. According to the sisters' interpretation of the notebooks, Ernie received $570,427.77 from his parents from 1998 through March 20, 2007, and was indebted to them in that amount. The sisters testified that they had found no documents indicating that Emil and Margaret had forgiven any debt and had had no discussions with Emil and Margaret to that effect.

In a jointly captioned order entered on December 3, 2008, and filed in each trust administration proceeding, the county

court found that the evidence had "raised [a] question about whether or not there is a debt due from Ernie to Emil's trust." The court further found that the trustee had not been provided with "the necessary information to research" the claim, and it therefore instructed the trustee to conduct an investigation. The court reserved ruling on the issue of Ernie's alleged indebtedness to the trust until a later date. The court ruled, however, that any payments to Ernie in 2005 and 2006 listed in the notebooks as a farm expense were not a loan and could not be considered a trust asset.

After conducting further investigation as ordered by the court, the trustee issued a jointly captioned report signed by a trust officer and filed in each trust administration proceeding on September 24, 2009. The report included a detailed examination of the notebooks and available financial records maintained by Emil and Margaret during their lifetimes. The trust officer stated that she was "advised" and "believe[d]" that Emil, Margaret, and Ernie had an "oral partnership," whereby Emil and Margaret had provided all the funds necessary for the farming operations on the real estate held by the trusts while Ernie had provided the labor, and that Emil and Margaret received 50 percent of the net income and Ernie received the remaining 50 percent. The trust officer further noted that apparently, "no written partnership agreement exists, and no partnership income tax returns were filed." The report summarizes entries in the notebooks designated as "loans" to Ernie, but notes that the trustee was unable to find any promissory notes evidencing debt owed by Ernie to either of his parents. The trustee further reported that it was unable to find any documents showing the terms of payment or due date of any of the loans referred to in the notebooks and that any such loans may be subject to defenses based upon the statute of limitations or the statute of frauds.

The county court conducted a second evidentiary hearing in the consolidated cases on December 18, 2009. The parties stipulated that if called to testify, the trust officer who prepared the report would testify as to its content, and that the court could take judicial notice of the report. The testimony and exhibits received at the prior hearing were reoffered and received. The

court also received additional documentary evidence and the transcript of Ernie's deposition taken on May 21.

In his deposition, Ernie explained that he had farmed with his parents since approximately 1975. During that time period, the parties had a general agreement whereby Ernie provided farm labor and his parents paid the bills. At the end of the year, the parties split the net profit. Ernie admitted that the entries in the notebooks were consistent with the parties' farming operations, but stated that his parents never said a word to him about his owing them money, and that he understood that the parties just "settled up" after each farming year and went on. He understood that his share of the farming expenses was covered by his labor, although he admitted that Emil also worked full time on the farm until about 5 years prior to his death. Ernie stated that he did not know the notebooks existed until after his parents' deaths and that he did not believe he owed his parents any money. Ernie stated that he believed that any amounts listed as "loans" to him in the notebooks were simply loans against the "wages" he was earning for his labor.

Ernie admitted that during the time he was farming with his parents, he had been convicted of three felonies and incarcerated on three occasions. The record does not disclose the nature of his offenses, other than Ernie's testimony that they did not involve victimization of his parents.

In its final order, the county court determined that while the evidence supported the conclusion that Ernie and his parents farmed pursuant to an oral partnership, it was not clear how the partnership actually worked. Noting the conflict between the sisters' testimony about Emil and Margaret's meticulous recordkeeping and Ernie's testimony that at the end of each year, he and his parents "basically settled up and moved on to the next year," the court concluded:

> The evidence presented would generally show that although ledgers or accountings of what Emil and Margaret . . . thought Ernie . . . owed to them may have been kept there is no evidence that Ernie . . . was ever told that he owed Emil and Margaret . . . money or was confronted with the fact that he owed them money as based on the ledgers. Additionally, although there would appear

> to be substantial amounts of money given to him and called "loans", there is insufficient evidence to show that they were in fact loans or that they were not reimbursed by labor or other means or that he was ever expected to pay the money back. Furthermore, there were no terms of payment or any sort of agreement to pay supported by the evidence.

The court further noted that Emil and Margaret were astute and intelligent people who could have documented any debt owed them by Ernie through the use of promissory notes but did not do so. And the court specifically found that there was no evidence that Ernie had threatened, intimidated, or exerted undue influence on his parents. Based upon these findings, the court overruled the sisters' objection to the trustee's accounting, concluded that Ernie owed no debt to the trusts, and ordered the trustee to administer the trusts as directed by the trust documents.

ASSIGNMENTS OF ERROR

The sisters assign, restated and summarized, that the court erred (1) in finding that there was insufficient evidence to prove that Ernie owed a debt, to the trusts, that was a trust asset; (2) if it found that the statute of limitations barred recovery; (3) in finding that a partnership existed; and (4) in failing to tax to Ernie costs and fees for their lawyer and the trustee's lawyer.

In a cross-appeal, Ernie asserts, restated, that the court erred in failing to find that his sisters' arguments were barred by the doctrine of collateral estoppel.

STANDARD OF REVIEW

[1,2] Ernie's cross-appeal raises an issue of collateral estoppel. The applicability of the doctrine of collateral estoppel is a question of law.[1] An appellate court reviews questions of law independently of the lower court's conclusion.[2]

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[1] See, *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

[2] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010); *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010).

The standard of review for the appeal, however, is less clear. As recently noted by the Court of Appeals,[3] there is some inconsistency in our case law regarding the appropriate standard of review in appeals involving the administration of a trust. We find that clarification of this issue is in order.

The Nebraska Uniform Trust Code, enacted in 2003, applies to "all trusts created before, on, or after January 1, 2005,"[4] and to "all judicial proceedings concerning trusts commenced on or after January 1, 2005."[5] According to Neb. Rev. Stat. § 30-3821 (Reissue 2008), appellate review under the Nebraska Uniform Trust Code is governed by Neb. Rev. Stat. § 30-1601 (Reissue 2008). Section 30-1601, which is a part of the Nebraska Probate Code, states general procedures for appealing cases arising under the Nebraska Probate Code and the Nebraska Uniform Trust Code and for superseding judgments during the pendency of an appeal. But it does not specify a standard of review.

Instead, that standard has been developed in our case law. With respect to review of probate cases, our case law provides two slightly different but consistent articulations of the standard to be applied. In some cases, we have stated very generally that "[a]ppeals of matters arising under the Nebraska Probate Code . . . are reviewed for error on the record."[6] And in other cases, we have stated more specifically that "absent an equity question, we review probate matters for error appearing on the record."[7] Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo.[8]

Our articulation of the standard of review of appeals involving trusts has been much less consistent. Beginning with *In*

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[3] *In re Trust Created by Socha*, 18 Neb. App. 471, 783 N.W.2d 800 (2010).

[4] See Neb. Rev. Stat. § 30-38,110(a)(1) (Reissue 2008).

[5] See § 30-38,110(a)(2).

[6] See, e.g., *In re Estate of Failla*, 278 Neb. 770, 771, 773 N.W.2d 793, 794 (2009). Accord *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007).

[7] *In re Estate of Hedke*, 278 Neb. 727, 742, 775 N.W.2d 13, 27 (2009). See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008).

[8] See *In re Estate of Everhart*, 18 Neb. App. 413, 783 N.W.2d 1 (2010).

re Zoellner Trust,[9] decided in 1982, we have stated, rather broadly, that all "[a]ppeals involving the administration of a trust are equity matters and are reviewable in this court de novo on the record." *In re Zoellner Trust* was an appeal from an order removing a trustee. But in arriving at the standard of review, we relied on *Scully v. Scully*,[10] which involved a beneficiary's attempt to compel a trustee to deliver trust property. In that case, this court stated: "It is elementary that appeal to this court in an equity action such as that at bar is heard de novo upon the record."[11]

We have since applied the de novo on the record standard in appeals involving various issues of trust administration, including whether payment for a trustee's service was proper,[12] whether a trustee improperly transferred trust funds to himself,[13] whether a settlor had revoked a trust prior to her death,[14] the manner in which trust assets were to be distributed to beneficiaries,[15] and whether a trustee of a discretionary support trust could pay the beneficiary's last-illness expenses after her death.[16]

But in at least two other appeals involving trust administration, we applied the error on the record standard applicable to probate appeals. In *In re Loyal W. Sheen Family Trust*,[17] a case involving removal of trustees which was decided before the enactment of the Nebraska Uniform Trust Code, we reviewed the order for error on the record, based upon the former provision of the Nebraska Probate Code which gave

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[9] *In re Zoellner Trust*, 212 Neb. 674, 678, 325 N.W.2d 138, 141 (1982).

[10] *Scully v. Scully*, 162 Neb. 368, 76 N.W.2d 239 (1956).

[11] *Id.* at 373, 76 N.W.2d at 244.

[12] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[13] *In re Estate of Hedke, supra* note 7.

[14] *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

[15] *In re Family Trust Created Under Akerlund Trust*, 280 Neb. 89, 784 N.W.2d 110 (2010).

[16] *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007).

[17] *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002).

probate courts jurisdiction over trust administration proceedings.[18] And in *In re Trust of Hrnicek*,[19] we cited an error on the record standard in a trust administration appeal in which we recognized that retainer was a valid, equitable remedy which could be utilized by a trustee to recover a beneficiary's indebtedness to a trust.

[3] In *In re R.B. Plummer Memorial Loan Fund Trust*,[20] we recognized both the error on the record standard generally applied to probate cases and the de novo on the record standard which we had applied to trust administration appeals. In determining which of these standards to apply in that case, we focused on the specific issue presented, which was whether the doctrines of cy pres or deviation could be applied to use trust income in a manner which was different from the testators' intent. We determined that because cy pres and deviation were equitable doctrines, our review was de novo on the record. We now conclude that this issue-specific approach is preferable and more consistent with our standard for appellate review under the Nebraska Probate Code than simply labeling all trust administration cases as equitable in nature and subject to a de novo on the record standard of review. Accordingly, we hold that 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.

[4,5] In this case, all of the sisters' assignments of error relate to the general question of whether the county court erred in determining that the trustee should not exercise the remedy of retainer with respect to Ernie's alleged indebtedness to the trusts. In *In re Trust of Hrnicek*, we reaffirmed that a trustee's "right of retainer lies in equity."[21] Accordingly,

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[18] See Neb. Rev. Stat. § 30-2806 (Reissue 1995) (repealed by 2003 Neb. Laws, L.B. 130, § 143).

[19] *In re Trust of Hrnicek*, 280 Neb. 898, 792 N.W.2d 143 (2010).

[20] *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003).

[21] *In re Trust of Hrnicek, supra* note 19, 280 Neb. at 902, 792 N.W.2d at 146, citing *Fischer v. Wilhelm*, 139 Neb. 583, 298 N.W. 126 (1941).

because an equity issue is presented, our review is de novo on the record. 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.[22]

ANALYSIS

Collateral Estoppel Does Not Apply

In his cross-appeal, Ernie contends that the issue of whether the notebooks establish that he is indebted to his parents is barred by the doctrine of collateral estoppel because it was decided in Margaret's estate proceedings that the notebooks were insufficient evidence of his debt.

[6,7] Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.[23] Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[24]

Ernie argues that the issue of whether the notebooks established his indebtedness to his parents was presented during Margaret's estate proceedings and that because his sisters were given notice in those proceedings, they had an opportunity to fully litigate the issue, but they chose not to. He asserts that the issue was finally decided because the probate judge ordered that the notebooks were insufficient to establish an indebtedness to the estate and told the personal representative to take no action on them.

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[22] *In re Family Trust Created Under Akerlund Trust, supra* note 15; *In re Estate of Hedke, supra* note 7.

[23] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008); *Metcalf v. Metcalf*, 17 Neb. App. 138, 757 N.W.2d 124 (2008).

[24] *Amanda C. v. Case, supra* note 23.

We conclude that Ernie is incorrect. Collateral estoppel does not apply here because the issue presented is not identical. Whether the notebooks established an asset of Margaret's estate is a different issue from whether the notebooks established an asset of her trust (or Emil's trust). We further note that according to the record, the issue of Ernie's indebtedness was not litigated in the estate proceedings because "the parties had agreed that the notebook issues would be most properly litigated" in the trust proceedings. Having once agreed to litigate the issues in the trust proceedings, Ernie cannot now contend that it was error for the court to allow him to do so.

Ernie's Debt to Trusts

[8] The equitable remedy of retainer in the context of trust administration is based upon the principle that

> [i]f a testator leaves property in trust and a beneficiary of the trust was indebted to the testator, the interest of the beneficiary in the trust estate is subject to a charge for the amount of his indebtedness, unless the testator manifested an intention to discharge the debt, or manifested an intention that the beneficiary should be entitled to enjoy his interest even though he should fail to pay his indebtedness.[25]

As noted, we first recognized this remedy in our recent decision in *In re Trust of Hrnicek*.[26] In that case, the indebtedness consisted of a loan made by the settlor to one of his children who was a cobeneficiary of his trust. The terms of the loan were set forth in a promissory note, and after the settlor's death, the beneficiary acknowledged the debt in a settlement agreement which was approved by the county court. When the beneficiary subsequently defaulted on the debt, the trustee exercised the remedy of retainer by applying for a contempt citation with an alternative purge plan whereby either the beneficiary would pay the amount due or the trustee would withhold that amount from the beneficiary's trust distribution. The county court

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[25] Restatement (Second) of Trusts § 251A at 634 (1959). See *In re Trust of Hrnicek, supra* note 19.

[26] *In re Trust of Hrnicek, supra* note 19.

granted the application and authorized the trustee to withhold funds to satisfy the indebtedness. We affirmed, concluding that "the retainer of a distribution is a valid, equitable remedy available to trustees in situations such as this."[27]

[9,10] Here, the trustee did not actively assert the remedy of retainer, but, instead, requested instruction from the county court regarding the existence of any indebtedness to which the remedy could apply and indicated that it would abide by the court's determination. The sisters, as interested parties, have taken the laboring oar in proving the existence of Ernie's debt to the trusts. They do so under a theory of assumpsit, which we have characterized as an action for money had and received. An action in assumpsit for money had and received may be brought where a party has received money which in equity and good conscience should be repaid to another.[28] In such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.[29] In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.[30] In the context of these appeals, the question is whether Ernie would have been liable to his parents under this theory prior to their deaths.

Resolution of this question necessarily involves an examination of the relationship between Ernie and his parents during their lifetimes. That relationship had both business and personal aspects which were deeply intertwined within the fabric of a family farming operation. Whether or not it was accurately characterized by the trustee and the county court as an "oral partnership," the business relationship consisted of Emil and Margaret providing land and operating capital for the farming

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[27] *Id.* at 902, 792 N.W.2d at 146.

[28] *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000); *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

[29] *Id.*

[30] *Id.*

operation, Ernie providing labor, and the parties dividing the net profits annually. Ernie lived on a parcel of land owned by Emil, but each day, he went to his parents' nearby home to do chores, and he regularly ate at least one daily meal which was prepared by Margaret. He assisted his parents with various tasks, including caring for their house and yard and butchering chickens. Ernie testified that his parents wanted him to continue the family farming operation after their deaths, and this testimony is generally consistent with the trustee's summary of the provisions of the trust dealing with the distribution of real property.

But it is also clear from the record that over the years, Emil and Margaret transferred substantial sums of money directly to Ernie through checks written by either Emil or Margaret on their joint bank account. The canceled checks in the record show that the memorandum line on these checks noted that the transfer was either for "[f]arm [e]xpenses" or for a "loan." Entries in the notebooks generally correspond with the check records. In addition, the record shows that Emil and Margaret regularly made other payments to third parties, such as utility companies, on Ernie's behalf.

There is no evidence or contention that Ernie reimbursed his parents for any of these payments during their lifetimes. Thus, the first and second elements of assumpsit are established, and we focus our de novo review of the record on the third element: whether in justice and fairness Ernie was obligated to repay the money he received from his parents.

We cannot conclude from this record that Ernie in justice and fairness had an implied legal obligation to repay his parents either for payments they designated as "farm expenses" or for payments they made on Ernie's behalf to third parties. These payments all appear to be related to the family farming operation in which Ernie and his parents were engaged, and there is no basis in the record to support a finding that both Ernie and his parents expected Ernie to repay these amounts. The evidence, viewed as a whole, is insufficient for us to conclude that Ernie was unjustly enriched by these payments so as to create an implied promise of repayment under principles of assumpsit.

Nor do we find Ernie to be liable for the "farm expense" or third-party payments under the sisters' alternative theory of "account stated." Where parties have ongoing business dealings, failure of one party to object to an account rendered can be evidence of the correctness of the amount shown as due, and proof of an express promise to pay is not required.[31] But here, the existence of such an account cannot fairly be presumed, as there was no evidence that Emil and Margaret ever presented Ernie with the notebooks which are alleged to constitute the account stated.

We reach a different conclusion with respect to the payments designated in the notebooks and on the canceled checks as "loans." The district court reasoned that the payments could not be considered loans because of the absence of a promissory note or other contractual obligation to repay. But we have recognized that in limited factual circumstances, this need not be outcome determinative. In *Cartney v. Olsen*,[32] the executor of an estate sought to recover amounts which he claimed his decedent had loaned to the defendants. The evidence included a ledger sheet on which the decedent maker had written "'loan for car.'"[33] There was conflicting evidence as to whether the payment was intended as a loan or as a gift, and, as in this case, there was no promissory note or other express contractual obligation for repayment. Citing the principle that a "'"loan of money is the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest,"'" we held that the evidence was sufficient to establish an implied agreement to repay the sums advanced.[34]

Under the sisters' assumpsit theory, the inquiry is whether the payments to Ernie which were designated as "loans" by his parents were made under circumstances where the law would

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[31] See *John Deere Co. of Moline v. Ramacciotti Equip. Co.*, 181 Neb. 273, 147 N.W.2d 765 (1967).

[32] *Cartney v. Olson*, 154 Neb. 546, 48 N.W.2d 653 (1951).

[33] *Id.* at 548, 48 N.W.2d at 655.

[34] *Id.* at 549, 48 N.W.2d at 655, quoting 38 C.J. *Loan* § 2 (1925).

imply a promise to repay in order to prevent Ernie's unjust enrichment at the expense of his parents and their trusts. On our de novo review, we conclude that they were. By entering the payments in their records as "loans," Emil and Margaret clearly expressed their expectation of repayment. While Ernie contends that his parents never communicated their expectation of repayment to him, the record shows otherwise. The evidence includes the originals or photocopies of 101 canceled checks written by Emil or Margaret on their joint checking account from 1998 through 2005, each payable to "Ernie Mastny." The checks were written for whole dollar amounts ranging from $120 to $30,000. The total amount of these checks is $287,570. The word "loan" is written on the face of each check, and there is a corresponding "loan" entry in the notebooks for almost all of the checks. In light of the notation "loan" on the face of each check, Ernie's endorsement and negotiation of these checks establishes that he knew or should have known the payments were intended as loans. The record does not include gift tax returns or other evidence that Emil and Margaret ever intended the payments as gifts, either when they were made or at any subsequent time. Nor does the record include income tax returns or other evidence to establish that the payments constituted wages, as Ernie suggests. There simply is no persuasive evidence that Emil and Margaret ever forgave any of these loans or that the loans were paid. Ernie's vague testimony that he and his parents "settled up" after each year and somehow wiped the slate clean is refuted by the fact that the loan amounts were carried forward on Emil and Margaret's records from year to year and by Schellpeper's testimony that from discussions with Emil and Margaret, she understood that Ernie's debt to them would be resolved through their trusts. We conclude that Ernie is indebted to the trusts for the $287,570 he received from his parents as "loans" from 1998 to 2005.

Statute of Limitations

The sisters assign that the trial court erred "when, and if, it thought the statute of limitations bars recovery." Neither the 2008 nor the 2009 order of the county court addressed whether

the statute of limitations barred recovery of Ernie's debt. Ernie does not argue any statute of limitations issue in his appellate brief or brief on cross-appeal.

[11,12] The statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it.[35] The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.[36] We find no pleadings filed by Ernie in the trust administration proceedings which include an affirmative allegation that any debt owed to his parents was barred by the statute of limitations. Although he included an argument to this effect in a brief filed in the county court, a brief is not a pleading.[37] We conclude that Ernie has waived any defense based upon the statute of limitations.

CONCLUSION

For the reasons discussed, we conclude on de novo review that the evidence is insufficient to establish that Ernie is indebted to the trusts either for payments designated by his parents as "farm expenses" or for payments made by his parents to third parties on his behalf. But we conclude under principles of assumpsit that Ernie is indebted to the trusts for payments his parents made to him for which the record shows a canceled check bearing the designation "loan." Justice and good conscience require that Ernie repay $287,570, the amount of these loans, and equity authorizes the trustee to exercise the remedy of retainer in order to recover the debt. We therefore affirm the judgment of the county court in part, and in part reverse. We further direct the county court on remand to enter an order requiring the trustee to retain $143,785 from any distribution to Ernie under Margaret's trust and to retain the same amount from any distribution to Ernie under Emil's

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[35] *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001). See *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954).

[36] *In re Estate of Reading, supra* note 35; *State ex rel. Marsh v. Nebraska St. Bd. of Agr.*, 217 Neb. 622, 350 N.W.2d 535 (1984).

[37] See 4 C.J.S. *Appeal and Error* § 747 (2007).

trust. Upon remand, the court may also consider an award of costs and attorney fees under Neb. Rev. Stat. § 30-3893 (Reissue 2008).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.