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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1998**

In re the Myrtle Haack Irrevocable Trust Agreement

**Filed July 14, 2009
Affirmed in part, reversed in part, and remanded; motion granted
Muehlberg, Judge***

Le Sueur County District Court
File No. 40-C6-01-000335

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Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and
Muehlberg, Judge.

UNPUBLISHED OPINION

MUEHLBERG, Judge

The district court's continuing supervision of an irrevocable trust, and the trustees' decade-long dispute over how to properly manage trust assets generates this appeal. The six trustee beneficiaries, five appellants and one respondent, challenge two district court orders governing the administration of the trust. Because the district court exceeded its

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

discretion by requiring the trustees to act unanimously and by compelling them to undo a transaction involving trust assets, we reverse in part and remand. Because we conclude that the district court did not abuse its discretion by awarding no attorney fees, we affirm in part. We also grant the motion of one of the co-trustees to strike a portion of appellants' brief.

FACTS

In March 1996, Myrtle Haack established an irrevocable trust and conveyed to it a 70-acre parcel of land. The trust was to provide for Myrtle Haack's "care, comfort, support and maintenance" during her lifetime through trust income, and upon her death, the trust corpus would be paid to her six children in equal shares. The Trust Agreement named three of Myrtle Haack's children as trustees: Richard Haas, Carol Ruff, and LeRoy Haas.

Not long after Myrtle Haack signed the trust agreement, her conservator petitioned the district court to set the agreement aside, alleging that the agreement was invalid for reasons of incompetence or undue influence. Myrtle Haack's son, Robert Haas, intervened in the action and joined the conservator's request. The district court denied the petition, but while an appeal of that decision was pending, the parties reached a settlement which the district court adopted by order. Under the terms of the settlement, the trust would convey to Robert Haas a three-acre portion of the trust corpus which had also been specifically set aside for him in his mother's will, subject to a life estate for Myrtle Haack. The settlement also provided that Robert Haas would be appointed as a trustee instead of Richard Haas. A later settlement and order directed that the trust

convey the three acres to Robert Haas in fee simple, free and clear of Myrtle Haack's life estate.

In 2001, Robert Haas sought an order compelling his co-trustees to provide an accounting, and for the district court to confirm him as a trustee and assume continuing supervision of the trust. After a hearing, the district court granted Robert Haas's requests and began to supervise the trust's administration pursuant to Minn. Stat. § 501B.23 (2008). Later that year, the district court found that all three trustees had breached their fiduciary duties to the trust, appointed an interim corporate trustee, and considered appointing a special master to investigate. The district court did not appoint a special master, and in 2003 it discharged the corporate trustee and appointed Myrtle Haack's six children as co-trustees. The district court's order required a majority of four trustees to agree before the trust could act.

Four years later, Robert Haas accused his co-trustees of again breaching their duties to the trust. By affidavit he alleged that his co-trustees had not yet complied with previous orders to repay improper disbursements and had been delinquent in repaying loans they had taken from the trust corpus, that they planned to gift themselves trust assets, and that trustee LeRoy Haas had not timely paid rent on a parcel leased to him by the trust. Robert Haas sought removal of his co-trustees, or in the alternative, an order directing them to recover the trust's outstanding debts.

Robert Haas also sought and obtained a temporary injunction preventing his five co-trustees from acting on behalf of the trust when he discovered that they had created HF Farms, LLC, and conveyed the trust's real estate to it. HF Farms's sole member is

the Myrtle Haack Irrevocable Trust, and it is governed by the trust's six co-trustees. The LLC's organizing resolution requires a majority of governors present at a duly held meeting to act, which could permit action by three or fewer of Myrtle Haack's children. Robert Haas complained that the trust had purported to convey to HF Farms land that belonged to him, including the three acres that the trust had conveyed to him in previous settlements. He acknowledges on appeal that he was notified of the trust's intent to create the LLC when he was sent a ballot to vote on the proposition.

Exactly 12 years after Myrtle Haack first created her irrevocable trust, the district court filed an order in response to Robert Haas's petition which is now the subject of this appeal. The March 4, 2008, order required the five co-trustees to cause HF Farms to reconvey the land to the trust, it vacated the requirement that the trustees act by affirmative vote of four and instituted a requirement that they act unanimously, and it reserved the issue of attorney fees related to the litigation to return the property to the trust. The five co-trustees appealed that decision, but this court concluded that the appeal was premature because the issue of attorney fees was reserved. The district court subsequently denied all attorney-fee requests. This appeal follows.

DECISION

A trustee or a party interested in the trust may petition the district court to construe, reform or authorize a deviation from the trust, to remove a trustee for cause, to redress a breach of trust, or to instruct the trustees, beneficiaries, or other interested parties in matters concerning trust administration. Minn. Stat. 501B.16 (2008). After holding a hearing on the petition, the district court "shall make an order it considers

appropriate.” Minn. Stat. 501B.21 (2008). Orders issued in this manner are final and binding “as to all matters determined” and appeals may be taken no more than six months after the filing of the order. *Id.*; Minn. R. Civ. App. P. 104.01.

A district court has equitable jurisdiction to govern the administration of a trust, upon receiving a proper section 501B.16 petition. *In re Foley Trust*, 671 N.W.2d 206, 209 (Minn. App. 2003) (citing *Plunkett v. Lampert*, 231 Minn. 484, 492, 43 N.W.2d 489, 494 (1950) and *First Trust Co. v. Union Depot Place Ltd. P’ship*, 476 N.W.2d 178, 184 (Minn. App. 1991), *review denied* (Minn. Dec. 13, 1991)). A district court’s order authorizing a deviation from or reforming the terms of a trust is therefore reviewed for an abuse of discretion.¹ *Foley*, 671 N.W.2d at 209. The district court’s “primary function” when exercising jurisdiction over trusts is to preserve them, and to ensure they are administered according to their terms. *Id.* Orders resolving petitions are final “as to all matters determined” but new petitions may present new matters, which may invite remedies inconsistent with remedies already provided. Minn. Stat. § 501B.21; *see also In re Enger’s Will*, 225 Minn. 229, 242–43, 30 N.W.2d 694, 703 (1948) (“[T]he right of the beneficiaries to hold the trustees liable for self-dealing amounts to a separate cause of action for each act of self-dealing.”).

¹ Appellant trustees argue that all of their issues raise questions of law for de novo review by framing them as issues of interpretations of statute or rule. But as noted above, we review trust administration decisions under an abuse of discretion standard. Respondent also asks this court to review the district court de novo, asserting that the district court’s orders were based on documentary evidence alone. The case he cites, *In re Trust Known as Great Northern*, 243 N.W.2d 302, 305 (Minn. 1976), is stale. *First Trust Co. v. Union Depot Place Ltd. P’ship*, 476 N.W.2d 178, 181 (Minn. App. 1991) (concluding that to the extent *Great Northern*’s standard was not clear error, it was effectively superseded by Minn. R. Civ. P. 52.01), *review denied* (Minn. Dec. 13, 1991).

Appellant trustees and respondent Robert Haas each identify several issues for our consideration. The bulk of the issues concern whether the district court abused its discretion in its March 4, 2008 order. The parties also challenge the district court's refusal to award any of the parties attorney fees, to be paid from the trust corpus. At the threshold, however, Robert Haas has moved to strike an issue from the appellant trustees' brief. We first consider his motion.

I.

The appellant trustees ask us to decide whether the district court “had jurisdiction to amend the terms of the trust and order a distribution of the trust principal to [Robert Haas].” Robert Haas contends that the question was decided by the district court in a 1998 order that was never appealed and is not properly before this court. The order effectuated a settlement between Robert Haas and the trust, conveying to Robert Haas the three acres that Myrtle Haack had specifically set aside for him in her will, and making Robert Haas a trustee. The appellant trustees now request, for the first time, that this court undo that decision.

Because this argument does not appear to fit the profile of a question of personal, subject-matter, or in rem jurisdiction, we question whether the issue actually concerns jurisdiction. This court generally does not address issues not first considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellant trustees contend that under Minnesota Rule of Civil Procedure 60.02, relief from the 1998 order would be just. But the record does not reflect that the district court contemplated whether

rule 60.02 relief was warranted, or that it was asked to do so by motion, as the rule requires.

Appellant trustees contend that because not every beneficiary agreed to the settlement, they and the trust should not be bound by it. But orders issued pursuant to a court's equitable jurisdiction to supervise trust administration are "final . . . and binding in rem upon the trust estate *and upon the interests of all beneficiaries, vested or contingent, even though unascertained or not in being.*" Minn. Stat. § 501B.21 (emphasis added). The district court's order adopting the settlement was therefore binding on the trust and its beneficiaries. The time to appeal from the 1998 order has passed. *See id.*; Minn. R. Civ. App. P. 104.01. We therefore grant the motion to strike the issue from the appellants' brief and do not consider it.

II.

The remaining issues concern whether the district court abused its discretion in its March 4 and September 17, 2008 orders. The district court, after considering the parties' petitions, submissions, and testimony, ordered appellant trustees to "cause HF Farms, LLC to reconvey" the land to the trust, required unanimous trustee agreement for future trust action, and required trust income to be paid to Myrtle Haack's conservator. It also denied all parties the ability to pay their attorneys from trust assets. Appellant trustees challenge each of those decisions. Robert Haas challenges the district court's failure to adopt different remedies and the denial of attorney fees. This court reviews the district court's trust-administration orders for abuse of discretion. *Foley*, 671 N.W.2d at 209.

We first consider the remedies the district court imposed, and then consider whether different remedies are required.

HF Farms, LLC

The district court ordered appellant trustees to undo the transfer of the trust corpus to HF Farms, LLC. It reasoned that though the transfer was not unlawful, it would negatively affect the contingent beneficiaries' rights. According to the district court, as long as the trust's chief asset was real estate, the contingent beneficiaries would eventually receive an undivided share that could then be partitioned by court order. The substitution of membership rights in an LLC puts the beneficiaries in a different position. According to HF Farms's operating agreement, the members must unanimously agree if a member wishes to assign or sell his or her interest. Citing the trustees' documented difficulty cooperating, the district court concluded that the transfer to the LLC must be undone.

Appellant trustees contend that the issue presented is whether a trust has the power to create an LLC and transfer trust assets to it in exchange for membership. They offer substantial argument concerning the benefit of converting the trust assets to LLC membership shares. Whether or not creation of the LLC was a wise action, we agree that the trustees acted within their discretion to take it. Myrtle Haack's trust endows its trustees with the power to sell, convey, or exchange any of the trust property as they deem beneficial to the trust and its beneficiaries. Appellant trustees correctly assert that "the Respondent failed to show that the Trustees acted imprudently or in breach of their fiduciary duty" by converting the trust assets to membership shares in an LLC. The

district court did not find that the action constituted a breach of fiduciary duty, only that the action affected the contingent beneficiaries' expectancies by changing the nature of the property that would be distributed at Myrtle Haack's death. The trustees have the power to take such action if, in their discretion, the action serves the interest of the trust. Because the trustees' action was authorized by the trust instrument, and because the district court did not find that the action was a breach of their obligation to the trust, we reverse the district court's order compelling the trustees to undo the transaction.

Unanimous agreement

The district court required that the trustees unanimously agree in order for the trust to act, vacating a previous order that the trustees act upon a 4-of-6 majority vote. It stated that though it knew of no authority supporting the previous order, its new order would stand on the same authority as the previous order. The appellant-trustees now challenge the unanimous-agreement requirement as an abuse of discretion.

Appellant trustees argue that the district court, in order to vacate a previous trust-administration order, must comply with Minnesota Rule of Civil Procedure 60.02 and the caselaw governing the application of that rule. But the matter was not before the district court on a rule 60.02 motion. It was before the district court on cross-petitions authorized by Minn. Stat. § 501B.16. Appellant trustees present no authority discussing whether the district court must apply rule 60.02 before it can issue an trust-administration order that supersedes a previous order. No published Minnesota case addresses whether the district court must perform a rule 60.02 analysis when presented with a section 501B.16 petition that presents novel issues of trust administration. *But see In re Petition for Instructions to*

Construe Basic Resolution 876, Nos. A07-1512, A07-1513, A07-1514, 2008 WL 2168643, at *3 (Minn. App. May 27, 2008) (discussing a rule 60.02 motion challenging previous trust-administration orders), *review granted* (Minn. Aug. 19, 2008).

By statute, the district court has the authority to issue any order “it considers appropriate.” Minn. Stat § 501B.21. And a petition by a trustee or interested party may present an issue that, in the district court’s discretion, requires an equitable remedy that obviates a remedy granted in response to a previous petition. *See In re Enger’s Will*, 225 Minn. at 243, 30 N.W.2d at 703 (acknowledging that causes of action may continue to arise during the course of trust administration). For example, the district court having once issued an order removing a trustee for cause and appointing a successor, should not be precluded from doing so again if in its discretion the facts and equity require it.

We nevertheless conclude that the district court abused its discretion by requiring unanimous agreement among the trustees. The district court reasoned that had it earlier required unanimous consent among trustees “this protracted and silly litigation could have been avoided.” There is little doubt that reducing litigation would help protect trust assets. But the district court does not have the authority to hamstring the trust in order to protect its assets. *Foley*, 671 N.W.2d at 209 (“The primary function of the court in exercising jurisdiction over trusts is to preserve them *and to secure their administration according to their terms.*”) (emphasis added) (quotation omitted). A trust incapable of effective administration cannot be administered according to its terms.

As the district court’s memorandum acknowledges, the record clearly reflects the trustees’ unwillingness to cooperate. It wrote in its September 17 order and

memorandum that “[w]hile this court would like nothing more than for the parties to engage in ADR, and to be successful, given the history of this proceeding such an order would be akin to ‘tilting at windmills.’” It ordered unanimous agreement among the trustee–beneficiaries in lieu of removing them all and appointing an independent trustee. It reasoned that its unanimous-action decision rendered the cross-petitions for removal of every trustee moot.

The district court apparently concluded that the trustees were so uncooperative that the only way to protect the trust was to commit them to deadlock. In doing so, the district court abandoned its obligation to secure the trust’s administration according to its terms. We conclude that the district court exceeded its discretion by requiring unanimous agreement among the six trustee–beneficiaries. We therefore reverse this portion of the March 4th order.

As a consequence, the issue of whether to remove every trustee is no longer moot. In order to remove a trustee, a district court must make certain findings justifying removal. Minn. Stat. § 501B.16(9)(i)–(v). The district court has not made the findings necessary to support removal of the trustees. We therefore remand to the district court with instructions to address the removal question and to make whatever findings it must to support a resolution.

Trust income

Appellant trustees argue that the district court abused its discretion by requiring trust income be paid to Myrtle Haack’s conservator. Robert Haas argues that the March 4th order did not modify the status quo in this regard. Appellant trustees apparently

construe the order to require the tenant of a lease on the trust property to pay its rent directly to the conservator, rather than to the trust. The order plainly says no such thing. It states: “[A]ll income *received by the trust* shall be paid over to the conservator”

But Robert Haas also presents a problematic interpretation of this paragraph of the district court’s order. He contends that the order did not modify a previous stipulated agreement, whereby 35% of the trust income would be retained by the trust. This appears to conflict with the plain language of the order, stating that “[A]ll income . . . shall” be paid to the conservator. The district court’s accompanying memorandum provides no explanation for this paragraph of the order.

We remand for the district court to clarify whether paragraph three of its order was intended to modify the stipulated agreement acknowledged by the district court in its order filed May 13, 2004.

Remedies not granted

Robert Haas argues that the district court abused its discretion by failing to remove his five co-trustees, by failing to require the trust to collect debts owed to it, and by failing to remove the trust’s attorney of record. Having addressed the trustee removal argument, we consider the two remaining issues he presents.

Robert Haas argues that the district court should have compelled the trust to accelerate and collect outstanding debts owed by its trustee beneficiaries. The district court declined the remedy without stating a reason. But it did require that the annual account reflect interest owed by appellant trustees. The most recent annual account in the record, for the period ending December 31, 2007, indicates that five of the trustees each

have outstanding loans for \$8,500. Robert Haas argues that the trust had a right, upon nonpayment of interest on the notes, to accelerate the debts. But he does not present a compelling argument that the district court, by failing to require acceleration of the debts, abused its discretion. We therefore decline to hold that the district court abused its discretion.

Finally, Robert Haas argues that the district court should have removed the trust's attorney of record. He details the history of appellant trustees' actions to retain Kakeley & Associates to represent the trust. The firm assisted appellant trustees in creating HF Farms, LLC, and was identified as attorney for the LLC. Robert Haas petitioned the district court to remove the firm for a conflict of interest after an attorney for the firm apparently stated that she represented the appellant trustees *individually*. The firm responded by asserting that it represented the five appellant trustees with respect to trust administration matters.

The decision to remove counsel of record is reviewed for abuse of discretion. *Kolles v. Ross*, 418 N.W.2d 733, 738 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988). Robert Haas acknowledges that no Minnesota case presently addresses the possibility for conflicts concerning intra-trustee disputes. He cites Minnesota Rule of Professional Conduct 1.7, which prohibits engaging in representations that involve concurrent conflicts of interest, and *Minneapolis Police Officers Fed'n v. Minneapolis*, 488 N.W.2d 817 (Minn. App. 1992), *review denied* (Minn. Sep. 15, 1992). The *Minneapolis Police Officers* court noted an "inherent conflict" between a city and a

police officer when they are both defendants and the officer is sued in his personal capacity. *Id.* at 819.

The district court did not abuse its discretion by denying Robert Haas's request to remove Kakeldey & Associates as attorney of record for the trust. Until the district court issued its order requiring unanimous agreement, the trust was empowered to conduct business by agreement of four trustees. That means that during the pendency of Robert Haas's petition, Kakeldey & Associates represented the trust at the trust's request. That representation necessarily involves acting as counsel to the majority in whatever litigation may be brought by a minority of trustees. Robert Haas details a variety of statements made by a Kakeldey & Associates' attorney that imply that the firm also represented appellant trustees individually, in particular, at a hearing involving collateral civil litigation. But *this* case does not require Kakeldey & Associates to act as counsel for appellant trustees in their individual capacity. Whether Kakeldey & Associates ought not represent the trustees individually in a separate civil action, having already been retained as counsel for the trust, might be a question for consideration in that separate action. Kakeldey & Associates' representation of the trust presents no conflict in this proceeding.

III.

Finally, the parties challenge the district court's order refusing to permit payment of attorney fees from trust assets. Attorney-fee decisions are reviewed for abuse of discretion. *In re Trusts Created by Hormel*, 504 N.W.2d 505, 513 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). We affirm the district court's decision to award no

attorney fees. The district court expressed its concern for the voluminous and seemingly endless litigation concerning this trust. The district court's refusal to award attorney fees is justified as a means of protecting trust assets by depriving the trustees of the perverse economic incentive to resolve their disputes through litigation.

Affirmed in part, reversed in part, and remanded; motion granted.