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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2292**

In re: The Jorgenson Family Trust dated March 12, 2001

**Filed June 24, 2013
Affirmed
Rodenberg, Judge**

Chippewa County District Court
File No. 12-CV-10-230

Keri A. Phillips, Gerald W. Von Korff, Rinke Noonan, St. Cloud, Minnesota (for appellant Michael Jorgenson)

Douglas G. Sauter, Tammy J. Schemmel, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for respondents Sharlene Jorgenson, Angela Scott, Jeremy Jorgenson, Kristi Block, Val Rae Boe)

Considered and decided by Stoneburner, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.*

UNPUBLISHED OPINION

RODENBERG, Judge

In these trust proceedings, appellant challenges the district court's orders and judgment (1) denying appellant's request to terminate or reform the trust; (2) removing appellant as trustee; and (3) denying appellant's request for attorney fees. We affirm.

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

FACTS

Appellant Michael Jorgenson and respondent Sharlene Jorgenson dissolved their 38-year marriage in 2001. As part of their marital termination agreement, appellant and respondent transferred their marital assets into the Jorgenson Family Trust. They appointed themselves and their children as trustees of the trust. Appellant and respondent reserved the right to revoke the trust with “the written consent of both Settlor or, in the event one Settlor is incapacitated or deceased, the remaining Settlor and all of the then living children of the Settlor.”

The trust instrument anticipated that appellant would continue to manage the trust’s assets, which include a large amount of agricultural land that is rented out for farming purposes. At the time the trust was created, the Jorgenson family was not actively farming this land, but instead rented it out to others. In 2003, appellant began renting less than 100 acres of trust land to farm on a small scale.

Another trust asset is the home that previously belonged to appellant’s mother, which had been purchased by contract for deed in 1977. This property was transferred to the trust at the time the trust was created, after which the trust made the payments on the contract for deed. In 2004, appellant’s mother forgave the balance of the amount owed and executed a warranty deed transferring a life estate in the residence to appellant and the remainder interest to the trust. But until 2010, appellant continued to deposit into his personal checking account trust funds in amounts which had previously been paid on the contract for deed.

In 2005, appellant withdrew \$81,000 from the trust account for personal use, later returning that amount of money to the trust account with interest.

In 2006, the settlors and trustees signed a handwritten “purpose and mission statement” providing that “[t]he purpose of this trust is to embellish or enhance the lives of Mike and Sharlene Jorgenson, the founders.” The statement related that “[t]he mission is to safeguard the financial well being of the trust, keeping in mind the opportunity for expansion.”

In 2007, appellant began to farm on a large scale. In late 2008, approximately one-third of the trust’s agricultural property was available for rent. Appellant expressed an interest in renting the property, and the other trustees delayed renting the property to other prospective renters to accommodate appellant’s interest in renting the land. However, appellant delayed submitting a bid until January 2009, offering substantially less than the per-acre rent he had offered for other comparable land.

On December 28 and 29, 2009, appellant withdrew \$9,560.40 from the trust account and used it to pay his personal legal expenses. The relationship between appellant and respondents became more contentious over the years, with respondents no longer acquiescing to appellant’s management decisions.

Appellant initiated the present action in 2010, seeking to have the trust terminated or to have the children removed as trustees and beneficiaries of the trust. Respondents then filed a petition seeking to have appellant removed as a trustee.

Respondents moved for partial summary judgment on appellant’s petition to terminate the trust. The district court awarded partial summary judgment based on its

determination that the purposes of the trust “have not been accomplished, are not impossible to accomplish and are not illegal.” The district court determined that the purposes of the trust are to “generate income for the lifetime of the Settlers, to distribute the trust’s assets to the Children after the deaths of the Settlers and to protect the Trust’s assets from losses caused by the personal liabilities of any beneficiaries.”

A trial on the petition to remove appellant as trustee occurred in March and April 2012. At trial, appellant offered numerous explanations for the conduct that respondents argued justified appellant’s removal as trustee. The district court found that appellant’s explanations were not credible. The district court concluded that appellant had violated his fiduciary duty of loyalty to the other beneficiaries of the trust and had committed several serious breaches of trust. The district court removed appellant as trustee and ordered the remaining trustees to delegate their authority as trustees to Bremer Trust N.A. for the remainder of appellant’s lifetime. This appeal followed.

D E C I S I O N

I.

Appellant’s first argument on appeal is that the district court erred in granting respondent’s motion for summary judgment on appellant’s petition to terminate the trust. Appellant argues that summary judgment was inappropriate for three reasons. First, appellant argues that there is a genuine issue of material fact concerning whether “cooperative management” of the trust’s assets was a purpose of the trust. Second, he argues that, because the “cooperative management” trust purpose was a question of material fact, whether trust purposes are impossible to accomplish is also a question of

material fact. Third, appellant appears to argue that, because of the district court's alleged errors as to whether a genuine issue of material fact exists as to the trust purposes, the district court erred in not applying the doctrine of equitable deviation.

A. Standard of review

This court reviews an award of summary judgment de novo. *Sampair v. Vill. of Birchwood*, 784 N.W.2d 65, 68 (Minn. 2010). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. Summary judgment is appropriate when the nonmoving party is unable to identify admissible evidence which, if fully believed by the trier of fact, would support the nonmoving party's position on a material issue. *See Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201–02 (Minn. App. 2010) (stating this proposition more generally and asking only whether the nonmoving party's evidence, if fully believed, would “support a claim”).

B. Determination of trust purposes

In its summary judgment order, the district court concluded that “[t]he purposes of the Trust are to generate income for the lifetime of the Settlers, to distribute the Trust's assets to the Children after the deaths of the Settlers and to protect the Trust's assets from losses caused by the personal liabilities of any beneficiaries.” Appellant does not challenge any of these conclusions. Rather, he argues that the district court erred by not

considering extrinsic evidence of the settlors' intent that an additional purpose of the trust was "cooperative management of Trust assets."

The district court's purpose in construing a trust is to ascertain the intent of the settlor. *In re Trust Created Under Agreement With McLaughlin*, 361 N.W.2d 43, 44 (Minn. 1985). The meaning of the trust instrument is a question of law unless the instrument is ambiguous, in which case the admission of extrinsic evidence renders it a question of fact. *See Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979) (stating this principle in the context of contract interpretation). Whether a writing is ambiguous is a question of law. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982). Ambiguity exists where language is subject to more than one reasonable interpretation. *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009).

When the language of a trust is unambiguous, extrinsic evidence of intent is not admissible. *Id.* at 44–45. Under the parol evidence rule, "extrinsic evidence may not be used to contradict or vary the settlor's written declaration of intent." *In re Bush's Trust*, 249 Minn. 36, 42, 81 N.W.2d 615, 620 (1957). However, such evidence is admissible to assist in "interpreting and clarifying a writing which is ambiguous." *Id.* Nevertheless, the extrinsic evidence is only admissible to address the ambiguity, and the presence of ambiguous language does not open the door to the admission of extrinsic evidence unrelated to the ambiguity. *See In re Estate of Rock*, 612 N.W.2d 891, 894 (Minn. App. 2000) ("If a writing is ambiguous . . . extrinsic evidence may be admitted *to resolve the ambiguity.*" (emphasis added)).

Appellant does not dispute that the district court properly concluded that the purposes of the trust include that it would “generate income for the lifetime of the Settlers, to distribute the trust’s assets to the Children after the deaths of the Settlers and to protect the Trust’s assets from losses caused by the personal liabilities of any beneficiaries.” An additional purpose of the trust was to avoid dividing the marital estate during the marriage dissolution proceedings. Appellant points to the provision for cooperative management in both the original trust instrument and the handwritten 2006 mission statement and argues that cooperative management is also a purpose of the trust. We disagree.

The trust instrument contains provisions establishing a cooperative framework for administering the trust, but it does not state that cooperative management of the trust is one of its purposes. The administrative procedures in a trust are not a purpose unto themselves. “In identifying the settlor’s purpose . . . it is necessary to distinguish the *material purposes* for which the settlor established the trust from *the method prescribed* in the trust instrument for carrying out those purposes.” *In re Boright*, 377 N.W.2d 9, 11–12 (Minn. 1985) (emphasis added). The trust does not contain language indicating that cooperative administration is a purpose of the trust, and the district court did not err in concluding that cooperative management was not a trust purpose but rather is the method identified to carry out the trust purposes. *See id.* The trust instrument is unambiguous in this respect.

Because the trust is unambiguous as to its purposes, determining its purposes is an issue of *law*. See *Turner*, 276 N.W.2d at 66. Appellant did not present the district court with a genuine issue of material *fact* on this question. See Minn. R. Civ. P. 56.03.

C. Whether trust purposes are impossible to accomplish

Appellant argues that the district court erred in granting summary judgment on his request to terminate the trust under Minn. Stat. § 501B.03 (2012), which permits the district court to terminate a trust if its purposes “have been accomplished, or become impossible of accomplishment or illegal.” While a trust may not be fully terminated under this provision if some material purpose of the trust remains unaccomplished, possible, and legal, the district court is not precluded from partially terminating or modifying the trust in order to remove provisions serving a purpose that is no longer viable under Minn. Stat. § 501B.03. See *Boright*, 377 N.W.2d at 13–14 (permitting partial termination of the trust so long as annuitant’s interest in lifetime payments was protected); *In re Tufford’s Trust*, 275 Minn. 66, 71, 145 N.W.2d 59, 64 (1966) (stating that termination of a trust “requires a showing that there is no material purpose to be served by the continuation of the trust”).

Appellant’s argument assumes that cooperative management of the trust is one of its purposes. Appellant argues that there is a question of material fact as to whether this purpose is now impossible to accomplish. Since appellant’s interpretation of the trust

purposes is not borne out by our reading of the trust, the district court did not err in awarding summary judgment on this question.¹

D. Equitable Deviation

Appellant argues that the district court erred in concluding that it lacked authority to terminate the trust under the doctrine of equitable deviation. Appellant cites no caselaw for this proposition, relying instead on the Restatement (Third) of Trusts § 66 (2003).

In general, this court will recognize and apply the Restatement (Second) of Trusts (1959) as authority in the absence of Minnesota authority on a point of law. *Kohler v. Fletcher*, 442 N.W.2d 169, 171–72 (Minn. App. 1989), *review denied* (Minn. Aug. 25, 1989). But if Minnesota caselaw exists on the point of law, the caselaw controls. *Id.* This position is based on our supreme court’s history of applying the Restatement (Second) of Trusts in the absence of Minnesota caselaw. *Id.* The Minnesota Supreme Court has yet to use the Restatement (Third) of Trusts to decide an issue. “[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.” *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

¹ Even if cooperative management of the trust could fairly be considered one of its purposes, the remedy would not have been to fully terminate the trust, as the other trust purposes remained viable. *Tufford’s Trust*, 275 Minn. at 71, 145 N.W.2d at 64. Instead, the district court would have been entitled to modify the trust to account for the fact that this particular purpose was no longer possible. *See Boright*, 377 N.W.2d at 13–14. In removing appellant as trustee and ordering respondents to delegate their authority as trustees, the district court effectively resolved the cooperative-management issue, if such a purpose were assumed to exist.

Although Minnesota courts have not applied the Restatement (Third) of Trusts § 66, the supreme court has construed and applied its predecessor, Restatement (Second) of Trusts § 167 (1959). See *In re Trusteeship Agreement with Mayo*, 259 Minn. 91, 96, 105 N.W.2d 900, 904 (1960); Restatement (Third) of Trusts § 66, reporter’s note (indicating provenance of section 66). In *Mayo*, the supreme court stated that

[i]t is only in exceptional circumstances described as cases of emergency, urgency, or necessity that deviation from the intention of the donor, as evidenced by the trust instrument, has been authorized. . . . Even under such circumstances deviation will not be authorized unless it is reasonably certain that the purposes of the trust would otherwise be defeated or impaired in carrying out the donor’s dominant intention.

Id. at 96–97, 105 N.W.2d at 904.

Here, appellant has advanced only that the doctrine of equitable deviation is applicable because of “unexpected circumstances” or the imprudence of the settlors in creating the trust. However, appellant has not argued that the present circumstances are “exceptional” in the sense that they rise to the level of “emergency, urgency, or necessity.” *Id.* at 97, 105 N.W.2d at 904. Nor do the circumstances before the district court at the time of the summary judgment motion indicate that this was the case.²

² Appellant’s essential argument is that the exceptional circumstances are the inability of the former spouses to cooperate as trustees. But the settlors’ original “dominant intention” was to allow the parties’ marital estate to continue without division as between the spouses. *Id.* at 97, 105 N.W.2d at 904 (stating that the duty of the district court “is to give effect to the donor’s dominant intention”). That dominant intention has been accomplished thus far and remains susceptible of accomplishment. There is no “exceptional circumstance . . . emergency, urgency or necessity [making it] reasonably certain that the purpose of the trust would . . . be defeated or impaired.” *Id.* at 96–97, 105 N.W.2d at 904. To the contrary, and regardless of the obvious present preference of

The district court did not err in directing entry of summary judgment on appellant's request to invoke the doctrine of equitable deviation.

II.

Appellant argues that the district court abused its discretion by removing him as trustee and offers two arguments in support of this theory. Appellant first argues that his removal as trustee is contrary to the purpose of the trust and the settlors' intent. This argument is based on the administrative provisions of the trust and extrinsic evidence that appellant argues should have been considered in construing the trust. These arguments are unavailing for the same reasons discussed above. *See Boright*, 377 N.W.2d at 11–12 (stating that administrative provisions in a trust are not evidence of trust purposes); *Bush's Trust*, 249 Minn. at 42, 81 N.W.2d at 620 (parol evidence rule).

Second, appellant takes issue with the soundness of the findings of fact on which the district court based its decision to remove appellant as trustee.

A district court is statutorily authorized

to remove a trustee for cause; or if the court finds that removal of the trustee best serves the interests of all of the beneficiaries, is not inconsistent with a material purpose of the trust, and one or more of the following elements is found:

- (i) the trustee has committed a serious breach of trust;
- (ii) lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (iii) the unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively

Minn. Stat. § 501B.16(9) (2012).

appellant to avoid the effects of the parties' agreement to utilize the trust procedure, the trust has done what it was set up to do.

Removal of a trustee under Minn. Stat. § 501B.16 (2012) is an exercise of the district court's equitable authority. *In re Foley Trust*, 671 N.W.2d 206, 209 (Minn. App. 2003); *see Plunkett v. Lampert*, 231 Minn. 484, 490, 43 N.W.2d 489, 493 (1950) (stating that the administration of a trust is equitable in character). We review the exercise of a district court's equitable authority for an abuse of discretion. *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005). We review the district court's findings of fact for clear error. *In re Trust created by Voss*, 474 N.W.2d 199, 202 (Minn. App. 1991) (citing *In re Estate of Balafas*, 302 Minn. 512, 516, 225 N.W.2d 539, 541 (1975)). In doing so, we view the facts in the light most favorable to the district court's decision. *Id.* at 201 (citing *In re Estate of Bush*, 304 Minn. 105, 121, 230 N.W.2d 33, 42 (1975)). The district court, sitting as fact-finder, "is the sole judge of the credibility of witnesses" and may accept or reject any part of a witness's testimony. *City of Minnetonka v. Carlson*, 298 N.W.2d 763, 767 (Minn. 1980).

The district court determined that removal of appellant as trustee is appropriate because he has breached his fiduciary duty of loyalty to the other beneficiaries and committed several serious breaches of trust. Appellant argues that respondents consented to or acquiesced in these breaches of trust and that it was therefore inappropriate to remove him as trustee.

A trustee cannot engage in transactions with a trust that place his personal interest over the interest of the trust. *In re Robbins' Estate*, 94 Minn. 433, 436, 103 N.W. 217, 218 (1905). Self-dealing, purchasing, or renting trust assets at below-market rates, and withdrawing trust money for personal use is a breach of a trustee's fiduciary duty to a

trust. *Wiztman v. Lehrman, Lehrnan & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). The trustees of a trust may ratify and acquiesce to the unauthorized actions of a cotrustee. *Winter v. Skoglund*, 404 N.W.2d 786, 794 (Minn. 1987). Should the other trustees also be beneficiaries of the trust, they would then lose the ability to recover from the cotrustee for a breach of trust so ratified. *In re Kelley's Will*, 266 N.W.2d 700, 703 (Minn. 1978).

Here, the district court found that appellant favored himself in transactions with the trust and, in a number of instances, used trust assets for his own purposes. Appellant offered explanations for these incidents, arguing that respondents consented or that appellant acted in good faith. Had the district court believed this testimony, respondents would not have been entitled to remove appellant because they had ratified and acquiesced to the breaches of his duties to the trust. *See Winter*, 404 N.W.2d at 794; *Kelley's Will*, 266 N.W.2d at 703. The district court did not find appellant credible and found that respondents had not known of, ratified, or acquiesced to appellant's breaches of his duties to the trust. We defer to the district court's assessment as to the credibility of appellant's evidence. *See Carlson*, 298 N.W.2d at 766. The district court's findings are not clearly erroneous, and its decision to discharge him from his duties as trustee was not an abuse of discretion. *See Minn. Stat. § 501B.16(9); Wiztman*, 601 N.W.2d at 187.

III.

Appellant argues that the district court should have awarded him attorney fees from the trust. We review the award or denial of attorney fees in trust disputes for an abuse of discretion. *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 409 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001) (*Williams II*).

In some cases, a trustee may be entitled to reasonable attorney fees paid out of the trust. *Id.* However, the determination of whether attorney fees are appropriate is left to the sound discretion of the district court. *In re Trusteeship of Williams*, 591 N.W.2d 743, 748 (Minn. App. 1999) (*Williams I*). “[W]here a trustee has acted in bad faith . . . the trustee may be denied attorney fees.” *Id.* at 748–49.

Here, the district court determined that appellant had breached his fiduciary duty of loyalty, had committed multiple serious breaches of his duties to the trust, and was unwilling to appropriately exercise his authority as trustee. We conclude that this finding amounts to an implicit finding that appellant acted in bad faith, and the district court did not abuse its discretion in denying appellant’s motion for attorney fees.

In sum, the district court’s decisions in this matter were neither erroneous nor an abuse of discretion. The district court was presented with the difficult task of resolving a dispute over a viable, but perhaps improvidently made, trust. By removing appellant as trustee and ordering respondents to delegate their authority as trustees to a neutral third party for the balance of appellant’s lifetime, the district court used its equitable powers appropriately and reached a reasonable resolution of difficult and contentious issues.

Affirmed.