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**STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0318**

In re: The Donald Briks Revocable Lifetime Trust Agreement
dated April 2, 1991, as amended

**Filed December 15, 2014
Affirmed in part, reversed in part, and remanded
Smith, Judge**

Wilkin County District Court
File No. 84-CV-12-181

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Considered and decided by Hooten, Presiding Judge; Smith, Judge; and Klaphake,
Judge.

UNPUBLISHED OPINION

SMITH, Judge

We affirm the district court's determination that an oral agreement to transfer land is unenforceable and its denial of the request to remove the trustees. We reverse the district court's determination that the trustees are personally liable for the value of the transferred land because the trust's broad exculpatory clause includes transactions beyond their powers that are not fraud or willful misconduct. We remand for the district court to reconsider available remedies and its award of attorney fees and costs and disbursements.

FACTS

Donald L. Briks created a revocable trust in 1992 and served as trustee until his death in 2010. The current beneficiaries of the trust include Donald Briks's four sisters and two brothers, James Briks and Jerome Briks, with income to Donald Briks's nephews and their issue upon the death of his last sibling; the remainder beneficiaries are the Carmelite Sisters in Texas and in North Dakota. The trust agreement states that Donald Briks did not want real estate to be transferred outside the trust unless necessary and that Donald Briks intends for his brothers to be allowed to farm the land under a "suitable arrangement" as long as they are actively farming. If suitable terms cannot be reached, the trust and the brothers must arbitrate. In addition, the trust has an exculpatory clause, stating: "No Trustee shall be responsible for the manner in which any discretion is exercised pursuant hereto, or for any misinterpretation of this Agreement, . . . or, unless his conduct amounts to fraud or willful misconduct, for any act or omission of his own."

In 1993, the brothers deeded their interests in the "home farm," the land on which the siblings were raised and in which each owned a one-seventh interest, to Donald Briks. In 1995, Donald Briks entered into two contracts-for-deed to sell farmland owned by the trust to the brothers. About six months later, Donald Briks executed modifications of the contracts to reduce the remaining balances because of a miscalculation in the pricing.

Upon Donald Briks's death, the trust owned farmland with substantial value, including the land under contract to the brothers and additional farmland leased to them. In addition, James owed the trust a balance of \$108,780.10 and Jerome owed a balance of

\$118,540.50 on the contracts-for-deed. After Donald Briks's death, two of his sisters began serving as successor trustees, in accordance with the terms of the trust.

Respondent Beverly Jaehning, Donald Briks's sister and a trust beneficiary, petitioned for an accounting and removal of the trustees, wherein she challenged four transactions. In the first challenged transaction, the trustees rented the trust's farmland to the brothers for three years. The trustees agreed to the terms requested by the brothers, including the rent, after seeking the advice of the trust's attorney and the trust's bookkeeper. The trust's attorney also represented the brothers at the same time he represented the trust, and the trust's bookkeeper is engaged to one brother in addition to serving as the brothers' bookkeeper. The trustees did not charge additional rent for a grain handling system on the land. At trial, an economist testified that the rent was low for the market.

In the second challenged transaction, the brothers claimed that, under Donald Briks's authorization, they had paid certain expenses owed by him prior to his death that covered the remaining balances on the contracts for deed, except for \$3,807.85 later paid in cash. The trustees sought the advice of the trust's attorney before authorizing the claims. The trustees executed warranty deeds to the brothers in March 2011.

In the third challenged transaction, the brothers submitted a claim for fertilizer costs as a credit against the rent owed under their lease. The brothers had applied the fertilizer while farming the land during the 2009-2010 crop year and requested a credit for the value of fertilizer remaining in the land afterward. The trustees sought the advice of the trust's attorney before authorizing the claim.

In the fourth challenged transaction, the trustees transferred two one-seventh interests in one parcel of trust land to the brothers for no consideration. At the time of Donald Briks's death, the trust held a three-sevenths interest in the "home farm," the land on which the siblings grew up. In July 2011 and April 2012, the brothers submitted claims to the trust that they were entitled to two one-seventh interests in the home farm based on an oral agreement made with Donald Briks prior to his death. There was no written memorandum of the agreement. Again, the trustees sought the advice of the trust's attorney before deeding the claimed interests to the brothers.

In response to the claims, the trustees maintained that they acted in accordance with their legal obligation to pay claims against the trust and to perform an oral contract between the trust and the brothers.

The district court held a trial and concluded that the trustees should not be removed because there was no willful mismanagement. On the first challenged transaction, the district court found that the trustees charged the brothers a reasonable rent on the leased farmland, satisfying their obligation to come to "suitable" terms. On the second challenged transaction, the district court found that the expenses submitted by the brothers were valid expenses paid on behalf of the trust, except for the travel expenses of one brother's wife and certain payments that were made prior to the existence of the contracts-for-deed. Therefore, the district court found that the trustees had improperly credited the brothers for \$91,366.77 on the balance due. Furthermore, the district court found that the trust's exculpatory clause does not require the trustees to reimburse the trust for the improper credits. The district court did not specifically address the third

challenged transaction for fertilizer expenses, but it denied all other requests by Jaehning. On the fourth challenged transaction, the district court found that, although Donald Briks and the brothers had an oral agreement to return the interests in the home farm to the brothers, the agreement is unenforceable. The district court also found the trustees liable for the value of the land transferred to the brothers, valued initially at \$613,672. The district court granted attorney fees and costs and disbursements to Jaehning. The district court later issued additional orders changing the award to “expenses/costs and disbursements.”

Jaehning also disputed the valuation of the transferred interest in the home farm and moved for amended findings. In response, the district court first amended its findings to hold that the credit for residual fertilizer in the land was reasonable. The district court then issued supplemental findings valuing the two-sevenths interest in the home farm at \$716,372.

D E C I S I O N

We review findings of facts under a clearly erroneous standard. *In re Trust Created Under Agreement with Lane*, 660 N.W.2d 421, 425-26 (Minn. App. 2003). “Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made.” *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotations and citations omitted). We review a district court’s conclusions of law de novo. *Lane*, 660 N.W.2d at 425-26.

I.

The trustees argue that the district court erred by concluding that the oral agreement is unenforceable after finding that the oral agreement existed and that Donald Briks intended for the property to be returned to the brothers without payment.

First, the trustees argue that the district court ignored its purpose of construing the trust consistently with the intent of Donald Briks because the district court found that Donald Briks intended to deed the land to the brothers. However, “where the language of the trust instrument is not ambiguous, the intent of the settlor must be ascertained from the four corners of the agreement, without resort to extrinsic evidence of intent.” *In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 44-45 (Minn. 1985). The plain language in the trust agreement at issue here makes clear that Donald Briks intended for the trust to retain all farmland. All evidence of intent to transfer property to the brothers is extrinsic, based on the testimony of those who participated in the challenged transaction. The trust agreement itself does not contain a single reference to an obligation to convey the property back to the brothers, despite the fact that it was amended several times over the years. Contrary to the trustees’ assertions that deeding the interests to the home farm was consistent with Donald Briks’s intent to care for his siblings, the transfers significantly reduced the value of the trust and thus the value of each sibling’s interest and were in violation of the clear intent to retain farmland and provide for all surviving siblings as expressed in the trust agreement.

The trustees also argue that, when the brothers deeded their interests in the property to Donald Briks, they transferred legal title only and retained equitable title.

Such an arrangement would create a trust in the property with Donald Briks serving as trustee holding legal title and the brothers as beneficiaries with equitable title. However, it is well established in Minnesota law that trusts in land must be in writing to be enforceable. *See* Minn. Stat. § 513.04 (2012); *see also, e.g., Dietz v. Dietz*, 244 Minn. 330, 333, 70 N.W.2d 281, 284 (1955) (applying this requirement). Because there are no allegations that legal title was obtained through fraud, in bad faith, or by taking advantage of a fiduciary relationship, any intended trust that was not memorialized in writing is unenforceable. *Henderson v. Murray*, 108 Minn. 76, 79, 121 N.W. 214, 216 (1909). In addition, Minnesota law requires that contracts for the sale of an interest in land be in writing to be enforced. Minn. Stat. § 513.05 (2012). Therefore, under either theory, the district court did not err by determining that the oral agreement is unenforceable.

II.

The trustees next argue that the district court erred by concluding that they are personally liable for the value of the property deeded to the brothers because the trust contains an exculpatory clause and the trustees' actions do not amount to fraud or willful misconduct. The exculpatory clause reads: "No Trustee shall be responsible for the manner in which any discretion is exercised pursuant hereto, or for any misinterpretation of this Agreement, . . . or, unless his conduct amounts to fraud or willful misconduct, for any act or omission of his own." Again, we must discern the settlor's intent and strictly construe the trust agreement's exculpatory clause. *In re Trusteeship of Williams*, 591 N.W.2d 743, 748 (Minn. App. 1999). The final portion of the clause at issue here purports to limit the trustees' liability to fraud or willful misconduct; however, the district

court concluded that the exculpatory clause is inapplicable because the trustees do not have the power to convey trust lands for no consideration.

Previously we have upheld the denial of damages where the trustee improperly exercised an authorized discretionary power and the trust contained an exculpatory clause. *In re Margolis Revocable Trust*, 765 N.W.2d 919, 926-27 (Minn. App. 2009). Here, however, Donald Briks did not grant the trustees the power to gift property or to distribute farmland prior to trust termination, and he explicitly stated his intent to retain farmland and specified an order in which property may be sold if the trustees determine a sale is in the best interests of the beneficiaries. Because the property was deeded to the brothers for no consideration, there was no sale. Therefore, the conveyance must be considered a distribution of farmland or a gift to the brothers, both of which exceed the powers granted to the trustees.

The next question is whether a conveyance beyond powers falls within the exculpatory clause. Although the trustees were not granted the power to make gifts or distribute farmland, the district court found that they acted consistently with Donald Briks's wishes, though in contravention of his intent as expressed in the trust agreement, and upon the advice of the trust's counsel to issue deeds to the brothers, and that the conduct was not willful mismanagement. Jaehning does not challenge these findings. Rather, she argues that the district court did not err because the findings should not affect the trustees' liability for transactions in excess of the trustees' powers.

While there is no Minnesota caselaw considering the question of whether an exculpatory clause covers acts beyond trustee powers that do not rise to willful

misconduct, other courts have held that exculpatory clauses do not relieve a trustee of liability for such conduct. See *Dunkley v. Peoples Bank & Trust Co.*, 728 F. Supp. 547, 563 (W.D. Ark. 1989) (applying Florida law and holding that a corporate trustee is liable for distributions made in violation of the trust's terms because his conduct was "grossly negligent"); *Conover v. Guarantee Trust Co.*, 102 A. 844, 849 (N.J. Ch. 1918) (holding trustee liable for actions not authorized despite exculpatory clause); *April v. April*, 6 N.E.2d 43, 47 (N.Y. 1936) (holding trustee liable for actions not authorized by trust terms despite exculpatory clause); *Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173, 187 (Tex. Civ. App. 1979) (holding that an exculpatory clause covering acts in conformity with the trust does not cover acts in excess of the powers granted where the trustee himself benefitted).

However, this case is distinguishable from those where liability was imposed. First, the district court expressly found that the trustees carried out what they believed to be Donald Briks's intent after consulting with the trust's attorney. The trust's attorney failed to advise the trustees of any reason not to proceed with the transfer, instead advising them to complete it. Second, these particular trustees are not corporate trustees acting in a grossly negligent manner, and they did not benefit from the unauthorized conduct. To the contrary, the conveyance actually reduced their own interests as beneficiaries of the trust. Rather, the trustees relied on the legal advice of the same attorney who had represented the trust while Donald Briks was trustee and who failed to advise them of his potential conflict of interest. The trustees' conduct was essentially the

result of a mistaken understanding of the legal obligations of the trust under the oral agreement, not a conscious disregard of the powers granted by the trust agreement.

Given the language of the exculpatory clause, this is very likely the type of conduct Donald Briks intended to exculpate. The trust uses broad language to exempt any acts or omissions other than fraud or willful misconduct. The clause is therefore broad enough to cover mistakes of law, including the mistaken belief that the trust is obligated by an oral agreement to deed land. *See Margolis*, 765 N.W.2d at 923, 927 (holding that an exculpatory clause exempting “mistakes of law” covers conduct in violation of a statutory obligation). Because the district court expressly found the conduct not to be willful mismanagement and there are no allegations of fraud, it erred by concluding that the exculpatory clause does not apply. We therefore reverse on this issue, remand for reconsideration of available remedies, and do not reach the issue of valuation.

III.

The trustees argue that the district court abused its discretion by granting attorney fees to Jaehning because she prevailed on only one of four main issues, entitling her to only one-fourth of her attorney fees, and because some of the fees were “administrative” in nature. The district court found that “all of the attorney’s fees claimed . . . are reasonable [and] are related to properly raising Trust accounting issues The fact that [Jaehning] did not prevail on all her issues does not diminish the appropriate utilization of attorney time to evaluate Trust activities.”

The district court may award attorney fees for litigation brought in good faith and for the benefit of the trust. *In re Freeman's Trust*, 247 Minn. 50, 57, 75 N.W.2d 906, 911 (1956). Litigation is not brought in good faith when it is meritless or frivolous. *See* Minn. Stat. § 549.211 (2012) (enumerating requirements for filing claims in good faith). An action may be considered beneficial when it results in “the discontinuance of certain objectionable practices” in the management of the trust. *Freeman's Trust*, 247 Minn. at 57, 75 N.W.2d at 911. A party is not required to prevail for the district court to grant attorney fees. *In re Trust Created by Atwood*, 227 Minn. 495, 501, 35 N.W.2d 736, 740 (1949). However, the trustees' liability appears to have been a factor considered in the district court's exercise of its discretion. We therefore remand the attorney-fee issue for reconsideration along with the issue of available remedies.

IV.

The trustees argue that the district court abused its discretion by awarding costs and disbursements to Jaehning. The district court initially awarded costs and disbursements under Minn. Stat. § 549.04 (2012) to Jaehning as the prevailing party, but it later amended its order to also include an award of expenses under Minn. Stat. § 501B.71, subd. 3(2) (2012), as requested by Jaehning. Under section 501B.71, subdivision 3(2), the district court may award reasonable costs to any necessary party acting for the benefit of the trust, regardless of whether the party ultimately prevails, if there is reasonable doubt about the terms of the trust. *See Atwood*, 227 Minn. at 500, 35 N.W.2d at 740 (allowing costs, paid out of trust principal, for action brought to interpret the trust instrument). “A determination of what costs are reasonable is largely left to the

discretion of the [district] court.” *Casey v. State Farm Mut. Auto. Ins. Co.*, 464 N.W.2d 736, 740 (Minn. App. 1991), *review denied* (Minn. Apr. 5, 1991). Again, the trustees’ liability appears to have been a factor considered in the district court’s exercise of its discretion. We therefore remand the costs and disbursements issue for reconsideration along with available remedies and attorney fees.

V.

Jaehning challenges the district court’s denial of her petition to remove the trustees under Minn. Stat. § 501B.16(9) (2012), which lists grounds for removal. “[T]he determination of what constitutes sufficient grounds for removal of a trustee is within the discretion of the [district] court” *In re Gerschcow’s Will*, 261 N.W.2d 335, 338 (Minn. 1977); *see also* Minn. Stat. § 501B.21 (2012) (“Upon hearing a petition filed under section 501B.16, the [district] court shall make an order it considers appropriate.”). We review the district court’s denial of removal for an abuse of discretion. *Gerschcow’s Will*, 261 N.W.2d at 338.

A district court may remove a trustee under section 501B.16(9) for cause or if removal is in the best interests of the beneficiaries, “is not inconsistent with a material purpose of the trust,” and the trustee persistently fails “to administer the trust effectively.” Minn. Stat. § 501B.16(9)(iii). However, it is not an abuse of discretion to deny removal of a trustee who has erred in good faith after acting upon advice of counsel, but otherwise managed the trust “in a careful, prudent, honest, and intelligent manner.” *In re Comstock’s Will*, 219 Minn. 325, 340, 17 N.W.2d 656, 665 (1945). In addition, when the trustee errs in a good-faith attempt to carry out the settlor’s wishes but does not

prejudice the trust, despite “inconsequential deviations from legal requirements in the past,” it is within the district court’s discretion to deny removal. *Gerschcow*, 261 N.W.2d at 340. Moreover, the “courts are more reluctant to remove a trustee who has been chosen by the settlor than one who is court-appointed.” *Id.* at 338 (quotation and citation removed).

Jaehning contends that the following acts are grounds for removal: (1) not charging the brothers additional rent for the use of the grain handling system; (2) agreeing to a low rental term in a lease with the brothers; (3) executing warranty deeds in performance of the contracts for deed without verifying credits toward the brothers’ payments; (4) paying the brothers’ fertilizer bill; (5) improperly reimbursing the travel expenses of a sister-in-law; (6) conveying the interests in the home farm to the brothers in violation of the trust agreement; (7) relying on the legal advice of an attorney who also represented the brothers; and (8) violating the duty of impartiality by favoring the brothers in transactions and the duty to inform by failing to notify the beneficiaries of transactions and the status of the trust.

In *Gerschcow*, the trustee chose to continue the investment practices of the trust settlor, her sister, in a belief that she was carrying out the settlor’s wishes. *Id.* at 339. In addition, the trustee failed to make annual accounting as required by law. *Id.* at 340. Only one beneficiary petitioned for her removal, arguing that another investment strategy should have been used. *Id.* at 339. The supreme court held that the district court did not abuse its discretion by refusing to remove the trustee because it found that the trustee had acted reasonably and in good faith and that past “inconsequential deviations from legal

requirements,” such as failure to file accountings, could be corrected in the future. *Id.* at 340.

Similarly, Donald Briks chose his sisters as trustees, and their management of trust assets closely resembled his. They even retained his financial and legal advisors. The trustees believed they were carrying out Donald Briks’s wishes by continuing to deal with the brothers and manage the trust as he had. Furthermore, the actions of the trustees are challenged by only one beneficiary, as in *Gerschcow*. We address each of the challenges in turn.

First, the district court did not abuse its discretion by finding that the rental term of the lease was an insufficient ground for removal. Based on the evidence, the district court found that the trustees obtained a reasonable rent for the leased farmland, including the grain handling system. In addition, the trust agreement required the trustees to reach “suitable” terms with the brothers, not the highest possible rental value. Therefore, the rental term does not demonstrate a failure to manage the trust effectively.

Second, the district court did not abuse its discretion by finding that the credits allowed are insufficient grounds for removal. While the district court found that the credits for contract-for-deed payments made prior to the modification and credits for the sister-in-law’s travel expenses were improper, it specifically found that the trustees had not willfully mismanaged the trust by allowing those credits and had acted in reliance on the trust’s attorney. The district court found all other credits, including the fertilizer credit, to be proper, based on the evidence. Therefore, the credits do not demonstrate a failure to manage the trust effectively.

Third, the district court did not abuse its discretion by finding that the conveyance of the interests in the home farm was an insufficient ground for removal. While the conveyance caused a significant loss in value to the trust and contradicts the terms of the trust agreement, the district court found that the trustees were acting in good faith in an attempt to carry out the wishes of Donald Briks by transferring the interests. In addition, the district court found that the trustees were acting on advice of the trust's attorney, who requested that they comply with Donald Briks's oral agreement to transfer the land and that the transfers were not evidence of willful mismanagement. The district court could have found that the conveyance was sufficient grounds for removal. However, given the reluctance of Minnesota courts to remove a trustee named by the settlor, it was within the district court's discretion not to do so.

Fourth, the district court did not abuse its discretion by finding that reliance on the advice of the attorney who also represented the brothers was an insufficient ground for removal. The district court declined to make a finding on whether a conflict of interest actually existed, instead stating:

It is unclear whether there was any actual conflict of interest, although the appearance of a conflict obviously may have existed. There is no evidence that either of the successor trustees was aware, or had been advised, of any potential conflict of interest until it was raised by [Jaehning's] attorney.

Based on the lack of evidence that the trustees were aware or had been advised of a conflict, Donald Briks's prior use of the same attorney in transactions with the brothers, and the instruction to find a new attorney to represent the trust in the future, the district court was within its discretion to find that this is an insufficient ground for removal.

Finally, the district court did not abuse its discretion by finding that the trustees' failure to inform the beneficiaries about the trust status and alleged favoring of the brothers are insufficient grounds for removal. The trustees' failure to notify the beneficiaries of transactions and send financial statements is similar to the failure to file accountings in *Gerschcow* and can be easily remedied in the future. And the alleged improper favor shown to the brothers is unsupported by the district court's findings that the rental terms were reasonable for the market and all claims made by the brothers were allowed only on advice of counsel, whether ultimately determined to be proper or improper. In addition, the trust agreement expressly requests that the trustees give the brothers the opportunity to farm the trust property, therefore the trust agreement itself obligates the trustees to engage in transactions with the brothers on "suitable" terms. Therefore, the district court acted within its discretion by finding these are insufficient grounds for removal.

Considering the allegations en masse, the district court could have found that sufficient grounds existed to remove the trustees; however, it was within its discretion to find that the allegations were insufficient when there were no findings that the trustees acted in bad faith, intentionally disregarded Donald Briks's wishes or failed to seek out legal or financial advice when needed, and Donald Briks named his successor trustees. Therefore, the district court did not abuse its discretion by denying Jaehning's request to remove the trustees.

Affirmed in part, reversed in part, and remanded.