STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1853

In re: The Dale A. Johnson Trust Under Agreement Dated August 10, 2006
as Amended and Restated on November 8, 2012

Filed July 17, 2017
Affirmed in part, dismissed in part; motion to supplement granted
and motion to strike denied
Connolly, Judge

Hennepin County District Court
File No. 27-TR-CV-15-163

Paul F. Shoemaker, Shoemaker & Shoemaker, PLLC, Bloomington, Minnesota (for appellant)

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Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith, Tracy M., Judge.

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

CONNOLLY, Judge

On appeal in this trust dispute, appellant, a child of the trust grantor, argues that the district court erred by (a) misreading the trust instrument and not directing the trustee to convey certain real property per the grantor's instructions in a devise; (b) failing to find that the trustee breached her fiduciary duty in her management of certain real property; and

(c) failing to direct the trustee to terminate the trust, per the grantor's instructions. Also before this court is a motion to strike portions of respondent's brief and a motion to supplement the record and to dismiss part of the appeal as moot. Because additional facts lead to the conclusion that appellant's first issue is moot, we grant respondent's motion to supplement the record and deny appellant's motion to strike. Because the district court did not err in concluding that respondent did not breach her fiduciary duty in her management of the trust or in declining to terminate the trust, we affirm.

FACTS

On August 10, 2006, Dale A. Johnson (Decedent or Grantor) executed the Dale A. Johnson Trust (Trust), which was subsequently amended and restated on November 8, 2012. Decedent died on January 20, 2013 and was survived by his spouse and four children: S.J.; appellant Martin A. Johnson; respondent-trustee Wendy L. Johnson-Ness; and A.J. An inventory of Trust assets on hand at the time of Decedent's death was filed with the district court, and, in addition to cash accounts and tangible personal property, the Trust contained the following real property:

(a) A commercial strip mall property consisting of 9,000 square feet divided into a number of independently leasable units (Mini-Mall);

(b) A residential townhouse (Ridge Stone House);

(c) A single family residential home (Braun House);

(d) Hunting land consisting of two parcels totaling 78 acres (Kittson County Land);

(e) 40 undeveloped acres containing approximately 12 acres of tillable land, a power line pole, and a cell tower (40-Acre Property);

(f) A vacation home in Arizona used by Decedent as a vacation home (Rio Vista Home); and

(g) Residential rental property consisting of five buildings and seven units (Cavaness Property).

At the time of Decedent's death, the status of the real properties were as follows:

(a) Mini-Mall was one-third rented with the remainder vacant, it had a mortgage of $711,938.68, and was suffering a loss of approximately $5,500 per month;

(b) Ridge Stone was rented and producing income;

(c) Braun House was rented and producing income;

(d) Kittson County Land was not producing income;

(e) Rio Vista Home was vacant and not producing income; and

(f) Cavaness Property was in a state of disrepair with only two of seven units rented and producing income.

Article 4 of the Trust provides that on Decedent's death the 40-Acre Property would be distributed in equal shares to Decedent's children subject to a life estate for the benefit of Decedent's spouse. Article 5 of the Trust provides for distribution of the remaining Trust assets to Decedent's children in equal shares, subject to offsets for lifetime gifts made by Decedent and his spouse.

After Decedent's death, the four children met to discuss issues related to the assets held by the Trust, and to determine the course of action to pursue. In May of 2013, appellant, respondent, and S.J. went to view the Cavaness Property to decide whether or not to repair and upgrade the property to get it fully leased before selling it. A meeting was arranged with a contractor, and a walk-through of the property was done. Based on this meeting, the contractor gave a verbal estimate of approximately what his costs might

be for repairs to the property to make the units rentable and ready for sale. After review of the property, the siblings agreed that repairs should be made to the Cavaness Property so that it would be rentable and eventually sold. Soon after the contractor began work, unforeseen issues were uncovered that required repair, including rotted roof structures and floors, cabinets and appliances that needed replacement, two water heaters requiring replacement, a blocked sewer line, replacement of electrical wiring found in violation of code, landscaping that had suffered years of neglect, and a severe storm that necessitated more repairs. The total amount spent on the Cavaness Property was $188,799.27, of which $166,376.15 was spent on building repairs and maintenance, replacement of appliances, storm damage, landscaping, and sewer repairs. The remaining $22,423.12 was spent on utilities, taxes, insurance and other expenses related to the administration of the property.

On approximately November 25, 2013, appellant notified respondent that he did not want to wait any longer for distribution of his share of the Trust. Respondent continued efforts to lease all the rental units and to sell the properties, keeping her siblings informed of her activities through frequent e-mails.

Prior to Decedent's death, the Mini-Mall had two mortgages recorded against it. Following Decedent's death, Respondent successfully refinanced the property to the benefit of the Trust in the name of JA Commercial Properties, LLC, and the property is now 80% leased and listed for sale with a realtor that specializes in commercial building sales in the area that the property is located. The property is still subject to approximately $680,000 in mortgage debt.

In addition to other rulings that are not before this court, the district court[1] (1) denied the request to remove respondent as trustee; (2) ordered respondent to continue to make reasonable efforts to preserve and sell remaining Trust property; (3) required respondent to obtain a court order prior to making further distributions of the Trust corpus.

At the time of the district court order, Ridge Stone, Braun House, Kittson County Land, and the Cavaness Property had been sold. Except for the Kittson County Land, the properties were sold at or above the appraisal value on Decedent's estate tax return. The district court found that "[t]he evidence supports a finding that had repairs not been made to the properties, they likely would have sold for much less."

The district court also found that "there is . . . an agreement among the parties to sell the [40-Acre Property]." The 40-Acre Property was listed for sale as of July 1, 2016, without the specific approval of appellant or S.J.

On October 28, 2016, over a month after the district court order, respondent sold the 40-Acre Property.[2] On November 4, 2016, respondent notified the beneficiaries of the Trust that the 40-Acre Property had been sold. Appellant's notice of appeal was filed on November 21, 2016. On April 2, 2017, appellant filed a motion to strike the portions of respondent's brief pertaining to the sale of the 40-Acre Property. In response, respondent made a motion to supplement the record and responded in opposition to the motion to

[1] The referee filed his order on September 14, 2016 and the district court adopted the order in its entirety on September 21, 2016. We refer to the order written by the referee and adopted in its entirety as a decision by the district court.

[2] The facts in this paragraph are the subject of appellant's motion to strike and respondent's motion to supplement the record. We consider these facts solely for the purpose of determining the issue of mootness.

strike, arguing that the requested relief regarding the 40-Acre Property cannot be granted by any court and thus, the issue is moot.

D E C I S I O N

Appellate courts "review de novo a district court's interpretation of a written document, which in this case is the Trust." *In re Pamela Andreas Stisser Grantor Trust*, 818 N.W.2d 495, 502 (Minn. 2012). "We review a district court's findings of fact under the clearly erroneous standard." *Id.* at 507. A district court finding that a trustee committed no breach of fiduciary duty or abuse of discretion will not be set aside unless clearly erroneous. *Matter of Trusts Created by Hormel*, 504 N.W.2d 505, 512 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). "When determining whether a finding is clearly erroneous, we take the view of the evidence which is most favorable to the [district] court's findings and defer to the district court's opportunity to assess the credibility of witnesses." *Stisser*, 818 N.W.2d at 507 (quotation omitted). Findings of fact are not clearly erroneous unless we are "left with the definite and firm conviction that a mistake has been made." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (citation omitted).

I. Did the district court err in not ordering respondent to complete a specific devise of the 40-acre parcel?

Appellant first argues that the district court erred in failing to order the trustee to complete the specific devise of the 40-Acre Property. Because additional facts not present in the record help us determine that this issue is moot, we grant respondent's motion to supplement the record and deny appellant's motion to strike portions of respondent's brief

regarding the sale of the 40-acre Property. Because the issue is moot, we do not reach the merits of whether the specific devise would have been proper.

As a general rule, when, pending appeal, an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be dismissed as moot. *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). Appellate courts have granted motions to supplement the record when events have occurred between the district court's order and the appeal and raise issues relating to mootness. *See Housing and Redev. Auth. ex re. City of Richfield v. Walser Auto Sales Inc.*, 641 N.W.2d 885, 888 (Minn. 2002); *Brosdahl v. Minnesota Mut. Fire and Cas. Co.*, 437 N.W.2d 695, 697-98 (Minn. 1989). However, the supplemental record can only be used to consider the issue of mootness. *Id*. Because the documents in the supplemental record lead to a conclusion "with certainty that they render this appeal moot," we grant the motion to supplement the record and deny appellant's motion to strike. *See Brosdahl*, 437 N.W.2d at 698.

"The mootness doctrine . . . implies a comparison between the relief demanded and the circumstances of the case at the time of decision in order to determine whether there is a live controversy that can be resolved." *Minnegasco*, 565 N.W.2d at 710. "A court will not dismiss an issue as moot if it is capable of repetition and likely to evade review . . . [or] if it is related to important public issues of statewide significance that should be decided immediately." *Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. App. 2004) (quotation omitted). Events pending appeal do not deprive an appellate court of its power to give effective relief, especially in a case where there is no innocent third-party

purchaser whose rights could be prejudiced. *United Realty Trust v. Prop. Dev. & Research Co.*, 269 N.W.2d 737, 741 n.5 (Minn. 1978) (concluding that the mootness argument was without merit because the court was not deprived of its power to give effective relief including invalidation of the foreclosure sale, where there was no innocent third-party purchaser whose rights could be prejudiced).

Appellant seeks specific performance. He requests that the 40-Acre Property be given to him and his siblings equally, subject to the life estate. The property is now owned by a third party. There is no information before this court regarding the sale of the 40-Acre Property, other than that it was sold and the beneficiaries were informed. Appellant does not ask for damages or an alternative form of relief other than the specific devise of the 40-Acre Property. Because there is no evidence that the sale was not to an innocent third-party purchaser, we will not remand and order the district court to invalidate the sale of the property. As such, this court can offer no relief to appellant.

Appellant argues that respondents "willful and deliberate actions" of selling the property before the expiration of the appeal period despite lack of consent to sale by two of the four remaindermen cannot be rewarded by "rendering the [district] court's failure to order the Trustee to complete the Grantor's specific devise as moot." However, appellant failed to take appropriate steps to prevent the sale of the 40-Acre Property before he had a chance to be heard on appeal, regardless of the alleged district court error. Despite knowing that the 40-Acre Property was for sale, there is nothing in the record to show that a lis pendens had been filed on the property, indicating that appellant had an interest. Appellant did not make a motion for a temporary injunction against selling the property or inform the

district court of his intent to pursue an appeal. He never requested that a stay on selling the property be issued until the appeal had occurred. He did not file his notice of appeal before the property had been sold and did not request any relief from the district court after he discovered the sale and prior to the closing. Any of these actions may have been enough to prevent the sale until appellant had the opportunity to be heard on appeal.

As previously stated, because we are unable to grant the specific relief requested by appellant, we conclude that the first issue regarding the specific devise of the 40-Acre Property raised by appellant is moot. Consequently, we grant respondent's motion to supplement the record, deny appellant's motion to strike, and dismiss as moot the portion of the appeal involving the 40-acre parcel.

II. Did the district court err in finding that respondent had not breached her fiduciary duties in the management of the trust property?

Appellant next argues that the district court erred by failing to make any specific findings related to the respondent's management of the Cavaness or Braun rental properties and by making findings not supported by the evidence. We disagree.

"A trustee has the duty to exercise reasonable care, skill, and caution in investing and managing trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." *Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571, 580 (Minn. App. 2003) (quotation omitted). "A trustee may not exercise its discretion in a manner that defeats the settlor's intent or the purposes of the trust." *Id*. But "[so] long as the trustees act in good faith, from proper

motives, and within the bounds of reasonable judgment, the court will not interfere with their decisions." *Id*. at 580-81.

Respondent was granted administrative powers by the Trust, to be exercised "in the Trustees' discretion." Concerning the real estate, the Trust agreement gives respondent the authority to "make ordinary or extraordinary repairs, improvements or alterations in buildings or other structures or in any other asset of the trust estates, and to remove or demolish any improvements."

Cavaness Property

Appellant argues that, despite spending a large amount of Trust assets on the improvements of the Cavaness Property, the Trustee realized no additional value on the sale and that the district court abused its discretion when it concluded that respondent's actions in her management of Cavaness did not breach her fiduciary duty. The district court found that, after the contractors started work on the Cavaness Property, a multitude of unforeseen issues were uncovered including rotted roof structures and floors, cabinets and appliances that needed replacement, two water heaters requiring replacement, a blocked sewer line, replacement of electrical wiring found in violation of code and landscaping that had suffered years of negligence. Additionally, a severe storm necessitated even more repairs. These findings are supported by the record. The district court concluded: "The Trustee has prudently administered the Trust assets. In particular, she took reasonable steps to maintain and repair the Cavaness Property, mitigating problems and appropriately addressing unforeseen problems. She was able to take very

distressed rental property in Arizona with less than 30% occupancy, turn it around, and within a relatively short period of time have it fully rented."

Appellant agreed to spend Trust assets to upgrade the Cavaness Property after visiting the property in May 2013. When other problems arose, as they do when repairing a building, appellant decided that he did not want to be part of the investment of the property any longer and requested that respondent sell the Cavaness Property, which respondent did. Respondent was within her discretion to "make ordinary or extraordinary repairs, improvements or alterations in buildings or other structures." She upgraded the property in order to make the property fully rented and obtain a higher sale price. Because she acted in good faith, from proper motives, and within the bounds of reasonable judgment, we will not interfere with her decision.

Appellant also argues that respondent did not adequately and appropriately inform appellant and the other beneficiaries of the troubles of the Cavaness Property. We disagree. There is very clear evidence that she was communicating the conditions of the Cavaness Property via e-mail, even going as far as to call the property "Pandora's Corner" in reference to Pandora's box because "[i]t seemed every time we were trying to do something, something else came up." Furthermore, there is no obligation in the Trust Agreement that respondent communicate all her decisions to the beneficiaries. Her role was to act in the best interest and she had the discretion to "make ordinary or extraordinary repairs, improvements or alterations in buildings or other structures." She did so.

Appellant also specifically challenges several findings of the district court regarding amounts spent to upgrade the Cavaness Property as clearly erroneous. The district court

found that Rick's Home Maintenance was paid a total of $30,044.43 for work performed from 2013-2015, that Mick Rodriguez Landscaping was paid $38,243.22 during the same time and $18,593.86 was paid for necessary plumbing and sewer repairs and that $21,356.00 was paid for roof repairs. These findings are clearly erroneous because the district court mistakenly stated the totals paid to Rick's Home Maintenance for 2013 alone rather than adding the totals from 2013-2015. The district court mistakenly did the same for Mick Rodriguez Landscaping. However, this error is harmless and does not merit reversal. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for a de minimis, technical error). Both parties, the district court, and the record agree that a total of $188,799.27 was spent on the Cavaness Property from 2013-2015. Because the district court correctly found the total spent on repairs and maintenance of the Cavaness Property, it could appropriately conclude that the steps she took to maintain and repair the Cavaness Property, mitigate problems, and appropriately address unforeseen problems were prudent.

Appellant also claims that at no point did respondent make the Cavaness Property productive in any regard, "either as to [its] eventual value on resale, nor as an income producing property." Appellant states that respondent sold the Cavaness Property at approximately equal to what it was worth at the time of the Decedent's death. However, the district court found that respondent took a distressed rental property in Arizona with less than 30% occupancy and within a relatively short period of time, had it fully rented. Despite the property being fully rented, appellant argues that it was not an income-producing property because respondent was not making the monthly distributions that were

being made prior to his father's death. Appellant fails to recognize the trustee's ultimate responsibilities in managing the Trust. Respondent is responsible for managing the debts and expenses of the Trust, which includes a $680,000 mortgage. The properties needed to be producing income to help pay that mortgage. That appellant was not receiving the same rental payments from the Cavaness property as he was prior to his father's death does not mean that the property was not productive.

Because the property was fully rented and producing income, we conclude that respondent did not breach her fiduciary duties in managing the Cavaness Property. Respondent did everything in her power to deal with the myriad of issues the property presented and, when appellant decided he wanted to sell the property and liquidate the Trust, respondent did so in an appropriate fashion.

Braun House

Appellant argues that the district court's failure to make findings related to the Trustee's mismanagement of the Braun House constitutes an abuse of discretion. Appellant's list of why respondent mismanaged the Braun House is extensive. Appellant states that this mismanagement includes "a sham purchase agreement at an inflated price, outright deception, a willful lack of control over the trust assets, a lack of sound discretion and judgment, and lack[ing] the reasonable skill, care[,] and caution required by a trustee." We conclude that the district court did not err in concluding that respondent did not breach her fiduciary duty in her management of the Braun House.

The district court did not address the Braun House specifically other than to state that it had been sold at or above the appraisal value on the Decedent's estate tax return.

However, the district court concluded that respondent "has in all respects met the statutory duties as Trustee." This is a finding that respondent acted appropriately in the management of the Braun House.

The Braun House was a rental property owned by Decedent. Upon his death, it was rented and producing income. Respondent actively sought and obtained renters after Decedent's death. She did not hire a licensed real estate agent to sell the property but rather sought renters or buyers on her own. She obtained new renters in February 2014. In lieu of a cash deposit, the new renters agreed to fix the siding of the Braun House and paint, handling all costs and labor. It continued to go well through April 2014 and respondent kept appellant and the other beneficiaries updated via e-mail. By May 2014, the new renters had still not painted or fixed the siding, but were beginning to discuss the possibility of buying the house rather than lease it. In October 2014, the new renters stated their intention to purchase the Braun House, and respondent began going through the steps to sell the property.

Due to an emergency medical issue with their daughter, the new renters fell behind on rent as of January 2015. Talks of them purchasing the Braun House stalled. The new renters never performed the barter trade that respondent arranged in lieu of a security deposit. Respondent was eventually required to terminate the lease in October 2015 because the new renters did not make any payments from December 2014 to October 2015. Respondent obtained a judgment against the new renters for $20,345 and testified that the judgment is being paid through wage garnishment.

Respondent testified as to her motivations for trying to work out a sale to the new renters. It was her belief that the new renters would take the house as is: the new renters loved and took pride in living at the Braun House, and they had talked to a banker and had a plan in place to purchase the property. Respondent also did not want to put in $30,000 of work into the house to get it ready for sale. The $30,000 was at least partially due to a septic system that would have had to be replaced if a buyer did not take the property as is.

We conclude that respondent did not breach her fiduciary duty in managing the Braun House. "The law is emphatic that the trustee is not to be second guessed by the infallibility of hindsight." *In re Irrevocable Inter Vivos Trust Established by R.R. Kemske by Trust Agreement Dated October 24, 1969*, 305 N.W.2d 755, 761 (Minn. 1981). Prior to appellant's request to cash out of the Trust, she was successfully renting the property. After the request, she attempted to arrange a seller who would take the property as is and save the Trust $30,000 to replace a septic tank. The sale fell through, and the renter and potential purchaser failed to make rental payments. She obtained a judgment and is recovering the lost money.

Whether the trustee is prudent in doing an act depends on the circumstances at the time when he or she does it. We conclude that the district court did not err in ruling that, at the time, respondent's handling of the Braun House was appropriate.

III. Did the district court err by not ordering respondent to complete the administration of the Trust, distribute the remaining assets held in the Trust, and terminate the Trust?

Appellant argues that the district court erred when it did not order respondent to distribute the remaining Trust estate and terminate the Trust. Appellant argues that the district court failed to comply with Minn. Stat. § 501C.0817(b) (2016), which requires:

> Upon the occurrence of an event terminating . . . a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes and to secure a right of reimbursement if the reserve is inadequate.

Appellant argues that, pursuant to the statute, the Trust assets should be distributed and the Trust terminated because the process has taken over three and a half years and there is no need to pay any remaining debts. The primary issue respondent raises with distributing the remaining assets and terminating the Trust is the Mini-Mall which is indebted to the bank holding the mortgage in an amount of approximately $675,000-$680,000. The Mini-Mall is the last remaining property to be sold. Respondent and her legal counsel maintain that, based on the Grantor's directive in Article 3 of the Trust, respondent was obligated to pay all the legal debts and expenses of the Grantor's estate prior to distributing any portion of the estate. The bank required respondent to, in her capacity as trustee, have the Trust guarantee the obligations of the Mini-Mall debt. If there was no guarantee, the bank said that "they would call the note due and if the [T]rust couldn't pay it, it would foreclose on the property and come after the [T]rust for any shortfall."

Appellant argues that there is no obligation for the trustee to pay the note secured by the mortgage on the Mini-Mall. *See Stisser*, 818 N.W.2d at 506. *Stisser* involved a personal representative, the husband of the deceased, arguing that the Trust Agreement required the trustee to "Pay all of [the grantor's] debts at the time of her death, including the mortgage notes." *Id.* The supreme court concluded that, as a matter of law, the grantor's unambiguous intent as expressed in the trust agreement was not to exonerate her secured debts and held that the trustee is not required to pay the debts secured by personal and real property at the time of her death. *Id.* The language used in the Trust in this case and the trust in *Stisser* is similar.

While the supreme court held that a trustee is not required to pay the debts secured by real property at the time of her death, there is nothing in that decision that indicates that, in her discretion as trustee, respondent is prohibited from paying the debts secured by real property. While there is testimony that the current market value of the property is $765,000, an amount that would pay off the mortgage on the property, there is no evidence that the Mini-Mall will get as much from a prospective buyer, when the property sells. Respondent, pursuant to her fiduciary responsibility to manage the Trust, decided that she will not make a final distribution until the Mini-Mall is sold, ensuring that the assets from the sale of the other properties will be available to cure any deficiencies that might arise from the sale of the Mini-Mall. We conclude that the district court did not err in ruling that this is a prudent decision that is within respondent's authority as trustee.

Because the district court's finding that respondent's decision in refusing to distribute the trust corpus until the Mini-Mall has been sold and the debt on the Mini-Mall

has been paid was prudent, we conclude that the district court did not err in refusing to order a final distribution and termination of the Trust.

Affirmed in part, dismissed in part; motion to supplement granted and motion to strike denied.