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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0053**

In the Matter of the Otto Bremer Trust.

**Filed August 30, 2021
Affirmed
Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-C9-61-315222

Keith Ellison, Attorney General, James W. Canaday, Deputy Attorney General, Carol R. Washington, Katherine A. Moerke, Lindsey W. Lee, Assistant Attorneys General, St. Paul, Minnesota; and

Christopher Burns, Special Assistant Attorney General, Henson & Efron, Minneapolis, Minnesota (for appellant State of Minnesota)

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Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this action seeking removal of the trustees of the charitable trust Otto Bremer Trust,¹ appellant, the Minnesota Attorney General, challenges the district court's order

¹ The trustees are Charlotte S. Johnson, Daniel C. Reardon, and S. Brian Lipschultz.

granting in part and denying in part the attorney general's petition for interim relief. The attorney general argues that the district court (1) erred by applying the *Dahlberg* standard instead of Minn. Stat. § 501C.0706(c) (2020) when addressing whether to grant interim injunctive relief, (2) applied the wrong standard for removing a trustee as an interim measure under section 501C.0706(c), and (3) should not have allowed respondent-trustees to use trust assets to pay for litigation expenses while the litigation was ongoing. Because the attorney general has not shown that the interim relief granted by the district court was insufficient to protect the trust during the pendency of the action and because we otherwise discern no abuse of discretion, we affirm.

FACTS

In 1944, Saint Paul banker Otto Bremer established the trust as a charitable trust. As a charitable trust, the trust is registered with the attorney general and files annual informational filings as required by Minn. Stat. § 501B.38 (2020). Since its creation, the trust has been held and administered according to the trust instrument and has been continuously supervised by the Ramsey County District Court.

The trust instrument identifies the charitable purposes of the trust, which include alleviating poverty, establishing need-based scholarships to Minnesota colleges, promoting public health, and other purposes. From 2012 to 2019, the trust distributed \$367 million in service of its charitable purposes.

To fund its charitable activities, Otto Bremer endowed the trust with assets, including stock in the Otto Bremer Company, now Bremer Financial Corporation (BFC). The assets of the trust currently fall into two general categories: (1) BFC assets, which

represent about 90% of the trust estate, and (2) non-BFC assets consisting of securities and investments, which make up the remaining 10% of the trust estate. According to the district court, the value of the trust assets more than doubled in recent years, from approximately \$765 million in 2012 to approximately \$2 billion at the time of the district court's order.

The trust instrument permits the trustees to sell BFC stock “if, in the opinion of the Trustee[s], it is necessary or proper to do so owing to unforeseen circumstances.” In October 2019, the trustees sold part of the trust's BFC stock to 19 investors. The trustees' sale of BFC stock led to a flurry of litigation—BFC and its employee shareholders separately sued the trustees, and some of the investors also sued BFC. Three months after the October sale of stock, the attorney general launched an investigation into the trustees' administration of the trust.

Following an eight-month investigation, the attorney general petitioned the district court for removal of the trustees. The attorney general also filed an emergency petition seeking interim relief pending a final decision on the merits of the removal action. The district court's decision on the interim-relief petition is the focus of this appeal.

In a memorandum accompanying its petition for interim relief, the attorney general set forth the reasons asserted in support of the interim relief it requested. Generally, the attorney general asserted that the trustees have “engaged in a longstanding and presently ongoing pattern of imprudent, self-interested, and otherwise unlawful behavior” that is adverse to the trust and its charitable purposes. The petition enumerates 16 acts of misconduct allegedly undertaken by the trustees. These acts include breaches of the

trustees' fiduciary duties, the settlor's intent, the trust instrument, and the Minnesota statutes and common law governing trusts.

Based on these allegations, the attorney general requested interim relief under the Minnesota Trust Code, Minn. Stat. §§ 501C.0101-.1304 (2020). The requested relief included enjoining the trustees from committing a breach of trust; requiring the trustees to account; appointing a special fiduciary to administer the trust; suspending or removing the trustees; prohibiting, or requiring court approval of, all payments of attorney fees out of the trust property; and other relief.

The district court granted some interim relief but denied the attorney general's requests to remove the trustees and to prohibit the trustees from using trust assets to pay their attorney fees.

The attorney general appeals.

DECISION

The attorney general makes three arguments challenging the district court's decision to deny some of the attorney general's requests for interim relief. The first two arguments assert that the district court committed legal error in analyzing the matter—specifically, (1) that the district court erroneously applied the common-law *Dahlberg* standard for temporary injunctive relief rather than the statutory standard under the Trust Code and (2) that the district court applied the wrong legal standard for removal of a trustee as an interim measure under the Trust Code. The attorney general's third argument asserts that the district court abused its discretion by not prohibiting the trustees from using trust assets

to pay their litigation expenses during the pendency of this and other lawsuits alleging trustee misconduct.

We review a district court's exercise of its equitable jurisdiction over a charitable trust under an abuse-of-discretion standard. *In re Easton Fund*, 680 N.W.2d 541, 547 (Minn. App. 2004). Generally, a district court abuses its discretion when its decision is based on an erroneous view of the law, *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 278 (Minn. 2010), or when its decision is against the facts in the record, *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

I. Assertions of Legal Error

We begin with the attorney general's assertions of legal error. We first briefly lay out the statutory framework to explain the attorney general's arguments.

The attorney general petitioned the district court to remove the trustees pursuant to section 501C.0706 of the Minnesota Trust Code. Paragraph (b) of that section sets forth four bases on which a district court may remove a trustee, one of which is that the trustee has committed a "serious breach of trust." Minn. Stat. § 501C.0706(b)(1). Paragraph (c) of that same section provides for interim relief during a trustee-removal action. It provides that, "[p]ending a final decision on a petition to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under section 501C.1001, paragraph (b), as may be necessary to protect the trust property or the interests of the beneficiaries." Minn. Stat. § 501C.0706(c). Section 501C.1001(b), in turn, authorizes a court "[t]o remedy a breach of trust that has occurred or may occur" in part by suspending a trustee, removing a trustee "as provided in section 501C.0706," enjoining the trustee from

committing a breach of trust, ordering a trustee to account, reducing or denying compensation to the trustee, or ordering “any other appropriate relief.” Minn. Stat. § 501C.1001(b).

The attorney general asserts that the district court committed two legal errors when applying these statutes. First, the attorney general argues that the district court erred by applying the *Dahlberg* analysis for granting temporary injunctions, rather than the statutory standard laid out in section 501C.0706(c). The *Dahlberg* analysis is a five-factor test directing courts to consider (1) the parties’ relationships, (2) the relative harm to the parties of granting or denying temporary relief, (3) the likelihood of success on the merits, (4) public policy, and (5) the administrative burden in enforcing injunctive relief. *See Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). The attorney general argues that the *Dahlberg* analysis is inapplicable when temporary injunctive relief is explicitly authorized by statute and that, instead, a district court should analyze whether the statutory prerequisites have been demonstrated and the injunction would fulfill the legislative purposes behind the statute. *See Wadena Implement Co. v. Deere & Co.*, 480 N.W.2d 383, 389 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992). The statutory prerequisite here, set forth in section 501C.0706(c), is that relief is “necessary to protect the trust property or the interests of the beneficiaries.” The attorney general asks us to remand this matter for the district court “to reevaluate all of the remedies requested by the Attorney General within the appropriate framework.”

Second, the attorney general argues that the district court committed legal error by analyzing whether the trustees had committed a “serious breach of trust.” The attorney

general argues that, while a “serious breach of trust” is one of the bases for permanent removal of a trustee under section 501C.0706(b), removal of a trustee is authorized as interim relief under section 501C.0706(c) and that provision does not require a “serious breach of trust” but rather authorizes removal when “necessary to protect the trust property or the interests of the beneficiaries.” Minn. Stat. § 501C.0706(c).

Both of the attorney general’s arguments of legal error may be reduced to the assertion that the appropriate standard for a district court to apply when deciding whether to impose interim relief, including the removal of a trustee, is whether the relief is “necessary to protect the trust property or the interests of the beneficiaries.” Under that standard, the attorney general suggests, the district court should have done more—including removing the trustees.

In its order granting in part and denying in part interim relief, the district court began its analysis by reciting the statutory standard under section 501C.0706(c)—namely, whether relief is “necessary to protect the trust property or the interests of the beneficiaries.” The district court then performed its analysis, denied the requested removal of the trustees, and imposed other interim measures. The district court determined that those interim measures were appropriate to “protect the assets of the Trust, compel full transparency of the Trustee[s]’ administration, and ensure the continued philanthropic activities of the Trust.”

If the district court acted within its discretion in determining that the relief that it ordered will “protect the trust property or the interests of the beneficiaries,” Minn. Stat. § 501C.0706(c), any legal error asserted by the attorney general is harmless. *See* Minn. R.

Civ. P. 61 (requiring harmless error to be ignored). If the trust property and beneficiary interests are already adequately protected, the statutory standard under section 501C.0706(c) is met—there would be no reason to remand for consideration of additional protections. Thus, rather than start with analysis of the district court’s alleged legal errors, we turn to the question whether the district court abused its discretion by determining that, with the interim measures imposed by the district court, the trust property and interests of the beneficiaries will be protected pending final resolution of this case.²

In its order, the district court imposed a number of interim measures to protect the trust. It enjoined the trustees from making certain investments; directed that the trustees’ compensation would revert immediately to an earlier amount approved by the district court in a previous order; suspended the annual fee to be paid to the trustees based on the market value of the trust’s non-BFC holdings; prohibited the trustees from selling additional BFC stock without obtaining prior court approval; prohibited the trustees from using trust-office resources, including office space, equipment, and staff time, for non-trust purposes without court approval; prohibited the trustees from making any new investments in private equity funds or hedge funds absent court order or written approval from the attorney general; required the trustees to engage the services of a human-services professional and to report

² In turning to this question, we do not mean to imply that the district court committed legal error. As noted above, the district court recognized the statutory standard for interim remedies set forth in section 501C.0706(c). And, with respect to *Dahlberg*, the district court questioned whether the *Dahlberg* factors were applicable in this context but stated that it found the *Dahlberg* principles “instructive” as a “guide” in analyzing the petition for interim relief.

back to the court; and required the trustees to identify and complete training regarding the fiduciary duties of trustees of charitable trusts and report back to the court.

The district court in its order explained that there are also external protections already in place for the trust estate. The district court observed that the trust is regulated in multiple capacities by four separate government entities: as a charitable trust, by the district court and the attorney general; as a bank holding company, by the Federal Reserve; and as a private foundation, by the Internal Revenue Service. As a charitable trust, the trust has filed annual accounts with the district court and at least every five years has filed detailed petitions seeking and obtaining review and approval of the trustees' administration of the trust. There are annual audits of the trust, and the trust also files reports, on demand and on a regular basis, with the Federal Reserve and annual Form 990 PF tax returns with the IRS. Citing these already-existing protective measures, the district court reasoned that, even without granting the specific injunctive relief requested by the attorney general, protections exist to minimize the potential harm to the trust property and to protect the public trust beneficiaries.

Because we address it in the next section, we leave aside for the moment the attorney general's argument that the district court abused its discretion by not prohibiting the trustees from using trust assets to pay their attorney fees. Apart from that issue, we conclude that the attorney general has not demonstrated that the district court abused its discretion by concluding that the trust is sufficiently protected by the interim measures and external safeguards already in place. Specifically, the attorney general has not demonstrated that, despite those measures and safeguards, the district court must remove

the trustees on an interim basis, before the petition to permanently remove the trustees is determined, in order to protect the trust. We therefore conclude that, even if the attorney general were correct in its assertions of legal error by the district court, any such errors would be harmless and that no remand is needed for the district court to reevaluate the attorney general's petition for interim relief.

II. Attorney Fees

We turn to the attorney general's argument regarding attorney fees. The attorney general argues that, "under any standard," the district court abused its discretion by not prohibiting the trustees from using trust assets to pay their legal fees to defend against this enforcement action or any other action alleging trustee misconduct. The attorney general argues that the decision not to bar the use of trust assets to pay attorney fees is an abuse of discretion because the expenses to defend the trustees' conduct will not confer a benefit on the trust.

The decision of whether attorney fees will be chargeable to a trust lies within the sound discretion of the district court. *In re Tr. Created by Boss*, 487 N.W.2d 256, 262 (Minn. App. 1992), *review denied* (Minn. Aug. 11, 1992). Generally, a trustee defending in good faith a challenge to the trustee's administration of the trust is entitled to reasonable attorney fees paid out of the trust. *See In re Tr. Created by Hill*, 499 N.W.2d 475, 494 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). A district court may deny a trustee's claim for attorney fees paid out of the trust when the trustee acts in bad faith or is guilty of fraud. *In re Tr. of Freeman*, 75 N.W.2d 906, 910 (Minn. 1956).

We are not persuaded that the district court abused its discretion by not prohibiting the use of trust assets to pay the trustees' attorney fees pending final resolution of this or other matters. First, as outlined in the previous section, the district court imposed interim measures and relied on other safeguards already in place to protect the trust during the pendency of litigation. Second, the attorney general does not point to any Minnesota caselaw holding that a district court is *required* to stop attorney fees from being paid out of trust assets in a trustee-misconduct case.

Instead, the attorney general offers as guidance the California case of *People ex rel. Harris v. Shine*, 224 Cal. Rptr. 3d 380 (Cal. Ct. App. 2017). In *Shine*, the California appellate court considered whether a trustee was entitled to have interim attorney fees paid by the trust to defend himself against a removal petition brought by the state attorney general. *Id.* at 382. Shine moved the district court for advanced fees from the trust for defense against the petition, and the district court granted his request. *Id.* The *Shine* court reversed the district court's decision and remanded for reconsideration. *Id.* In so doing, the appellate court recognized that, under California law, "a probate court has the *discretion* to award interim fees in some circumstances." *Id.* at 391. In the ordinary case, the court explained, "where the trust instrument is silent on interim fees," the court should "first assess the probability that the trustee will ultimately be entitled to reimbursement of attorney fees and then balance the relative harms to all interests involved in the litigation." *Id.* at 392. The court observed that the trial court had "made an express finding that *the People* had demonstrated a 'strong case' in support of the removal and discharge petition" and that Shine had submitted no evidence to counter the allegations against him. *Id.* The

court also expressed its view, which the attorney general here highlights, that “an award of pendente lite fees will seldom be justified where, as here, the trust is silent on interim fees and the trustee’s misconduct is at issue.” *Id.*

The attorney general relies on *Shine* for the proposition that a district court abuses its discretion by allowing a trustee to use trust assets to defend against a public enforcement action when the trust instrument is silent as to attorney fees. Even leaving aside whether the trust instrument here is silent as to attorney fees—an issue that the parties dispute—*Shine* simply does not stand for the proposition that the interim use of trust assets to pay attorney fees in an enforcement against a trustee is always an abuse of discretion. Rather, *Shine* holds that a probability of success on the merits of the enforcement action and the relative harms to all interests in the litigation are factors for a district court to consider in exercising its discretion. *Id.* at 392. In *Shine*, the state district court found that the state had made a strong case. *Id.* In contrast, here, the district court made no such finding; rather, it stated that “the extensive factual disputes in the record at this early stage, makes it difficult to conclude preliminarily whether the evidence will ultimately establish that removal of the Trustees is mandated for a ‘serious breach of trust’ as required by Minn. Stat. § 501C.0706(b)(1).” We are not persuaded that *Shine* supports reversal here.

In its order, the district court expressed that there are a number of issues raised that cause it concern, including “the issue of increasing and perhaps duplicative trustee compensation, investment strategies and other issues impacting the workplace environment more generally.” The district court concluded that the interim relief that it ordered is “appropriate to better protect the integrity of the Trust, provide interim limitations on

trustee compensation, and bring more transparency and accountability to the administration of the Trust going forward until the evidence has been fully developed and considered.” We discern no abuse of discretion in the district court’s determination.

Affirmed.