**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-2327**

In the Matter of the Trust Created by
Lottie P. Silliman, dated December 29, 1950,
commonly known as The Silliman Trust.

**Filed September 4, 2012**
**Affirmed**
**Halbrooks, Judge**

Cottonwood County District Court
File No. 17-CV-06-645

C. Thomas Wilson, Sara N. Wilson, Gislason & Hunter LLP, New Ulm, Minnesota; and

Stephen L. Nelson, Stephen L. Nelson & Associates, St. Paul, Minnesota (for appellant Ruby S. Gustafson)

George R. Serdar, Messerli & Kramer P.A., Minneapolis, Minnesota; and

Edward G. Heilman, Heilman & Schlotthauer, PLLC, Wayzata, Minnesota (for respondents Thomas J. Peterson, Evelyn C. Lennon, James L. Silliman)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

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

**HALBROOKS**, Judge

Appellant challenges the district court's award of damages stemming from improper distributions made by the trustees of an irrevocable inter vivos trust, arguing that the district court abused its discretion by (1) its determination of damages, (2) failing to impose a constructive trust, (3) failing to award appellant attorney fees, and (4) failing to order the trustees to disgorge their attorney fees. Because the district court acted within its discretion, we affirm.

## FACTS

On December 29, 1950, Lottie P. Silliman executed an irrevocable inter vivos trust, known as the Silliman Trust, for the benefit of her six children and their issue. Silliman designated her six children as the trustees. The last of Silliman's children died in 1997. As Silliman's grandchildren, appellant Ruby Gustafson and her seven cousins became the trust beneficiaries; three of the cousins also became successor trustees and are respondents in this case. Appellant owns 31.25% of the shares, four cousins each own 12.5% of the shares, and three cousins each own 6.25% of the shares.

In creating the trust, Silliman's intent was to preserve the trust's assets in the form of real estate. The corpus of the trust consisted of the income generated by nine farms, together with the buildings, equipment, supplies, tools, and other personal property associated with the operation of the trust's farms. The language of the trust provides in article II:

> The trustees are fully empowered to sell, assign, convey, exchange, and otherwise dispose of and deal with the trust property (including that listed in Schedule "A" and any other property which may become a part of the trust property) and any increase thereof or income therefrom, as may seem to said trustees desirable from the standpoint of the best interests of the beneficiary or beneficiaries of the trust.

Article V of the trust provides: "The net income from the trust remaining after the payment of expenses of managing the trust and the taxes due from said trust, shall be paid annually in equal shares." The last sentence of article V states, "In the making of the distribution of annual income of this trust, the trustees shall have the right to determine what constitutes income and what constitutes corpus."

Before 1997, the original trustees annually distributed the net income, which was nearly all of the trust's receipts minus the managing expenses, to the life beneficiaries. But after 1997, the successor trustees distributed approximately 50% of the trust's receipts and reinvested the remainder into the corpus of the trust. The successor trustees purchased additional farmland and invested in the Bingham Lake Ethanol Co-op, the Minnesota Soybean Processor Co-op, and Summit Wind, LLC. From 1997 to 2007, the equity of the trust increased 267%, while the income distributions only grew 14%. Appellant initiated this action, challenging the successor trustees' authority to reinvest what would otherwise be distributable income. The district court considered the issue in a bifurcated trial.

In the first part of the trial, appellant argued that the language of the trust requires the trustees to annually distribute all of the net income and that they are prohibited from reinvesting any of that money. The trustees countered that they have sweeping discretionary authority to determine the amount of distributable income in a given year, consistent with the best interests of the beneficiaries.

The district court found that the trust was ambiguous as to the degree of discretion that it afforded the trustees in distributing income and denied appellant's motion for partial summary judgment. Following the first portion of the bifurcated trial, the district court determined that collateral evidence pertaining to Silliman's purpose and intent in creating the trust granted the trustees broad discretionary authority to determine the portion of net income that is distributable to the income beneficiaries, subject to the fiduciary obligation to act in the best interests of the income beneficiaries and residual beneficiaries.

In the second part of the bifurcated trial, the district court considered whether the trustees breached their fiduciary duties to act impartially and in the best interests of the beneficiaries. The district court found that for the tax years 1997 through 2007, the trustees reported to the Internal Revenue Service (IRS) that the trust was a simple trust and that the trust distributed all net income to the income beneficiaries for each tax year. But the evidence showed that the trust issued income distributions that were substantially less than what was reported to the IRS for each of the tax years. Instead, that money was accumulated by the trust. Furthermore, appellant reported on her income taxes that she was receiving the full distributions, consistent with what the trustees erroneously reported to the IRS, and paid a total of $47,616 in taxes on "phantom income."

The district court concluded that the trustees breached their fiduciary duty of impartiality "by unduly favoring remainder beneficiaries to the detriment of income beneficiaries." In support of this conclusion, the district court referred to the trustees' erroneous reporting of the income distributions to the IRS from 1997 to 2007 and found that the vast accumulation of income and corresponding purchase of additional farmland and considerable quantities of stock had increased the principal but not the annual income distributions. While mindful of the broad discretionary powers of the trustees, the district court noted that the investments in Minnesota Soybean Processors and Summit Wind, LLC, yielded income returns substantially lower than that normally earned by trust investments and ordered an immediate equalization distribution of $123,127.20 for the loss of income that was used to acquire those investments. The district court further determined that even though the trust accumulated income through erroneous deductions of income distributions, it lacked jurisdiction as to appellant's claim for damages regarding the accounting methods and disclosures to the IRS and the Minnesota Department of Revenue under federal statute and case law. The district court denied the posttrial motions of both appellant and the trustees to amend the findings.

On appeal, this court considered whether the trust instrument requires the trustees to distribute all the net income to the beneficiaries or if they have discretion to reinvest a portion of the trust receipts into the corpus. *In re Silliman Trust*, No. A10-590, 2010 WL 5071339 (Minn. App. Dec. 14, 2010), *review denied* (Minn. Feb. 23, 2011). We concluded that the trustees do not have discretion; as directed by the language of the trust, the trustees are required to pay out all of the income annually. *Id.* at *6. This court reasoned:

> It would be improvident to ignore the consistent, longstanding conduct of the original trustees, who lived during the settlor's lifetime and who would presumably be subject to the settlor's scrutiny as they administered the trust, in favor of the conduct of successor trustees who became such after the settlor's death and who radically altered the customary manner of dealing with Silliman Trust income.

*Id.* This court reversed the district court's determination that the trustees enjoy broad allocative discretion as to whether to distribute or to hold back net income, affirmed the district court's ruling that the trustees breached their fiduciary duty, and remanded on the issue of damages. *Id.* at *6-8. With respect to damages, we instructed that

> [t]he proper measure of damages . . . is the aggregate of the income distributions [appellant] was entitled to receive, and on which she has already paid taxes. The remedy for a trustee's breach of a fiduciary duty is the amount of money necessary to place the beneficiary in the position she would have been in had the trustee performed the duty. The district court appeared to suggest that [appellant]'s proper remedy would be to seek a tax refund or credit. But, because the trustees improperly failed to pay to her the appropriate shares of net income, that is what she has lost and over which the district court has jurisdiction. Thus, we reverse the district court's determination that it lacks subject-matter jurisdiction over the issue of [appellant]'s damages . . . .

*Id.* at *8 (citation omitted).

On remand, the district court determined that the income beneficiaries were entitled to all the net income accumulated by the trust from 1997 to 2007, amounting to $537,188.99. The district court reduced this total by $123,127.20 for the previously ordered equalization distribution and ordered a final award to the income beneficiaries of $414,061.79. As for the choice of remedies, appellant argued for a constructive trust. But the district court ordered that an equitable lien be placed on all property acquired with accumulated income, for the total of the aggregated amount, reasoning that it was the remedy most advantageous to the beneficiaries. Appellant moved for attorney fees, which the district court denied. Finally, appellant contended that because the trustees breached their fiduciary duties, the trust should not pay their attorney fees. The district court denied appellant's motion to order disgorgement of the trustees' attorney fees because the award of attorney fees in the district court's earlier order was not challenged in the first appeal. This appeal follows.

**D E C I S I O N**

This court reviews the district court's findings of fact concerning a trust for clear error, but reviews conclusions of law de novo. *In re Estate of King*, 668 N.W.2d 6, 9 (Minn. App. 2003). When reviewing findings of fact, we view the record in the light most favorable to the judgment of the district court. *Id.* We will not reverse for clear error unless we have a definite and firm conviction that a mistake has been made. *Id.*

**I.**

Appellant contends that the district court erred by improperly applying the conclusions of law in its determination of the damages award. Specifically, appellant argues that for her to be put in the same position in which she would have been but for the trustees' breach, the trust must disgorge the full value of the additional assets and return that money to the income beneficiaries. We disagree.

An award for damages from a trustee is based on the equitable principle of making the person whole and to place the person in the position that she would have been in if the trustee had performed the required duty. *In re Comstock's Will*, 219 Minn. 325, 338-39, 17 N.W.2d 656, 664 (1945). The district court has discretion to grant equitable relief, and this court will not reverse a decision absent an abuse of that discretion. *Nadeau v. Cnty. of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

In the first appeal, we provided the district court with specific instructions to calculate damages. We stated that the amount of damages to which appellant is entitled is the aggregate of the income distributions, and that the remedy for the trustees' breach of their fiduciary duty is the amount of money necessary to place the beneficiary in the position she would have been in had the trustees performed the duty. *In re Silliman Trust*, 2010 WL 5071339 at *8.

On remand, the district court explained its determination of damages in order to place appellant in the position she would have been in had the trustees performed their duties properly: "In its November 17, 2009, Order, this Court found that, from 1997-2007, the Trust 'reported total income distributions of approximately $1,537,635.90 to the IRS, only made actual distributions in the amount of $1,000,447.00, and accumulated some $125,978.09 in non-cash patronage dividends.'" The district court found the difference between what was reported to the IRS ($1,537,635.90) and the amount that was actually paid in distributions ($1,000,447) to be the aggregate of the income distributions owed to the beneficiaries: $537,188.90. The district court then subtracted the equalization distribution of $123,127.20, for a total award of damages of $414,061.79.[1] The district court did not err in executing this court's mandate as to the aggregate of the income distributions. *See Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988) ("A [district] court's duty on remand is to execute the mandate of the remanding court strictly according to its terms.").

Appellant argues that the district court failed to make her whole because the award of $414,061.79 is only the net taxable income, which does not account for the profits

[1] By our calculation, this subtraction results in $414,061.70. But a de minimis technical error does not require a remand. *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985).

made as a result of the breach of fiduciary duty. Appellant contends that when the trustees invested in new acquisitions after 1997, the full value of those investments are part of the breach. And she argues that because the trust would not own those assets but for the breach, those assets must be disgorged from the trust to make appellant whole. While appellant cites generally to the Restatement (Third) of Trusts in support of her argument, she offers no applicable statute or dispositive case law. Furthermore, appellant's interpretation is contrary to this court's instruction to the district court and to the precedent provided by *Comstock*. She is only entitled to her share of the income distributions, which the district court determined to be $414,061.79. Because disgorgement of the acquired assets is not necessary to make appellant whole, we conclude that the district court did not abuse its discretion in its ruling.

**II.**

Appellant asserts that the district court erred by not imposing a constructive trust instead of an equitable lien. "Whether a constructive trust should be imposed is a question of fact for the district court that this court reviews for clear error." *Peterson v. Holiday Recreational Indus., Inc.*, 726 N.W.2d 499, 506 (Minn. App. 2007), *review denied* (Minn. Feb. 28, 2007).

"A constructive trust is a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest." *Wilcox v. Nelson*, 227 Minn. 545, 550, 35 N.W.2d 741, 744 (1949). "The elements of a cause of action to enforce a constructive trust are the existence of a fiduciary relation and the abuse by defendant of confidence and trust bestowed under it to plaintiff's harm." *Id.* A constructive trust "arises by operation of law without any reference to any actual or supposed intention of creating a trust." *Sieger v. Sieger*, 162 Minn. 322, 324, 202 N.W. 742, 743 (1925).

The district court is not bound by a formula if it finds that a constructive trust should be imposed, but "is free to effect justice to avoid unjust enrichment according to the equities." *Freundschuh v. Freundschuh*, 559 N.W.2d 706, 711 (Minn. App. 1997), *review denied* (Minn. Apr. 24, 1997). A constructive trust may be imposed when the evidence demonstrates that it would be morally wrong for the property holder to retain the property. *Spiess v. Schumm*, 448 N.W.2d 106, 108 (Minn. App. 1989). The party moving for the constructive trust must show by clear and convincing evidence "that the imposition of a constructive trust is justified to prevent unjust enrichment." *In re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983).

The district court here noted that the beneficiaries could not unanimously decide on a remedy and that, in the absence of a unanimous decision, the district court had to enforce a remedy that is most advantageous to all of the beneficiaries. While appellant advocated for a constructive trust, respondents, as trustees and beneficiaries, opposed it. The district court determined that "the remedy most advantageous to the income beneficiaries is an equitable lien on all property acquired with accumulated income in the amount of 'the aggregate of the income distributions the income beneficiaries were entitled to receive, and on which they already have paid taxes.'" The district court reasoned that "[alt]hough a constructive trust would permit the income beneficiaries to immediately reach all income and equity (if any) earned from accumulated income, the trustees have made profitable investments with accumulated income for the income beneficiaries," and concluded that "[p]ermitting the Trust to retain any equity realized from property acquired with accumulated income, will produce more income for the income beneficiaries in the future." The district court observed that an equitable lien is advantageous to the income beneficiaries because it provides them with annual income, which is consistent with the fundamental purpose of the trust. The district court further found that an equitable lien places the income beneficiaries "in at least the position that they would have been in had the Trust been administered properly."

Appellant meets the elements for a cause of action for a constructive trust—there was a fiduciary relationship, the trustees breached that duty, and it was to appellant's detriment. *See Wilcox*, 227 Minn. at 550, 35 N.W.2d at 744. But appellant fails to establish by clear and convincing evidence that a constructive trust is necessary to prevent unjust enrichment. While the district court did not analyze the issue within this framework, it did not find any basis for concern about unjust enrichment. *See In re Estate of Ericksen*, 337 N.W.2d at 674. The district court found that appellant and the trustees would benefit by retaining the acquired assets, and, more importantly, that appellant will be placed in the position that she would have occupied had the trust been administered properly. Because appellant fails to establish by clear and convincing evidence that the imposition of a constructive trust is necessary to prevent unjust enrichment, the district court did not clearly err by imposing an equitable lien.

**III.**

Appellant contends that the district court abused its discretion by denying her attorney fees and costs. We review a district court's award or denial of attorney fees under an abuse-of-discretion standard. *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 409 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001).

This court has applied the "American rule" of awarding attorney fees in cases involving trusts. *Id.* The American rule provides that it is a "fundamental principle of law deeply ingrained in our common law jurisprudence that each party bears his own attorney fees in the absence of a statutory or contractual exception." *Id.* (quoting *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000)). Here, the Silliman Trust does not provide any provision for attorney fees, and there are no applicable statutes.

Minnesota caselaw provides that a trustee may be entitled to reasonable attorney fees paid out of the trust in the context of a trustee defending the administration of the trust. *Id.*; *see also In re Atwood's Trust*, 227 Minn. 495, 502, 35 N.W.2d 736, 740 (1949) (allowing reasonable attorney fees, paid out of trust corpus, to parties for proceeding brought to interpret ambiguous trust provisions). But this court has noted that as of 2001, there were no Minnesota cases requiring a trustee, whose management of a trust has been challenged, to pay attorney fees incurred by a successful challenger. *Williams*, 631 N.W.2d at 409-10. And there have not been any since. *See In re Margolis Revocable Trust*, 765 N.W.2d 919, 928 (Minn. App. 2009).

Other jurisdictions have recognized an exception to the American rule when a trustee is found to have engaged in "gross or inexcusable" misconduct. *Williams*, 631 N.W.2d at 410. Misconduct that is "gross or inexcusable" includes self-dealing or failure to obtain independent appraisal of property or inform beneficiaries of its sale when property was the trust's only asset. *Id.* (quoting foreign jurisdictions). Appellant cites both *Williams* and *Margolis* for the proposition that "the significance of sending a signal to the Trustees regarding the seriousness of the matter to deter future misconduct makes this case appropriate for an award of [appellant]'s attorneys' fees and costs." But both cases stand for the opposite conclusion. We have not recognized an exception to the American rule because this court's role is not legislative or doctrinal. *Id.* at 410; *Margolis*, 765 N.W.2d at 928 (stating that it is not the role of this court to create a new rule that goes against the deeply ingrained common-law jurisprudence of our state, as such a task falls to the supreme court). Because Minnesota does not recognize the "gross or inexcusable" exception to the American rule, we conclude that the district court did not err in denying attorney fees to appellant.[2]

**IV.**

Appellant contends that the district court abused its discretion by not ordering that the trustees' attorney fees be disgorged. This court reviews the district court's award of attorney fees under an abuse-of-discretion standard. *Williams*, 631 N.W.2d at 409.

[2] Even if we were to recognize the "gross or inexcusable" exception, the district court made no findings of conduct that would rise to the level of gross or inexcusable misconduct.

The district court did not reach the merits of this argument because, in its November 17 order, it approved the trust accountings, which included payment for the trustees' attorney fees and costs. And neither party challenged this award in the first appeal. We nevertheless address the merits on this second appeal in the interests of justice. *See* Minn. R. Civ. App. P. 103.04 (providing that court may review issues in the interests of justice).

A trustee can collect attorney fees from a trust when:

> [1] the terms of the trust instrument were ambiguous and uncertain in meaning and that they had been construed at different times in different ways; [2] . . . litigation was necessary to resolve these ambiguities in meaning as a prerequisite to a determination of the present and future rights of all parties concerned; [3] . . . respondent[s] in [their] representative capacity [were] necessary and proper part[ies] to this litigation; [and 4] . . . all litigation in which respondent[s] participated and all the legal services performed and expenses incurred in connection therewith were necessary and proper and were of benefit to all the beneficiaries and to the trustees . . . .

*Atwood's Trust*, 227 Minn. at 498-99, 35 N.W.2d at 739.

In this case, the terms of the Silliman Trust have been construed by the trustees in two different ways. Before 1997, all of the net income was distributed annually. But from 1997 to 2007, as much as 50% of the net income was withheld and reinvested in the corpus. The purpose of this litigation was to resolve the ambiguity of how the trustees should distribute the income. Respondents are the current trustees and the proper parties to the litigation, the legal services were necessary and proper, and the litigation benefited all of the beneficiaries and clarified the duties of the trustees. Because the requirements set out in *Atwood's Trust* have been satisfied, the trustees' attorney fees were properly paid. And the district court acted within its discretion by denying appellant's motion that the trustees' attorney fees be disgorged.

**Affirmed.**