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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0911**

In re: Pearl F. Dynan Living Trust Under Agreement dated November 30, 1992,  
Eric C. Dammeyer, Trustee.

**Filed April 21, 2009  
Reversed and remanded  
Stoneburner, Judge**

Hennepin County District Court  
File No. 27C098000140

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Wayzata Home, Inc.)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and  
Collins, Judge.\*

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Discovery of contamination on property owned by a trust resulted in the delay of  
distribution of a bequest to appellant and created a question about the appropriate  
valuation date for the bequest. Appellant challenges the district court's order determining

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

the valuation date of March 1999, which is based, in part, on the district court's assumption that contamination was substantially remediated or no longer affected the value as of that date. Appellant argues that (1) the evidence does not support the district court's finding about the status of remediation in March 1999; (2) the district court erroneously substituted its discretion for the discretion of the trustee who valued the bequest as of October 2003; and (3) as a matter of law, appellant's distribution is a "fractional share" that is to be valued on the actual date of distribution. Because the district court's finding about the status of remediation on March 1999 is clearly erroneous and the district court failed to address the trustee's exercise of discretion, we reverse and remand for further proceedings.

## **FACTS**

In 1992, Pearl F. Dynan (settlor) transferred substantially all of her assets to a trust. The transfer included all shares of stock in a laundry business, Wayzata Home, Inc. (the laundry), that settlor had operated for over 30 years and the land on which the laundry is located.

The trust provided that, on settlor's death, the laundry shares were to be distributed equally to four of settlor's children and that appellant Antoinette Moore, also settlor's child, was to receive "a sum of cash equal to one-fourth (1/4th) of the fair market value of all stock in [the laundry], outstanding and issued of record on the date of [settlor's] death." The assets of the laundry consist of the business and a parcel of real estate that is adjacent to the land on which the laundry is located. Settlor died on October

7, 1997. Her will devised the residue of her estate to the trust, and the trust is the dispositive instrument in this litigation.

Before trust assets were distributed, it was discovered that the laundry had contaminated the land on which it is located. The adjacent land, owned by the laundry, was not contaminated. The Minnesota Pollution Control Agency (MPCA) ordered the trust to remediate the contamination, but the laundry was also potentially responsible for remediation, so the order affected the value of the laundry shares.

Moore's siblings refused to take immediate possession of the shares devised to them due to the effect of the looming remediation costs on the value of the asset. And Moore's siblings appear to have agreed that it would not be fair to base Moore's distribution on the contamination-depressed value of the laundry shares. Moore's siblings accepted distribution of the shares in March 1999 for reasons not explained in the record, but there was not sufficient cash in the trust at that time to fund Moore's bequest because the trust had to initially fund remediation.

The trustee entered into an oral agreement with Moore to delay her distribution so that the trust could use its cash to fund remediation. The trustee, who anticipated eventual reimbursement from a special fund for remediation costs, agreed to base Moore's eventual distribution on the "post-remediation" value of the laundry shares. There is a dispute about who was aware of this agreement, but a letter dated January 12, 1999, from Moore's attorney to Moore references a conversation that Moore's attorney had with attorneys for the laundry, proposing that Moore's "25% would be valued after the clean-up without any reduction in value by virtue of the environmental problems."

In 2000, the trust was partially reimbursed for remediation expenses, but the MPCA did not provide a letter stating that remediation was complete until October 2003.<sup>1</sup> Moore and the trustee agreed that Moore's distribution would be based on the value of the stock as of October 2003. Two share-holding siblings objected, arguing that, under the language of the trust, Moore's distribution must be based on the value of the shares on the date of the settlor's death, October 7, 1997.

Because the siblings could not agree on the date to be used for valuation of Moore's distribution and because the trust still lacked sufficient cash, the trustee petitioned the probate court for an order authorizing the sale of a trust asset and for a determination of the value of the specific devise to Moore. The parties subsequently agreed that the laundry would buy the property on which the laundry is located and the issue of the valuation date for Moore's bequest would be submitted to the district court on "summary judgment." The parties agreed that, based on the existing record, the district court would first determine the date on which the shares should be valued and, if necessary, would then determine the actual value of the shares and Moore's bequest.

The district court concluded that, to give effect to the settlor's intent that the involved siblings be treated equally, Moore's devise should be based on the value of the stock at the time her siblings accepted their shares in the laundry. The district court issued an order determining that Moore's devise should be valued as of March 1999 plus pre-judgment interest. The decision is based, at least in part, on the district court's

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<sup>1</sup> The MPCA letter is not in the record on appeal.

“assumption” that as of March 1999, “the remediation was either completed or at least no longer posed a significant liability to [the laundry].”

The parties then stipulated that the value of the stock in March 1999 was \$400,000, making the value of Moore’s gift \$100,000 plus prejudgment interest at the rate of 4.33%. The stipulation preserved Moore’s right to appeal the order determining the valuation date. Based on the stipulation, the district court ordered the trustee to pay Moore \$137,887.50 (\$100,000 principal + \$37,887.50 pre-judgment interest) in full satisfaction of her devise under the trust. This appeal followed.

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

Because the parties have treated this matter procedurally as having been tried to the court on a stipulated record rather than as a summary-judgment proceeding, we will apply the standard of review appropriate to such a trial.

### **I. Valuation date**

Appellate courts review a district court’s findings of fact concerning wills and trusts under a clearly erroneous standard and review conclusions of law de novo. *In re Trust Created Under Agreement with Lane*, 660 N.W.2d 421, 425–26 (Minn. App. 2003). When reviewing a district court’s findings of fact, this court views the record in the light most favorable to the judgment of the district court. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). “Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted).

Moore argues that the district court's "assumption" that remediation was substantially complete in March 1999 or was no longer a significant liability for the laundry is not supported by evidence in the record. We agree.

The record reveals that it was not until March 11, 1999, that the trustee was authorized by the district court to undertake environmental remediation which, at that time, was estimated to cost \$250,000 and take several years to complete. The laundry remained potentially liable for remediation costs. The district court's finding that remediation was substantially complete as of March 1999 or that remediation no longer posed a significant liability to the laundry as of that date is clearly erroneous.

Although there is evidence in the record that the trust received some reimbursement for remediation in 2000, there is no evidence in the record of when the trust was fully reimbursed, when remediation was substantially complete, or when the trust last made a disbursement of trust funds for remediation. Moore argues that the trustee's affidavit referencing the MPCA's October 2003 letter establishes the date when remediation was complete and, because reference to that letter is the only evidence in the record of the date when the MPCA considered that remediation was complete, October 2003 must be the date of the valuation of the stock under her agreement with the trustee.<sup>2</sup>

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<sup>2</sup> Moore cites pre-1988 case law referencing Minn. R. Civ. P. 52.01 for the proposition that on appeal, review of documentary evidence is *de novo*. The rule was amended after 1988 to provide that "[f]indings of fact, *whether based on oral or documentary evidence*, shall not be set aside, unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P.

Respondent siblings argue that the district court's determination of March 1999 as the valuation date was based solely on the district court's determination that the settlor's intent to treat these five siblings equally is best achieved by valuing Moore's bequest as of the date of the distribution of the shares. The district court reasoned that it was the settlor's intent that only the four children who received shares would be subject to increases or decreases in the value of the shares after distribution and that the settlor did not intend for Moore's bequest to be affected by any post-distribution fluctuations in the value of the shares.

The flaw in the district court's finding that a March 1999 valuation date would result in the siblings being treated equally is that Moore did not receive her distribution on that date and was denied the opportunity to enjoy whatever increases or decreases in the value might have resulted from her use of her bequest from March 1999. An award of prejudgment interest at 4.33% does not make the gifts equal.<sup>3</sup>

Furthermore, the remediation date was plainly significant to the district court's determination of the valuation date. The district court stated:

The four shareholders declined to accept the stock while the contamination problem remained and the problem was resolved by expenditure of significant trust funds. The four shareholders obviously benefited from the stock's appreciation resulting from the remediation. Settlor's intent

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52.01 (1989). We conclude that the pre-1988 case law concerning de novo review of documentary evidence on appeal has been superseded by the current rule.

<sup>3</sup> The substantial appreciation in the laundry's shares between March 1999 and October 2003 was primarily due to the increased value of the adjacent lot and does not reflect management decisions of the shareholders or remediation efforts. Had Moore been able to invest her bequest in March 1999 she might have achieved a similar increase during that period.

to treat Moore equally cannot be satisfied by valuing her gift as of Settlor's date of death, when the four shareholders would not accept their stock until its value had been enhanced by the remediation.

We conclude that because the valuation date determined by the district court is not supported by the trust language or the record, the matter must be reversed and remanded for additional proceedings to determine a valuation date for Moore's shares that gives her the same benefit resulting from remediation that her siblings enjoyed (through use of Moore's funds) and does not penalize Moore for having allowed the trust to use her funds for remediation. The district court has the discretion to reopen the record on this issue.

## **II. Discretion of trustee**

Moore argues that the broad discretion given to the trustee shows the settlor's intent that the trustee should exercise his judgment in matters such as this one and that the district court should not substitute its judgment for that of the trustee absent a finding that the trustee has abused that broad discretion. Moore is correct that courts will not interfere with a trustee's decision so long as the trustee acts "in good faith, from proper motives, and within the bounds of reasonable judgment." *United States v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994). *See also In re Campbell's Trusts*, 258 N.W.2d 856, 866 (Minn. 1977) (stating that the supreme court will not substitute its discretion for the discretion of the trustee except when necessary to prevent an abuse of discretion); Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.").

Here, the district court did not analyze whether the trustee had discretion to select the stock valuation date and, if so, whether that discretion was abused. The scope of the trustee’s discretion can be determined by this court on de novo review of the interpretation of the trust instrument. *See In re Wyman*, 308 N.W.2d 311, 315 (Minn. 1981) (determining that trust provisions should not be read in isolation, but within the context of the trust instrument and effect should be given to each provision in the instrument whenever possible). But whether the trustee abused his discretion by promising Moore a post-remediation valuation date is a finding of fact that must initially be addressed by the district court.

The trust instrument gives the trustees administrative powers “to be exercised as they would be exercised by an ordinarily prudent person in managing the person’s own property”:

To retain any assets . . . for as long as they deem advisable . . . .

To sell, exchange, mortgage, lease, convey, encumber, pledge or otherwise distribute any real, personal or other property for any period, upon any terms and conditions, to any person, entity, beneficiary . . . .

To borrow money for any purpose they deem advisable from any source . . . .

To divide the trust, to determine values, to distribute like or unlike assets to different beneficiaries or trusts and to make distributions in cash or in kind, in divided or undivided interests;

. . . .

. . . to perform all other acts necessary or advisable to administer the trust. . . .

We conclude that the powers given to the trustee are sufficiently broad to allow the trustee to have entered into a working agreement with Moore that disbursement of her gift would be deferred to a post-remediation date. But we do not conclude that the trustee could *arbitrarily* determine the post-remediation date.

“The trustee may distribute property and money in divided or undivided interests and adjust resulting differences in valuation.” Minn. Stat. § 501B.81, subd. 26 (2008). “[I]mpartiality [toward beneficiaries] governs exercise of trustees’ powers . . . .” *In re Trust known as Great Northern Iron Ore Properties*, 263 N.W.2d 610, 621 (Minn. 1978). The trustee may ascertain value of an estate’s assets for distribution “in any reasonable way.” Minn. Stat. § 524.3-906(a)(3) (2008). On remand, the district court must address the trustee’s discretion and determine if the trustee abused his discretion in selecting October 2003 as the valuation date.

### **III. Moore’s gift is a specific pecuniary bequest.**

Moore argues that her distribution is a “fractional bequest” that is required by law to be valued as of the date of distribution. The district court did not reach this issue, but it was briefed by both parties. And because the issue calls for a legal, rather than a factual determination, in the interest of justice and judicial economy, we choose to accept review of this issue. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 874 n.6 (Minn. 2000) (noting that appellate courts may address issues not otherwise ripe for appeal in the interest of justice and judicial economy).

No Minnesota cases define “fractional bequests,” and Moore relies on a California case that describes a fractional bequest as a bequest of a fraction of each asset that has the

advantage of automatically participating in gains, and the disadvantage of participating in losses, from the date of death to the date of distribution. *Estate of Libeu v. Libeu*, 205 Cal. App. 3d 1436, 1447 (Cal. App. 1988) (citation omitted). We conclude that Moore's bequest is more properly denominated a specific pecuniary bequest, the amount of which was to be determined using a defined formula.

**Reversed and remanded.**