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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0147**

In the Matter of the Anthony J. Englund, Sr. Trust Agreement  
dated October 19, 1990

**Filed November 13, 2012  
Affirmed in part, reversed in part, and remanded  
Connolly, Judge**

Ramsey County District Court  
File No. 62-TR-CV-08-14

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Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and  
Ross, Judge.

**UNPUBLISHED OPINION**

**CONNOLLY, Judge**

In this probate matter arising out of a family trust to which appellant was a co-trustee and also a beneficiary, appellant challenges several district court orders denying and granting expenses and fees requested by appellant and respondents. Appellant

asserts that the district court erred by: (1) finding that he had resigned his trustee position in 2007, or, alternatively, had acted in bad faith and thus was not entitled to his requested trustee and attorney fees; (2) allowing expenses of the successor independent trustee and attorney fees incurred by other beneficiaries to be paid out of his share of the trust; and (3) finding that there was no evidence of the value of property left in the trustor's home and disposed of by his co-trustee and thus declining to require his co-trustee to reimburse the trust for that property. Because the district court properly determined that appellant was not entitled to attorney fees and that there was no evidence as to the value of the property removed from the trustor's home, we affirm in part. But because the district court clearly erred in finding that appellant had resigned as trustee in 2007 and did not make a finding that the requested trustee fees were related to his bad faith, we reverse the district court's denial of all of appellant's requested trustee fees and remand for the district court to determine how much appellant should be reimbursed for his work as a trustee.

## **FACTS**

Anthony Englund Sr. executed the Anthony Englund Sr. Trust Agreement on October 19, 1990. The beneficiaries of the trust are his six children: appellant Gary Englund and respondents Connie Swanson, Anthony Englund Jr., Terry Englund, Dan Englund, and Lynn Bauer. When Anthony Englund Sr. died on October 11, 2007, appellant and respondent Connie Swanson became co-trustees of the trust.

On October 21, 2007, the family had a meeting with all the beneficiaries present. The parties dispute what occurred at this meeting. Appellant argues that, at the meeting,

he “suggested that either he or Connie Swanson ‘take the lead’ as trustee.” Respondents argue that appellant actually resigned as trustee at this meeting. When asked whether she remembered if appellant had “resigned as a trustee or stepped down or if he was suggesting you take the lead,” Swanson testified that she “honestly could not say.” Appellant testified that he never resigned.

Appellant argues, and documentation demonstrates, that after the family meeting, he continued to act as a trustee, co-signing documents, opening bank accounts, transferring a vehicle title, and signing trust checks to pay bills. Respondents argue that, after the family meeting, appellant disrupted Swanson’s efforts to administer the trust.

Concerned that Swanson may be misusing trust assets, appellant moved the trust funds from U.S. Bank to Chase Bank, which had an account that required signatures of both co-trustees for all checks written on the trust account. He did so without the prior knowledge of Swanson or the other beneficiaries, but later informed Swanson that the transfer had occurred and kept both of their names as signatories on the account. In February 2008, still concerned about the trust’s management, appellant decided to move most of the funds into an out-of-state savings account, which was a joint account held by appellant and his wife. Appellant did so without the permission or knowledge of Swanson and the other beneficiaries.

In response to appellant’s actions, respondents filed a petition to remove appellant as trustee. A stipulated amended order was entered by the district court on April 14, 2009, finding that appellant and Connie Swanson agreed to voluntarily resign as co-trustees in favor of an independent trustee, Fiduciary Foundation LLC and ordering the

co-trustees to file a final account. Each co-trustee filed a final account on May 15, 2009. Appellant also filed an inventory, which included his valuation of property from the trustor's home not sold at a garage sale but removed from the home by Swanson. Appellant valued this property at \$6,180. Swanson did not file an inventory of this property. Both final accountings were objected to by the responding co-trustee.

A court trial on the final accountings was held in January 2011. The district court issued two separate orders, one related to the findings on the accountings and the other to requests for attorney fees. The first order directed the independent successor trustee to disburse funds according to the court's order and shifted the independent successor trustee's attorney fees and expenses of \$31,469.81 to appellant's share of the trust. The court also denied appellant's request for \$20,081.25 in trustee fees.<sup>1</sup> The court found that no evidence existed as to the value of the personal property remaining in the house after a five-day garage sale.

The second order dealt with motions for attorney fees. The district court found that appellant had resigned as co-trustee at the family meeting on October 21, 2007, and that, even if he had not, he had acted in bad faith by moving the trust funds into a secret account. Therefore, the district court found that appellant was not entitled to trustee fees or attorney fees and costs from the trust incurred in disputing his removal as trustee or for filing and completing an inventory and final accounting because they were actions that could not be considered proper or necessary to the administration of the trust. But the

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<sup>1</sup> Appellant requested reimbursement at a rate of \$25 per hour for 803.25 hours that he claimed to have worked on the trust between October 21, 2007 and January 13, 2009.

court determined that, as a beneficiary of the trust, appellant's attorney fees and expenses of \$19,094.69 incurred in objecting to Swanson's final accounting were reasonable and should be paid by the trust. The district court concluded that all of the trust beneficiaries should have their attorney fees and expenses related to disputing the final accounting paid from the trust.

Appellant moved for amended findings. The district court found that the personal property not sold at the garage sale had minimal, if any, value. The court also ordered that respondents' attorney fees and costs in responding to appellant's post-trial motion be paid from appellant's share of the trust. This appeal follows.

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

"Findings 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 [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. "It is not the province of this court to reconcile conflicting evidence." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). In contrast, "[n]o deference is given to a lower court on questions of law." *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

### **I. Fees**

Appellant argues that the district court abused its discretion in finding that appellant was not entitled to his requested trustee fees. The district court found that appellant had resigned as co-trustee on October 21, 2007 and that, even if he had not, he

acted in bad faith, and thus was not entitled to trustee or attorney fees from the trust incurred after October 2007.

**a. Resignation as Co-Trustee**

First, appellant argues that the district court's finding that he resigned as co-trustee was clearly erroneous. We agree. "Factfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *N. States Power Co. v. Lyon Food Prods.*, 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). On appeal, "we will not disturb the trial court's findings of fact . . . unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* Appellant's actions after the October 21 meeting demonstrate that appellant continued to act as a co-trustee by signing trust documents, including checks, stock certificates, and a vehicle title. Appellant acted as co-trustee until both he and Swanson resigned in 2009. There is no evidence in the record, other than a bare assertion by respondents, that appellant resigned as co-trustee in 2007. And these assertions are contradicted by respondents' stipulation that appellant was resigning in 2009. Moreover, when asked whether she remembered if appellant resigned or merely suggested that she take the lead in managing the trust, Swanson testified that she "honestly could not say." Because the district court's finding that appellant had resigned as co-trustee in October 2007 was clearly erroneous, the district court abused its discretion in holding that appellant could not recover any trustee or attorney fees due to his resignation.

**b. Bad Faith**

Alternatively, the district court held that even if appellant had not resigned as trustee in 2007, he acted in bad faith by moving the trust funds to a secret account and thus was not entitled to trustee or attorney fees. Appellant argues that the district court abused its discretion in finding that he acted in bad faith. Whether bad faith exists is a finding of fact for the district court. *Gendreau v. Foremost Ins. Co.*, 423 N.W.2d 712, 714 (Minn. App. 1988). Findings of fact will only be reversed if clearly erroneous. Minn. R. Civ. P. 52.01.

The district court found that appellant closed the trust account

at U.S. Bank in Minnesota and move[d] the money it contained to a new trust account at Chase Bank in Arizona without Connie Swanson or any of the other beneficiaries' knowledge; he then removed all funds in the Trust account at Chase Bank and placed them in an account in his own name, held jointly with his wife. [Appellant] then refused to disclose the location of the Trust funds.

This finding of the district court is not clearly erroneous, and the district court did not abuse its discretion in holding that appellant had acted in bad faith.

Because the district court held that appellant acted in bad faith, it denied his request for trustee fees. Appellant argues that this was error. A trustee is allowed reasonable trustee fees for services that benefit the trust. *In re Trusts of Dwan*, 371 N.W.2d 641, 642 (Minn. App. 1985), *review denied* (Minn. Oct. 18, 1985). The determination of whether to award a trustee fees for his services lies within the discretion of the district court. *Matter of Boss*, 487 N.W.2d 256, 261 (Minn. App. 1992), *review denied* (Minn. Aug. 11, 1992). Where the district court makes a finding of bad faith on

the part of a trustee, it has the discretion to deny trustee fees. *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 408 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001). But “[b]efore reducing or denying trustee fees, a district court must find that the fees to be reduced or denied relate to the trustee’s failure to render services or to render services properly.” *Id.* at 409.

Here, the district court denied all of appellant’s requested trustee fees from October 21, 2007 through early 2009, when the successor trustee was appointed. The district court also specifically denied appellant’s request for trustee fees related to his court-ordered “filing and completion of an Inventory and Final Account” because the district court found that, due to appellant’s resignation as trustee, these actions could not be considered “proper or necessary to the administration of the Trust.” The denial of all trustee fees and expenses was error because, as discussed above, appellant did not resign as co-trustee in October 2007. Moreover, the district court made no finding that all of appellant’s requested trustee fees related to his bad faith or to any failure to render service to the trust. *See id.* Therefore, we reverse the district court’s decision to deny all of appellant’s trustee fees and remand to the district court to determine how much appellant should be reimbursed for his work as a trustee.

On remand, we caution the district court that under *Williams*, if it decides to refuse or deny appellant’s requested trustee fees based on the finding of bad faith, it must make a finding that the fees to be reduced or denied relate to appellant’s failure to render services or to render services properly. *Id.* Specifically, in exercising its discretion, the district court must consider whether the trustee’s breach of duty was related to the

management of the whole trust or related only to a part of the trust property, and then refuse or deny fees accordingly. *See id.* Once the district court has determined what portion of the fees relate to appellant's bad faith and can be denied, the district court can then consider whether the remaining fees claimed by appellant are reasonable. We note that appellant's requested \$20,081.25 in trustee fees for more than 800 hours of service is much higher than the \$3,657 in trustee fees requested and awarded to respondent Swanson. The district court should carefully consider whether the amount of time and the hourly rate claimed is fully justified.

Appellant also challenges the district court's denial of appellant's request for attorney fees based on its finding that appellant acted in bad faith. "A trustee is entitled to reasonable attorneys' fees, to be paid out of the trust estate, incurred in good faith in defending his administration of the trust." *In re Freeman's Trust*, 247 Minn. 50, 56, 75 N.W.2d 906, 910 (1956). But "[w]here a trustee has acted in bad faith or has been guilty of fraud or inexcusable neglect that has caused loss to the estate he may be denied attorneys' fees." *Id.* at 56, 75 N.W.2d at 911. "We will not reverse a district court's denial of attorney fees absent an abuse of discretion." *In re Margolis Revocable Trust*, 765 N.W.2d 919, 928 (Minn. App. 2009).

The district court held that appellant could not be reimbursed for attorney fees "to address the other beneficiaries' petition to formally remove him as trustee." Appellant hired counsel in order to respond to respondents' petition to formally remove him as trustee because of appellant's bad faith actions in secreting the trust fund accounts. The

district court did not abuse its discretion in making this determination and properly denied appellant's requested attorney fees.

## **II. Shifting of Fees to Appellant's Share of the Trust**

The district court held that the successor trustee's \$31,469.81 in attorney fees and expenses should be paid from appellant's share of the trust "[b]ecause the actions of [appellant] were the sole reason for the appointment of an independent trustee." Additionally, the district court ordered that the respondents' attorney fees "for defending [appellant's] post-trial Motion shall be paid from [appellant's] share of the [trust]." Appellant argues that the district court abused its discretion by shifting these attorney fees and costs to appellant's share of the trust. We agree.

"A reviewing court will not reverse a district court's award or denial of attorney fees absent an abuse of discretion." *Williams*, 631 N.W.2d at 409. Minnesota follows the "American Rule" concerning the award of attorney fees, recognizing 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 district court did not identify a statutory or contractual provision on which its award of attorney fees to respondent or the independent successor trustee was based. While Minnesota caselaw provides that "a trustee may be entitled to reasonable attorney fees paid out of the trust[,] . . . there is no Minnesota case requiring a trustee whose management of a trust has been challenged to pay attorney fees incurred by the successful challenger." *Id.* at 409-10. *Williams* noted that the Minnesota Supreme Court

has left open the question of “whether a finding of bad faith or improper motive would justify [an award of attorney fees against another trustee].” *Id.* at 410. This court went on to conclude that, “[i]f an exception to the American rule is to be adopted in Minnesota for trust cases, a clear expression of that change should be made by the supreme court or the legislature; it is not our role to do so.” *Id.* Because there was no statutory or contractual authority to support this award of attorney fees, the district court abused its discretion by shifting these fees to appellant’s share of the trust.

### **III. Value of Unsold Property**

Finally, appellant argues that the district court abused its discretion in finding that the value of the trustor’s property removed from the home after a garage sale had little or no value and declining to require his co-trustee to reimburse the trust for that property. It is undisputed that the trust beneficiaries had a garage sale to sell the trustor’s personal property and clear out the house and that a family friend sold or disposed of some of the remaining property in the home. It is also undisputed that what property remained was disposed of by Swanson. The issue is whether the remaining, disposed-of-property had any value. Appellant provided an inventory to the court in which he estimated the value of that property at \$6,180. Swanson testified that the property was old, in poor condition, and had little value. Relying on Swanson’s testimony, in its findings of fact, the district court held that “[n]o evidence was presented with regard to the value of the Decedent’s personal property not sold at the garage sale; therefore, this property shall be awarded to whoever possesses said property at this time.”

The district court considered appellant's inventory, but found the testimony of respondent Swanson more credible. Because the district court's finding is reasonably supported by evidence in the record and is not clearly erroneous, the district court did not abuse its discretion in finding that the property had little to no value and declining to require appellant's co-trustee to reimburse the trust. *See Fletcher*, 589 N.W.2d at 101 ("On appeal, a trial court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous.")

Because appellant's attorney fees in responding to the petition to remove him as trustee were necessitated by appellant's own bad-faith actions, we affirm the district court's denial of appellant's requested attorney fees. We also affirm the district court's decision not to require appellant's co-trustee to reimburse the trust for property removed from the trustor's home because the finding that the property had little to no value was supported by the record. But because there was no statutory or contractual authority to support the district court's order shifting attorney fees, we reverse the district court's award of attorney fees to respondent and the independent successor trustee from appellant's share of the trust. And finally, because the district court clearly erred in finding that appellant resigned as co-trustee and did not make any findings regarding which of appellant's requested trustee fees related to appellant's bad faith, we reverse the district court's denial of all of appellant's trustee fees and remand to the district court to determine how much appellant should be reimbursed for his work as a trustee.

**Affirmed in part, reversed in part, and remanded.**