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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-507 / 92-1481

IN THE MATTER OF THE TRUST UNDER THE LAST WILL AND TESTAMENT OF CARRIE W. BERDO, Deceased,

JOHN W. BERDO, Trustee,

Petitioner-Appellant,

vs.

JANE BERDO CUSTER, and THE CHILDREN OF JANE BERDO CUSTER,

Respondents-Appellees,

And
THE CHILDREN OF JOHN W. BERDO,

Respondents-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Washington County, James D. Jenkins, Judge.

The petitioner trustee of an estate appeals a judgment of the district court in a declaratory judgment action removing the trustee and his attorney and naming a new trustee. **REVERSED, MODIFIED AND REMANDED.**

Kenneth L. Keith and Lloyd E. Keith of Keith, Orsborn, Bauerle, Milani & Neary, Ottumwa, for appellant.

Robert Day of Day & Meeker, Washington, for appellee Jane Berdo Custer.

Heard by Oxberger, C.J., Sackett and Habhab, JJ. Schlegel, J., takes no part.

SACKETT, J.

John W. Berdo, named as trustee under the will of Carrie W. Berdo, appeals an order that, among other things, removed him as trustee and removed attorney Kenneth Keith as attorney for the trust. We reverse, modify, and remand.

Carrie died in 1974 owning substantial farmland. Carrie's will created a trust which, as directed by her will, took title to the farmland. Carrie's son, Charles Berdo, was named as a trustee in Carrie's will. Charles qualified as trustee and served in that capacity until his death in 1989. John Berdo, Carrie's grandson, was named under Carrie's will to serve as trustee after the death of Charles. John and his sister, Jane D. Berdo Custer, were to receive any distributions made under the trust after the death of Charles. The children of John and Jane have interests on the death of their parents.

John was appointed successor trustee on June 16, 1989. At the time John was appointed successor trustee, he was a tenant farmer on a 645 acre tract owned by the trust. John had been a tenant on the land during Carrie's lifetime and Charles, as trustee of Carrie's trust, leased John the land. The written lease John had with Charles as trustee does not expire until 1995. John's position as tenant on the land is a primary reason for the problems that have surfaced.

After his appointment as trustee, John filed his first report as trustee in September 1990. Jane objected to the

report. The court ordered Kenneth Keith be appointed as attorney for the trustee because the attorney who drafted Carrie's will and was representing the trust would be called as a witness in the proceedings.

A report for 1990 was also filed. A hearing was held on December 5, 1991. Following the hearing, an order was entered finding the trustee had abused his broad discretion and directing a more detailed accounting for the years 1989 and 1990 be filed. Amended reports were then filed. Jane objected to the reports as amended. A review of the reports and objections reveal John and Jane interpreted the trust and John's position as trustee differently.

In February 1992, John, as trustee represented by attorney Keith, filed an application for declaratory judgment seeking direction from the court to interpret the trust established under Carrie's will and interpret what John could and could not do in administrating the trust. The application asked the district court to interpret the trust provisions of Carrie's will, the status of leases Charles entered into as trustee and give directions as to John's duties as trustee. Jane resisted the application. An attorney was appointed for the children of John and Jane. It was later determined John's and Jane's children had conflicting interests and separate attorneys were appointed for each family.

Then John filed a report for 1991. Jane objected to this report.

A hearing was held on John's application for declaratory judgment. On August 31, 1992, the district court filed what it captioned, "Preliminary Findings of Fact, Conclusions of Law, and Order Setting Further Hearing". The court did not address the questions raised in the petition for declaratory judgment. The court found to do so would not terminate the controversy.

The district court, without addressing the questions John posed in the declaratory judgment action of whether he still operated the 645 acre farm under the written lease he made with the trust prior to Charles's death, found John had engaged in self-dealing by renting the 645 acre farm, determining the rent for the farm, renting the farm on favorable terms to himself, and making capital improvements with income to benefit himself and his children.

The court found the interests of the children of Jane and John remote and similar to their parents and set fees to be paid by the trust for the children's attorneys at $500 each. The court found attorney Keith represented John, not the trust, and the trial court rescinded an earlier order appointing Keith attorney for the trust. John was ordered to repay the trust any sums the trust had paid Keith. The court then temporarily removed John as trustee and set a hearing for September 10 to consider John's permanent removal.

John appealed from the August 31, 1992 order on September 8, 1992. John then contended the appeal divested

the district court of jurisdiction to hold the September 10, 1992 hearing.

The district court disagreed with John's argument the September 8 notice of appeal divested it of jurisdiction and held the September 10, 1992 hearing. The court, in open court, found the record to show the petition for declaratory relief and the annual reports for the years 1989, 1990, and 1991 came before the court and were taken under advisement and on August 31, 1992, the court had filed preliminary findings of facts and conclusions of law which set the September 10 hearing and the court, on its own motion, had directed John to appear and show cause why he should not be removed as trustee. The court found John had appealed from its August 31 findings and conclusions prior to the September 10 hearing. John objected to the issue of his removal being considered contending it had not been raised and had been addressed in his favor earlier.

On September 14, 1992, the district court entered an order removing John as trustee permanently and naming the First Star Bank of Cedar Rapids trustee.[1] The bank was directed to recover Keith's attorney fees from John. The court further directed the trustee to investigate John's self-dealing and determine what damage John had done and what unauthorized improvements he had made. The trust was

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1. The Merchant's National Bank of Cedar Rapids appointed as successor trustee by Carrie is now the First Star Bank.

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then authorized to bring an action against John to enforce its decision and collect money from John and to ask for punitive damages if they deemed the punitive damages were warranted.

John raises a number of issues on appeal. He contends (1) the court did not approach the issues in a judicious manner and demonstrated bias toward John as against Jane; (2) the court erred in failing to rule on the declaratory judgment action and in failing to approve the 1989, 1990, and 1991 reports; (3) the court did not consider the provisions of the will that created the trust; (4) the court should have considered John's position with Carrie and the prior trustee; (5) the court should not have removed John as trustee; (6) the court should not have directed the successor trustee to investigate and commence suit against John without application; and (7) the court should not have rescinded the order appointing Keith attorney and ordering John to pay his fees.

This is a proceeding in probate and was tried as a proceeding in equity. See Iowa Code § 633.33. We review de novo. In re Willcockson, 368 N.W.2d 198, 201 (Iowa App. 1985). Where an action seeking a declaratory judgment was tried in equity at the trial court level it will be reviewed de novo in this court. See Citizens Sav. Bank v. Sac City State Bank, 315 N.W.2d 20, 24 (Iowa 1982).

The first question we address is whether the trial court was correct in temporarily removing John as trustee

and Keith as attorney for the trust. John contends the trial court was not because the issue was not before it.

An action for removal of a fiduciary is an equitable proceeding and our review is de novo. In re Estate of Fisher, 176 N.W.2d 801, 804 (Iowa 1970); In re Estate of Heller, 401 N.W.2d 602, 608 (Iowa App. 1986). Iowa courts have the authority to remove and replace trustees when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries. Schildberg v. Schildberg, 461 N.W.2d 186, 191 (Iowa 1990); see also Harvey v. Leonard, 268 N.W.2d 504, 516 (Iowa 1978).

The procedure for removing a fiduciary is set forth in Iowa Code section 633.65 (1991), which is relevant to the issues here and provides:

> When any fiduciary . . . has mismanaged the estate, failed to perform any duty imposed by law, or by any lawful order of court, . . . then the court may remove the fiduciary. The court may upon its own motion, . . . order the fiduciary to appear and show cause why the fiduciary should not be removed.

Removal of a fiduciary should be done in accordance with statutory provisions for removal. See Haddick v. District Court of Polk County, 160 Iowa 487, 500, 141 N.W. 925, 930 (1913). To secure removal the statutory direction must be followed. Heller, 401 N.W.2d at 609. The court may not remove a fiduciary on grounds that the interest of the estate requires it, without complying with statutory procedure. See In re Estate of Quinn, 243 Iowa 1266, 1270-71, 55 N.W.2d 172, 174 (1952).

The trial court should not have removed the trustee and the attorney in its August 31 order. The trustee and his attorney had not been given an opportunity to appear and show cause why they should not be removed. The trial court abused its discretion in ordering the removal without complying with the statutory directives. We modify the August 31 order to remove that portion of the order that temporarily removed the trustee and the attorney.

The next question then is did the trial court properly remove John and his attorney in the September 10 hearing. The trial court notified the trustee and his attorney it was considering removal and they had the opportunity to show cause why they should not be removed.

John claims the trial court was without jurisdiction to hold the September 10 hearing because he had, on September 8, appealed the adverse ruling in his application for declaratory judgment.

The general rule is the trial court loses jurisdiction over the merits of a controversy when an appeal is perfected. See In re B.L., 470 N.W.2d 343, 347 (Iowa 1991); Hulsing v. Iowa Nat'l Mut. Ins. Co., 329 N.W.2d 5, 7 (Iowa 1983); In re Scheib Trust, 457 N.W.2d 4, 10 (Iowa App. 1990). John appealed the trial court's refusal to address the questions he raised in the application for declaratory judgment. The issues raised in the declaratory judgment action were germane to the issues before the court in the permanent removal hearing. The trial court,

therefore, was without jurisdiction to enter the September 10 order permanently removing John as trustee and attorney Keith as attorney for the trust. Having found the trial court was without jurisdiction to enter the September 10 order, we vacate that order in its entirety.

John next contends the trial court should have addressed the questions raised in the declaratory judgment action. The trial court appeared to have relied on Iowa Rule of Civil Procedure 265, which provides, "[T]he court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding", in refusing to address the issues raised in the petition for declaratory judgment.

The underlying question is whether the facts alleged show there is a substantial controversy between parties having adverse legal interest of sufficient immediacy and reality to warrant a declaratory judgment. Erickson v. Christensen, 261 N.W.2d 171, 172 (Iowa 1978); Ewurs v. Irving, 344 N.W.2d 273, 276 (Iowa App. 1983). The facts as alleged by the trust show a continuing controversy between John and Jane as to John's duties under the trust agreement, the lease with his father, and Jane's right to receive income distributions from the trust. This controversy has proceeded beyond the stage of mere apprehension or fear that there will be a dispute. See Bechtel v. City of Des Moines, 225 N.W.2d 326, 330-32 (Iowa

1975). Jane contends John cannot lease to himself or hold over under the lease he had with his father and should distribute money to her. John contends he operates under a lease from the trust not yet expired; he is given authority under the will to lease to himself;' he is given authority under the will to improve the land; and the will imposes no duty to distribute income to Jane. There is a substantial controversy of sufficient immediacy and reality to warrant a declaratory judgment. See Ewurs, 344 N.W.2d at 276. We disagree with the trial court. The issues advanced in the petition for declaratory judgment are valid questions and must be addressed before the approval of the annual reports can be decided and before any issue of John's self-dealing can be decided.

We will address the issues raised in the petition for declaratory judgment. A central issue is what powers were given to John under the trust provisions in Carrie's will.

The principal assets from Carrie's estate that passed to the trust were a 645 acre century farm that John is farming and an undivided one-half interest in a 215 acre tract of farmland that was under lease to a third party. The provisions of Carrie's will that are relevant to the issues before us are set forth below:

DIVISION III.

TRUST

A. All the rest and remainder of my property of every kind and nature, I devise and bequeath to my trustee or trustees named below, in

trust, under the directions and conditions of this Division.

B. During the lifetime of Charles W. Berdo.

(1) The trustee shall manage and control all of the trust property, collect the income and distribute the income currently to Charles W. Berdo.

(2) During the lifetime of Charles W. Berdo, the trustee shall have a wide discretion to buy and sell real or personal property or sell any asset of the trust, and make sales, contracts, exchanges, transfers or conveyances without approval of Court; . . .

C. Upon the death of Charles W. Berdo:

(1) The successor trustee or trustees, as nominated below, shall be appointed and shall continue to manage and control all of the trust property, collect the income and distribute the income as follows:

(a) The trustee or trustees shall have complete and full discretion as to the amount of income to be retained in the trust and the amount to be distributed to the beneficiaries.

(b) Any amounts of income that the trustee or trustees elect to distribute shall be distributed equally to Jane D. Berdo Custer and John W. Berdo during their lifetime.

(c) In the event Jane D. Berdo Custer dies before John W. Berdo, leaving children surviving her, then her share of the income shall be paid to her children, in equal shares, per stirpes.

. . .

(d) In the event John W. Berdo dies before Jane D. Berdo Custer, leaving children surviving him, then his share of the income shall be paid to his children, in equal shares, per stirpes.

. . .

(e) In the event John W. Berdo dies before Jane D. Berdo Custer, without leaving children surviving him, then the trustee shall continue to have full and complete discretion as to the amount of income to be distributed to Jane D. Berdo Custer or her children, per stirpes.

. . . .

> (3) During the time that John W. Berdo [is] . . . trustee, I direct that the real property not be sold unless circumstances arise which the trustees agree would make the continued ownership of the real property, or portion thereof, economically impractical for the trust.
> (4) The trustees shall not buy or sell from or to himself and must keep the property of the trust separate from his own property.
> . . . .
> (7) The trust created under this Will shall in any event terminate twenty-one (21) years after the death of the last surviving member of the group consisting of Charles W. Berdo, John W. Berdo, and Jane D. Berdo Custer, who shall be living at the time of my death and thereupon the property held in trust shall be distributed outright to the persons then entitled to the income.

D. Upon the death of the survivor of Jane D. Berdo Custer and John W. Berdo, I bequeath the sum of $25,000.00 to the children of Jane D. Berdo Custer, in equal shares, per stirpes. I devise and bequeath all of the rest, residue and remainder of the trust property to the children of John W. Berdo, in equal shares, per stirpes. In event John W. Berdo is not survived by any children, grandchildren or lineal descendants of his own, then I devise and bequeath all the rest, residue and remainder of the trust property to the children of Jane D. Berdo Custer, in equal shares, per stirpes.

. . . .

DIVISION V.

A. I nominate Charles W. Berdo . . . trustee of the trust, without bond.

B. Upon the death, . . . of Charles W. Berdo, I nominate John W. Berdo and the Merchant's National Bank of Cedar Rapids, Iowa, as successor . . . co-trustees, without bond. However, John W. Berdo shall have full control and management of the real estate, except for major capital improvements which may be made only with the approval of the Merchant's National Bank while they are acting as co-trustees.

> When John W. Berdo reaches the age of thirty-five years, he shall serve as sole successor . . . trustee, without bond. While John W. Berdo is serving as . . . trustee, . . . the real estate may be rented to him. John W. Berdo should be allowed fair and reasonable fees for any services he might render as . . . trustee . . . .

The first of the questions posed in the declaratory judgment application was whether John has a lease on the 645 acres through 1995. When Carrie died, John was farming the 645 acre tract under advantageous terms. After Carrie's death, John continued to farm the 645 acre tract, leasing from Charles, as trustee. The lease Charles made with John was advantageous to John. The lease John had with the trust runs through the year 1995. Under the lease, John is to pay taxes, insurance and improvements, maintain the land, and pay his mother's medical insurance. John performed according to the terms of the lease. He invested the profits in the farm and has made improvements on the 645 acre tract with his own funds.

Jane argues any lease John had with the trust expired at Charles's death. She objects to John putting profits back in the farmland and contends John should have been making distributions to him and her. John's children have filed a brief contending it is necessary for John to put money back in the farm to protect their interests.

To answer these questions, we must look carefully at the language of the trust. The language of Carrie's will created the trust. Hanson v. Minette, 461 N.W.2d 592, 594 (Iowa 1990). A trustee has a duty to carry out and

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administer a trust according to the intention of the person making the trust agreement. See 76 Am. Jur. 2d Trusts § 374 at 370 (1992). The guiding principal is the intent of Carrie. See In re Trust of Killian, 459 N.W.2d 497, 499 (Iowa 1990). To determine Carrie's intent, we look at the language of the instrument, the scheme of distribution, and the facts and circumstances surrounding the document's execution. First Nat'l Bank v. Mackey, 338 N.W.2d 361, 363 (Iowa 1983); see also Eldred v. Merchants Nat'l Bank, 468 N.W.2d 221, 223 (Iowa 1991).

A primary question then is was Charles, by the terms of the trust, authorized to enter into the lease with John through 1995. Charles, as trustee, was given broad authority under Carrie's will, including the right to sell land and enter into other instruments without court approval. Clearly, Charles had authority as trustee to bind the trust to a lease of the farmland. Acts done within the scope of the authority of a trustee bind the trust property. See White v. Gutshall, 213 Iowa 401, 406-07, 238 N.W. 909, 911 (Iowa 1931). The trust made a lease with John that by its terms has not yet expired. We determine John may continue to lease the 645 acre farm through 1995 under the terms of the lease he made with Charles, as trustee. John, however, is bound to terminate the lease when by its terms it expires and not hold over under its terms.

The next question we need address are those raised by John as to his position as trustee.

Jane argues that John has not treated her fairly and he has enjoyed a superior position in relation to Carrie's trust. She contends he has, therefore, violated his duties as trustee and should be removed for doing so.

Unquestionably, John has enjoyed a position superior to Jane under Carrie's trust. The question, however, is not whether John has assumed a superior position, rather, the question is are John's actions contrary to the provisions of the trust.

Carrie, in creating the trust, clearly intended John and Jane were not to receive similar treatment from the trust. This is evidenced by Carrie's decision to name John trustee, give him considerable discretionary powers, provide he be allowed to farm the land, and, ultimately, giving the land to John's children while making a $25,000 cash distribution to Jane's children.

By the terms of a trust, the trustee may be permitted to do what, in the absence of such provision, would be a violation of loyalty and, within limitations, the trustee may be authorized by the trust instrument to act in matters involving a divided interest. See C.J.S. Trusts § 248 (1955). A trustee may by the terms of the trust deal with trust property on his or her own account and he or she violates his or her duty to the beneficiary only if he or she acts in bad faith. See Schildberg, 461 N.W.2d at 192

(citing Restatement (Second) of Trusts § 170, com. t (1959)).

With these principals in mind, we address the substance of the balance of the questions posed in the application for declaratory judgment.

The application asks if John can lease the farmland. We have determined John has a lease on the 645 acre tract through 1995. The question, therefore, is can he lease the other land now and in the future. Unquestionably, Carrie has specifically provided John may lease the land. However; any new leases John should enter into with the trust must be leases that are fair to the trust and are in conformity with arms-length leases in his neighborhood and are approved by the court after notice to all interested parties including Jane, her children and John's children.

The next question is whether John is required to make distributions to Jane. Carrie provided John "complete and full discretion as to the amount of income to be retained in the Trust and the amount to be distributed to the beneficiaries." Carrie made it very clear John is not required to make any distributions of income. John not only is under no obligation to make distributions, but he cannot be forced to make distributions either by Jane or her creditors or someone in her behalf. However; if John makes any distribution to himself, he is bound to make an equal distribution to Jane or, if she be deceased, to her children. John is in no way relieved of accounting to Jane

and her children and his children annually and retaining the income in prudent investments if it is not distributed.

The next question is whether John has the right under the terms of the trust to make capital improvements with income or whether all income must be distributed or retained in prudent investments other than the farmland. The language of Carrie's will provided "John have full control and management of the real estate". Under the terms of the will, John needed authority for major capital improvements only as long as the bank was acting as co-trustee. This language indicates it was Carrie's intention when the co-trustee was no longer necessary, John could make capital improvements. We do not interpret the language of Carrie's will as giving John unlimited discretion to make improvements.

As trustee, John is in a conflicting position between the desires of his children advanced in their brief to preserve and maintain the land and the position of Jane to obtain maximum distributions from the trust. Expenditures for the preservation of the real estate benefit John's children but are of no benefit to the children of Jane.[2] The conflicting position is not of John's making but was created by the provisions of Carrie's will. Where the settlor of a trust knows of a potential conflict of a trustee, yet appoints him or her, the conflict will not

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2. Jane's children would inherit real estate only if John did not have descendants.

ordinarily be a ground for removal. Schildberg, 461 N.W.2d at 192.

John should seek court authority and give notice to Jane and her children and his children if he seeks authority from the court for major capital expenditures.

During the term he was trustee, John received $25,500 for an easement across one farm. John used about $21,000 of the amount received for the easement to tile the farm across which the easement was granted. The easement affected John's and Jane's interests in the farm and the interest of John's children. John's children agree the improvements were proper. Jane has objected to the improvement issue. The giving of the easement decreased the interest of the trust in the land. While the rents received from the property might slightly diminish because of the easement, the tiling clearly is a benefit and we find nothing improper there. Furthermore, the language of Carrie's will anticipates that John has the authority to make major capital improvements. The improvements made with the easement money should be approved. See also In re Estate of Dolch, 237 Iowa 1064, 1067, 24 N.W.2d 447, 448 (1946).

The attorneys for the children have also challenged the trial court's refusal to award them fees commensurate with their duties. They contend the trial court was not

correct in finding the children were not necessary parties. We disagree with the trial court's findings the children were not necessary parties. The trial court found their interests remote. We disagree. Should either Jane or John die, their children would become beneficiaries of the trust. John's children will receive the farmland and have a real and viable interest in the preservation of it. Jane's children's interest is less significant because it would be very remote that John have no lineal descendants, therefore, their concern is that there be $25,000 to pay their bequest when their mother and uncle are dead. However; the attorneys were appointed and should be paid by the trust. The trial court limited the attorneys to fees of $500. A motion has been made that we remand to the trial court to determine a fair attorney fee for services rendered and assess the fee as a cost against the trust. We sustain that motion and direct that on remand the trial court should entertain the application for fees and should not limit the fees to $500 if the attorneys show work that calls for a fee in excess of that amount.

John also contends the trial court erred in failing to approach the issues before it in a fair, impartial, and judicious manner but, instead, demonstrated extreme bias, unfairness, passion, and prejudice in viewing the conduct of the trustee as compared with that of the complainant. We have reviewed de novo and are not bound by the factual findings of the trial court. We have modified the trial

court's decision. We determine, therefore, it is not necessary for us to address the issue of whether the trial court was not judicious.

We have found the trial court did not follow the statutory procedure in temporarily removing the trustee and the attorney for the trust and was without jurisdiction to enter the September 10 order. We have determined the trial court should have entertained the application for declaratory judgment. We have answered the questions posed that we determine should have been answered. We have approved the expenditure of the money from the sale of the easement for tiling. We remand to the trial court to consider the other objections Jane has made to the annual reports now that the questions posed in the declaratory judgment action have been answered. We have reversed the the order removing Keith as attorney for the trust. The trial court on remand shall consider the applications for fees of the trustee, the attorney for the trust, and the attorneys for the children.

We tax costs on appeal one-half to the trust, one-fourth to John, and one-fourth to Jane.

REVERSED, MODIFIED AND REMANDED.