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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court Case No. 20210258

In the Matter of the Rose Henderson Peterson Mineral Trust, dated March 26, 1987	)
---	)
Lyle M. Henderson, Clifford Henderson, Herbert Henderson, Emmalee McKenzie, and Dixie J. Henderson,	)
Petitioners and Appellees,	)
v.	)
Dennis Henderson and James Henderson, individually and as co-trustees of the Rose Henderson Peterson Mineral Trust,	)
Respondents and Appellants,	)
and	)
Donna Foreman, Patsy Gabbert, Kimber Henderson, Larry Henderson, Lyleen Henderson, and Penny Pitman,	)
Interested Parties and Appellees	)

APPEAL FROM THE *MEMORANDUM DECISION AND ORDER FOR JUDGMENT*, DATED JULY 22, 2021, AND THE *JUDGMENT*, DATED AUGUST 18, 2021, BY THE HONORABLE JUDGE ROBIN A. SCHMIDT, NORTHWEST JUDICIAL DISTRICT, MCKENZIE COUNTY, NORTH DAKOTA, CASE NO. 27-2012-PR-00293

BRIEF OF JAMES HENDERSON AND DENNIS HENDERSON, INDIVIDUALLY AND AS TRUSTEES OF THE ROSE HENDERSON PETERSON MINERAL TRUST

ORAL ARGUMENT REQUESTED

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2. Whether the District Court erred in concluding the Petitioners' claims were not precluded by the law of the case doctrine.
3. Whether the District Court erred in concluding the Petitioners' claims were not precluded by laches.

STATEMENT OF THE CASE

[¶2] James Henderson and Dennis Henderson (collectively "co-trustees"), individually and as trustees of the Rose Henderson Peterson Mineral Trust (the "RHPMT"), appeal the District Court's *Memorandum Decision and Order for Judgment*, dated July 22, 2021, and *Judgment*, dated August 18, 2021. The District Court found in favor of Lyle M. Henderson, Clifford Henderson, Herbert Henderson, Emmalee McKenzie, and Dixie J. Henderson (collectively "Petitioners") on their breach of fiduciary duty claim, ordered repayment of trustee compensation over 2%, set the rate of trustee compensation at 2%, and awarded payment of attorney's fees from the RHPMT to both Petitioners and the co-trustees. (App. 44-45). Notably, the District Court did not order the removal of the co-trustees.

[¶3] The dispute between the parties to this appeal revolves around a trust created under Rose Henderson Peterson's Last Will and Testament dated March 26, 1987. (App. 18-23). The trust was designed to hold McKenzie County mineral interests owned by Rose Henderson Peterson ("Rose") following her death in September 1995. (Id.) In her

will, Rose designated her grandsons James Henderson ("James") and Dennis Henderson ("Dennis") to serve as co-trustees of the RHPMT. (App. 20). Under the provisions of the RHPMT, James and Dennis assumed certain responsibilities including "holding, managing, and investing trust property," as well as to "collect and receive income thereof," and disposing of trust income according to the terms of the trust. (App. 19). James and Dennis have served as co-trustees of the RHPMT since its inception and continue to serve in that role today. (Trans. 167:21-22).

[¶4] On August 21, 2012, Petitioner, and beneficiary, Lyle "Rocky" Henderson ("Rocky") filed a petition with the McKenzie County District Court requesting the following relief: (1) an inventory of trust assets; (2) an accounting of the administration of the trust, along with plans for allocation of assets and distribution of income, and tax returns for the trust; (3) the return of compensation paid by the RHPMT to the co-trustees; (4) attorney's fees for the petitioner; and (5) any other relief determined equitable and proper by the court (the "2012 Petition"). (App. 13-17).

[¶5] On February 7, 2013, a hearing was held on the 2012 Petition (the "2013 Hearing"). Both of the co-trustees and the current petitioner, Rocky, were present at the 2013 Hearing when Judge Nelson issued his ruling. The Court's *Order for Judgment* was filed on February 25, 2013 (the "2013 Order"). (App. 24-26). The 2013 Order established, among other findings, that the co-trustee's compensation rate of 5% was reasonable under the circumstances. (App. 26). A transcript of the 2013 Hearing was filed in the record. (App. 7 at Index # 42). Judge David Nelson's ruling in the 2013 Hearing can be found at pages 198-204 of the transcript. The 2013 transcript was reviewed by the District Court prior to the hearing in 2021.

[¶6] More than six (6) years later, on September 4, 2019, Rocky, along with his siblings and co-beneficiaries of the trust; namely: Clifford Henderson, Herbert Henderson, Emmalee McKenzie, and Dixie Henderson, filed a subsequent petition (the "2019 Petition"), requesting nearly identical relief as the 2012 Petition. (App. 27-31). Specifically, the 2019 Petition again sought to: (1) require the co-trustees to provide an inventory of trust assets; (2) provide a complete accounting of the administration of the trust, with a plan for allocation of assets, schedule for distributions, and production of trust tax returns; (3) the co-trustees return compensation deemed unreasonable by the court; (4) attorney's fees for the petitioner; and (5) any other relief determined equitable and proper by the court. (App. 30). Additionally, the 2019 Petition sought removal of the co-trustees under N.D.C.C. § 59-15-06(2). (Id.)

[¶7] On March 23, 2021, a hearing ("2021 Hearing") was held before the Honorable Judge Robin Schmidt on the 2019 Petition. The District Court's *Memorandum Decision and Order for Judgment* was entered on July 21, 2021 ("2021 Order"). (App. 36-45). The District Court concluded that the co-trustees breached their fiduciary duties by continuing to receive 5% for administration of the RHPMT; set the rate of compensation for administration of the RHPMT at two percent (2%); and ordered repayment of trustee compensation over 2% since 2014. (App. 44-45). Judge Schmidt stated in her *Memorandum Decision* that the co-trustees' conduct did not constitute "a serious breach and does not require removal" of the trustees. (App. 42). Based on the 2021 Order, the District Court entered judgment on August 18, 2021 ("Judgment"). (App. 46-47).

STATEMENT OF FACTS

[¶8] Rose had two sons: Paul Henderson ("Paul") and Lyle Henderson ("Lyle"). Paul and Lyle's children and grandchildren are the beneficiaries of the RHPMT. (App. 19). There is a total of thirteen (13) present beneficiaries of the trust. (Trans. 15:1-7). The co-trustees are two of Paul's children, and the Petitioners are Lyle's children. The RHPMT was created to benefit Rose's grandchildren and their future generations. (App. 18). As stated above, James and Dennis have served as co-trustees of the RHPMT since its inception. (Trans. 167:21-22). The trust property consists of approximately 1,006 mineral acres located in McKenzie County, which have been held in production for more than a decade. (App. 37). At the time of the 2013 Hearing, the RHPMT had 12 active wells. This increased to 61 active wells as of the time of the 2021 Hearing. (Trans. 174:9-11).

[¶9] As explained above, James and Dennis serve as co-trustees of the RHPMT. From 1995 to 2011, the co-trustees did not charge any trustee fees. (Trans. 152:3-4). The co-trustees began charging an eight percent (8%) rate from September 2011 through March 2012, which they voluntarily lowered to five percent (5%) in April 2012. (Trans. 152:11-15). In 2012, before lowering their compensation rate to 5%, Dennis solicited advice from multiple trust companies. (Trans. 152:16-19).

[¶10] Following the 2012 Petition, the District Court issued its 2013 Order. (App. 24-26). It is the co-trustees' reliance on the 2013 Order which has given rise to the instant dispute. In concluding the co-trustees had produced inventories, accountings, and documents to the approval of the petitioners, including Rocky, the 2013 Order held the provisions of the RHPMT entitled the co-trustees to reasonable compensation, and that the "reasonableness of Trustees' compensation is determined not only by the amount of

services performed, but also by the amount of responsibility required of the Trustees." (App. 25). This responsibility component of a trustee's role is disregarded by the Petitioners' arguments and the District Court's 2021 Order and Judgment.

[¶11] Additionally, the 2013 Order established that the co-trustees' eight percent (8%) compensation rate from September 2011 to March 2012 was reasonable, and their five percent (5%) compensation rate from April 2012 was reasonable. (Id.) The 2013 Order further established that the co-trustees were entitled to their reasonable expenses in administering the RHPMT and that the monthly charge of $100 was also reasonable. (Id.) The 2013 Order explicitly denied the 2012 Petition, ordering "[t]hat Trustees shall not be required to return any amount of past compensation received[.]" (App. 26).

[¶12] The court further directed the co-trustees to "communicate with beneficiaries on a regular basis and otherwise provide any such documents relating to the Trust on a reasonable basis," and "continue to evaluate and assess their rate of compensation on a reasonable basis and communicate such rates to beneficiaries." (App. 25). The court did not, however, provide further direction regarding such matters. Lastly, the co-trustees were "encouraged to solicit input from the beneficiaries for future charges to the Trust." (Id.) During the 2013 Hearing, Judge Nelson specifically stated that this was a suggestion not a requirement. (See App. 7 at Index # 42, 203:16-17) ("For future charges, I'm suggesting – not ordering, but suggesting – input, consultation.").

[¶13] At the 2021 Hearing, evidence and testimony was presented for the court's consideration concerning the issues raised in the 2019 Petition. Petitioner Lyle "Rocky" Henderson and the co-trustees, James and Dennis, were present at the 2021 Hearing. Rocky, James and Dennis were the only three witnesses to testify during the hearing.

Rocky testified that he was aware of the assets of the trust: mineral acres, all subject to leases. (Trans. 86:6-8, 19-23). Rocky stated he has received adequate reporting from the co-trustees. (Trans. 105:15-18). Rocky testified in 2013 and 2021 that he believes the co-trustees should not receive any compensation for their services in administering the trust. (Trans. 88:15-24). Rocky was also aware of all trust income, having received the well production reports with the income paid to the RHMT every month, and the tax returns for all relevant tax years. (Trans. 93:15-20, 94:4-7). There were numerous exhibits entered at the 2021 Hearing which consisted of correspondence between the co-trustees and the beneficiaries from 2020 dating back to 2013. It is clear the co-trustees were following the 2013 Order by communicating information related to the RHPMT to the beneficiaries and were providing trust-related documents to the beneficiaries on a regular basis.

[¶14] At the 2021 Hearing, Rocky also testified that since the 2013 Hearing, he has always been informed of the fees charged by the co-trustees. (Trans. 94:8-10). He received a letter dated March 4, 2013 from the co-trustees indicating the co-trustees would charge a rate of 5%, and would inform the beneficiaries of any change in the fees. (Trans. 91:5-22). Rocky testified that he monitored the income and checks of the RHPMT and calculated the 5% fee every month since the 2013 Hearing. (Trans. 92:2-8).

[¶15] In following the court's 2013 Order, Dennis and James continued to charge a 5% compensation fee for administering the trust. They believed if the court deemed 5% was a reasonable fee, the safest approach for the co-trustees was to listen and reassess as directed by the court. Dennis testified the 5% fee is divided equally between James and himself. (Trans. 116:22-25). The industry standard for trustee compensation is based on a

percentage of income. This was confirmed in a report prepared by Charles "Wes" Turiano on behalf of the Petitioners, and received by the court by stipulation of the parties. (App. 9 at Index #134). Accordingly, when a trust, such as the RHPMT, has a large amount of income, as the RHPMT did from 2013 to present, a percentage of that income equates to higher trustee compensation. The inverse is true when there is less income equating to lower trustee compensation. The 2013 Hearing and 2013 Order established a percentage was a reasonable method in calculating compensation, not an hourly billable rate that the Petitioners manufactured at the 2021 Hearing. (App. 26). This corresponds with Judge Nelson's explanation to the parties that trustee compensation is not simply the labors completed, but also the responsibility assumed by the co-trustees. (App. 25).

[¶16] Dennis and James testified they justifiably relied on the statements made by Judge Nelson at the 2013 Hearing and in his 2013 Order. (Trans 125:13-15, 199:19-24). Their correspondence with the beneficiaries immediately following the 2013 Order includes their intentions to abide by the direction of the court in maintaining transparency, increasing communication, and continuing to assess their fees. Dennis testified he is in monthly contact with the beneficiaries, sending out statements by operators either by email or mail depending on the preference of the beneficiaries. (Trans. 154:10-24, 155:3-7). While the co-trustees speak regularly about trust matters, James dealt with certain matters which Dennis did not, including meeting with the tax preparer, and the periodic review of their compensation rates. (Trans. 177:20-24, 178:4-14 24-25, 179:1-9).

[¶17] At the 2021 Hearing, James explained he was the individual that continually evaluated their trust compensation rate. (Id.) James met with bankers, discussed the rate

with Roger Cymbaluk (a local businessman who also served as a trustee), and discussed the matter with attorneys and his accountant. (Id.) All of the feedback James received from the sources he consulted with was that 5% was a reasonable trustee rate.

[¶18] James also testified that the co-trustees' labors and their responsibility increased following the 2013 Hearing. The RHPMT went from twelve (12) wells to sixty-one (61). (Trans. 174:9-11). When he receives the documents from the operators paying income to the RHPMT, James reviews all data, enters the information into his own spreadsheet, and verifies permits and well production. (Trans. 176:11-25). James and Dennis testified that as the number of the wells increased by five times the amount in 2013, the amount of income increased as did the work completed by the co-trustees and the responsibility they held. (Trans. 157:13-14). Despite the additional labor and responsibility, the co-trustees determined it was fair and reasonable to be transparent and maintain the 5% rate approved by the court.

[¶19] On July 21, 2021, the court filed its 2021 Order in this case. (App. 36-45). The District Court concluded the co-trustees breached their fiduciary duties by continuing to receive 5% for administration of the RHPMT. (Id.) The 2021 Order and Judgment requires the co-trustees to repay compensation received over 2% since 2014 and set the reasonable rate of administration of the RHPMT at 2%. (Id.) The District Court also concluded removal of the co-trustees was not necessary as they did not commit a serious breach or any other act necessitating removal. (App. 42). However, the 2021 Order did not address the exculpation provision of the RHPMT absolving the co-trustees from liability in the administration of the trust.

LAW AND ARGUMENT

I. The District Court erred in failing to enforce the exculpation clause of the RHPMT.

[¶20] When enforcing a trust agreement, the court's principal purpose is to determine the settlor's intent. Dwyer v. Sell, 2021 ND 139, ¶ 8, 2021 WL 3412318 ("This Court's primary objective in construing a trust agreement is to ascertain the settlor's intent.") (citing Trust of Roger S. Linn Restated Trust Agreement, 2019 ND 58, ¶ 10, 923 N.W.2d 815). "When a trust instrument is unambiguous, the settlor's intent is ascertained from the language of the trust document itself." Id.; Dale Exploration, LLC v. Hiepler, 2018 ND 271, ¶ 18, 920 N.W.2d 750. North Dakota courts have applied the general rules of written contracts to the construction of trust agreements. Trust of Roger S., 2019 ND 58 at ¶ 11; Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 9, 788 N.W.2d 312 (citing Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶¶ 18-19, 750 N.W.2d 412). Therefore, the interpretation of a contract governed by N.D.C.C. Ch. 9-07 also applies to trust agreements. Id. Section 9-07-02 states the language of a contract controls its interpretation "if the language is clear and explicit and does not involve an absurdity." Id. The North Dakota Supreme Court has interpreted contacts "to give effect to the parties' intent, which, if possible, must be ascertained by giving meaning to each provision of the contract." Hillerson v. Bismarck Public Schools, 2013 ND 193, ¶ 18, 840 N.W.2d 65.

[¶21] Additionally, this Court has interpreted and enforced exculpatory clauses under contract law. See generally Reed v. University of North Dakota, 1999 ND 25, 589 N.W.2d 880; Kondrad ex rel. McPhail v. Bismarck Park Dist., 2003 ND 4, 655 N.W.2d 411. While exculpatory clauses are strictly interpreted against the benefitted party, "**the parties are bound by clear and unambiguous language evidencing an intent to**

extinguish liability." Reed, 1999 ND 25 at ¶ 22; Hillerson, 2013 ND 193 at ¶ 11 (emphasis added).

[¶22] The North Dakota Uniform Trust Code recognizes and enforces valid exculpatory clauses in trusts. See N.D.C.C. § 59-18-08. Under N.D.C.C. § 59-18-08, "[a] term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor." Section 59-18-08, N.D.C.C., is codified from § 1008 of the Uniform Trust Code, which exculpates a trustee for conduct "not committed in bad faith or with reckless indifference to the purposes of the trust or the interest of the beneficiaries." The Code defines the term "interests of the beneficiaries" as "the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries." § 706 cmts. See also N.D.C.C. § 59-09-03(9). The comments to Section 1008 specify that exculpation provisions do not relieve a trustee from acting in good faith, which is precisely what the co-trustees did in this case. In fact, "a trustee is presumed to act in good faith." Hodney v. Hoyt, 243 N.W.2d 350, 355 (N.D. 1976).

[¶23] North Dakota has not defined "willful misconduct" or "reckless indifference" to the purposes of the trust or interests of the beneficiaries; however, a discussion of a trustee's bad faith conduct occurred in In re Le Page's Trust, 67 N.D. 15, 269 N.W. 53, 58 (N.D. 1936) (suggests a trustee granted broad discretion must nevertheless be subject to judicial scrutiny to ensure that it acts "fairly and honestly" and "without fraud or collusion."); Nelson v. First Nat. Bank and Trust Co. of Williston, 543 F.3d 432, 435 (8th

Cir. 2008) (discussing In re Le Page's Trust, 67 N.D. 15, 269 N.W. 53 (N.D. 1936) ("A trustee who exercises its discretion 'from any fraudulent, selfish, or improper purposes,' or refuses to act for any of those reasons, is likely to be found in bad faith."). States which have adopted the Uniform Trust Code have further analyzed this issue and determined conduct of a trustee committed in bad faith, willful default, or in reckless indifference all involve breaches that are "substantially more culpable than mere negligent or erroneous conduct." Newcomer v. Natl. City Bank, Ohio App. 6 Dist. 2014, 19 N.E.3d 492; In re Donald Briks Revocable Lifetime Trust Agreement, 2014 WL 7011200, *5 (Minn. App. 2014) (holding "[b]ecause the district court expressly found the conduct not to be willful mismanagement and there are no allegations of fraud, it erred by concluding that the exculpatory clause does not apply.").

[¶24] Not every breach of trust justifies the removal of a trustee. § 706 cmts. Removal of a trustee requires a serious breach of trust. Id. See also N.D.C.C. § 59-15-06(2). "A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct." Id. A series of smaller breaches considered together can also constitute a serious breach of trust. Id. An appropriate circumstance warranting the removal of a trustee "is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information…" Id. Failure of a trustee to protect the interests of the beneficiaries is grounds for removal. Id.

[¶25] The de novo standard is applicable to the primary issue in this appeal, whether the District Court erred when it failed to enforce the exculpation clause within the RHPMT. See State v. Pagenkopf, 2020 ND 33, ¶ 6, 939 N.W.2d 2 ("In determining whether or not

the district court abused its discretion through misapplication or misinterpretation of the law, we apply a de novo standard of review.").

[¶26] Here, the RHPMT contains an enforceable exculpation clause as follows:

> H. Bond and Liability of Trustee. The Trustee specifically named herein or any successor Trustee shall not be required to give any bond or other security unless demanded by the beneficiaries. **The Trustee shall not be liable for any mistake or error in judgment in the administration of the Trust herein created, except for willful misconduct, so long as she continues to exercise her duties and powers in a fiduciary capacity primarily in the interest of the beneficiaries hereunder**.

(App. 21-22) (emphasis added).

[¶27] The RHPMT, including the exculpation language, was drafted by Rose's attorney, Dennis Johnson, on her behalf. (Trans. 35:15-18). Accordingly, the second part of Section 59-18-08, N.D.C.C., does not apply. Additionally, because the RHPMT does not relieve the co-trustees for willful misconduct or breach of trust committed in bad faith or with reckless indifference to the purposes of the trust, the exculpation language absolving the co-trustees from liability set forth by the RHPMT is enforceable under North Dakota law.

[¶28] It is clear from the language of the RHPMT that Rose's intent was to exculpate the co-trustees for any mistake or error in judgment of the administration of the trust made in good faith. The exculpation provision uses language such as "the Trustee shall not be liable" and limits the co-trustees' liability for actions that do not constitute willful misconduct. Again, it is the intent of the settlor ascertained from the language of the trust document that governs, and the District Court erred by not enforcing the applicable exculpation clause.

[¶29] The co-trustees relied, in good faith, on the court's determination that their 5% rate was reasonable based on their responsibilities and labors in administering the RHPMT:

> [Smith]: Now you were at the 2013 hearing; is that fair?
> [James]: Yes.
> [Smith]: Do you recall anything that the Judge said after the hearing about your fees?
> […]

(Trans. 172:12-16).

> **[James]: He testified that the fees were reasonable under the circumstances, and that we were doing the trust required us to do, and basically to continue doing what we were doing.**
> [Smith]: Do you recall him talking about the difference between your labors and your responsibilities?
> [James]: Yes.
> [Smith]: What was your understanding of that?
> [James]: The responsibilities extend to negotiations, being responsible for what's going on, being responsible for how the trust is managed, doing whatever it takes to keep the trust functioning and going forward.

(Trans. 173:1-16, 22-25; 174:1-2) (emphasis added).

Even though Judge Nelson determined the fees were reasonable in 2013, the co-trustees continued to assess their fees after the 2013 Hearing. (Trans. 129:1-13). James met with bankers, attorneys, businessmen who also serves as a trustee, and his accountant to confirm the co-trustees' compensation rate was reasonable. (See Trans. 177-179). All of these individuals confirmed that a 5% rate was reasonable. Not only were the co-trustees' fees deemed reasonable by individual professionals, but also by the ruling of a district

court judge. In accordance with the RHPMT, the co-trustees' good faith conduct relieves them from liability for compensation received in the administration of the trust.

[¶30] In following the 2013 Order, the co-trustees increased their communication with the beneficiaries, made all attempts to be transparent regarding their fees, and advised the beneficiaries they would continue to charge the rate (5%) and costs ($100 per month) which had been deemed reasonable by the District Court in 2013. (Trans. 91:2-7, 16-25). The co-trustees indicated they would inform the beneficiaries of any change in the fees. (Id.)

[¶31] In its 2021 Order, the District Court specifically noted the co-trustees' acceptance of substantial trustee compensation was not a serious breach. (App. 42). "The Trustees have also not committed any other act which would necessitate removal." (Id.) Without a finding of a serious breach or other misconduct justifying removal of the co-trustees, the mere acceptance of compensation in reliance on the court's 2013 Order, certainly does not rise to the level of willful misconduct, and the District Court erred in failing to enforce the exculpation clause of the RHPMT.

II. The District Court erred in failing to follow the 2013 Order.

[¶32] The District Court's 2021 Order fails to account for an important issue adjudicated by the 2013 Order: that "Trustees shall not be required to return past compensation received." (App. 36-45) (App. 26). The bar on repayment is similar to the District Court's decision to follow the 2013 Order by awarding attorney's fees to both parties. (Id.) The policy central to this case is the promotion of consistency, efficiency, and finality in our judicial system. Consistent with this policy, "[t]he doctrines of res judicata and collateral estoppel bar courts from relitigating claims and issues in order to

promote finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources." Ungar v. North Dakota State University, 2006 ND 185, ¶ 10, 721 N.W.2d 16 (citing Simpson v. Chicago Pneumatic Tool Co., 2005 ND 55, ¶ 8, 693 N.W.2d 612); See also Fettig v. Estate of Fettig, 2019 ND 261, ¶ 15, 934 N.W.2d 547 ("These doctrines promote efficiency for both the judiciary and litigants by requiring that disputes be finally resolved and ended."). The applicability of collateral estoppel or res judicata is a question of law that is fully reviewable on appeal. Ungar, 2006 ND 185 at ¶ 10.

[¶33] The law of the case doctrine is based upon the theory of res judicata and is grounded on judicial economy to prevent unnecessary litigation. Glass v. Glass, 2018 ND 14, ¶ 5, 906 N.W.2d 81. This doctrine consists of two branches: (1) that district courts follow decisions of appellate courts in subsequent proceedings and to carry out appellate mandates; and (2) **that a court respect rulings made in earlier proceedings of the same case, even when made by a different judge.** See generally Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc., 2006 ND 183, 721 N.W.2d 43; Ellis v. U.S., 313 F.3d 636 (1st Cir. 2002) (emphasis added). Because the 2013 Order was not appealed, the second branch of the doctrine applies in this case. "This means that a court ordinarily ought to respect and follow its own rulings, made earlier in the same case." Ellis, 313 F.3d 636 at 646. "The presumption, of course, is that a successor judge should respect the law of the case." Id. The Ellis court explained the rationale behind the second branch of the doctrine:

> For one thing, the law of the case doctrine affords litigants a high degree of certainty as to what claims are—and are not—still open for adjudication. For another thing, it furthers the abiding interest shared by both litigants and the

> public in finality and repose. Third, it promotes efficiency; a party should be allowed his day in court, but going beyond that point deprives others of their days in court, squanders judicial resources, and breeds undue delay. Fourth, the doctrine increases confidence in the adjudicatory process: reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system. Finally, judges who too liberally second-guess their co-equals effectively usurp the appellate function and embolden litigants to engage in judge-shopping and similar forms of arbitrage.

Ellis, 313 F.3d 636 at 647 (internal citations omitted).

[¶34] This Court has stated it agrees with the Ellis court. Peoples State Bank of Truman, 2006 ND 183 at ¶ 11 ("noting there is a presumption 'that a successor judge should respect the law of the case' and 'orderly functioning of the judicial process requires that judges of coordinate jurisdiction honor one another's orders and revisit them only in special circumstances.'"). The Ellis court discussed certain general principles in determining what circumstances justify revisiting a ruling previously made in the same case by a judge of coordinate jurisdiction. Id. at ¶ 13 (citing Ellis, 313 F.3d 636 at 647).

> First, reconsideration is proper if the initial ruling was made on an inadequate record or was designed to be preliminary or tentative. Second, reconsideration may be warranted if there has been a material change in controlling law. Third, reconsideration may be undertaken if newly discovered evidence bears on the question. Lastly, reconsideration may be appropriate to avoid manifest injustice.

Ellis, 313 F.3d 636, at 647-648.

[¶35] Following the law of the case, the District Court should have found the co-trustees are not required to repay past compensation received for their services in administering the trust. (See App. 26) ("Trustees shall not be required to return any amount of past

compensation received."). First, Judge Nelson based his ruling on complete briefing, oral argument, witness testimony, and an examination of the record as whole (the same record that was before Judge Schmidt with the exception of additional responsibility and labors for the co-trustees due to an increase in the amount of producing wells for the RHPMT). Second, Judge Nelson's *Order*, filed on February 25, 2013, offers no indication that it was meant to be preliminary or tentative. To the contrary, Judge Nelson ruled the co-trustees were not required to return any past compensation received. (App. 26). Third, Rocky did not identify any intervening change in the law nor any new facts indicating the co-trustees' conduct was reckless toward the purposes of the trust or that they committed any act of misconduct. Finally, there is no manifest injustice in Judge Nelson' previous ruling. This standard is rarely achieved: "a finding of manifest injustice requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong." Ellis, 313 F.3d 636 at 648. This case is not the exceptional case in which a previous *Order* made in the same case may be revisited. Judge Nelson's *Order* should have been honored by the District Court; exempting the co-trustees from repaying past compensation received. The District Court erred when it did not follow the law of the case.

[¶36] Moreover, following Judge Nelson's *Order* will accomplish the purpose of the law of the case doctrine: efficiency, certainty, and consistency. The 2019 Petition effectively argues that immediately following the 2013 Order, the co-trustees were in breach of a duty owed to the beneficiaries because they charged a 5% compensation rate. Due to the fact that the co-trustees' fees were challengeable immediately following the *Order*, no degree of certainty is provided to the co-trustees they will be in constant

litigation with Rocky and the other Petitioners over the reasonableness of their fees. In fact, Rocky claims that **any amount** of compensation charged by the co-trustees is unreasonable:

> [Smith]: So at the 2013 hearing, you testified; correct?
> [Rocky]: Yes.
> [Smith]: And you told Judge Nelson at that time that a reasonable fee for the trustees would be zero percent; is that correct?
> [Rocky]: That's what I said, yes.
> [Smith]: And when I took your deposition in October, you held that position; correct?
> [Rocky]: Yes.
> [Smith]: And that's your position today that zero percent is the reasonable fee that should be allowed.
> [Rocky]: That's what I have stated that I think is reasonable, based on my experience of managing this type of trust.

(Trans. 88:13-24).

There is no degree of certainty provided to the co-trustees that they will not be in a cycle of litigation for receiving any amount of trustee compensation. The underlying policy of consistency and finality was not upheld in this case, and the District Court erred when it found the law of the case doctrine does not apply.

III. The District Court erred in its application of the doctrine of laches which precludes the Petitioners' stale claims.

[¶37] The District Court erred in holding the co-trustees' equitable defense of laches does not apply. (See App. 43).

> A "stale claim" may be barred by the equitable defense of laches. **Laches is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay.** [L]aches does not arise from a delay or lapse of time alone, but is a delay in enforcing one's rights which

> works a disadvantage to another. The party against whom laches is sought to be invoked must be actually or presumptively aware of his rights and must fail to assert them against a party who in good faith permitted his position to become so changed that he could not be restored to his former state. The party invoking laches has the burden of proving he was prejudiced **because his position has become so changed during the delay that he cannot be restored to the status quo.**

Stenehjem ex rel. State, 2014 ND 71 at ¶12 (internal citations omitted) (emphasis added).

"The determination of whether laches applies is a fact intensive inquiry." Id.

> [L]aches focuses on the reasonableness of the plaintiff's delay in suit… Thus, for laches, **the length of delay, the seriousness of prejudice, the reasonableness of excuses, and the defendant's conduct or culpability** must be weighted to determine whether the [plaintiff] dealt unfairly with the [defendant] by not promptly bringing suit.

Id. at ¶ 15 (citing A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1034 (Fed. Cir. 1992) (emphasis added)).

[¶38] The clearly erroneous standard is applicable to the issue of laches. See Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, ¶ 13, 844 N.W.2d 892 (holding laches is reviewable under the clearly erroneous standard).

> A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it, or it the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made.

Pioneer State Mutual Ins. Co. v. Bear Creek Gravel Inc., 2021 ND 53, ¶ 6, 956 N.W.2d 377.

[¶39] The District Court found the co-trustees did not establish a viable laches defense, specifically finding the award of repayment for compensation paid from 2014 onward "does not prevent the Petitioners from [bringing] this issue before the court." (App. 43).

Most significant, is the District Court's one-sentence explanation of why the defense of laches does not apply in this case. The Court's failure to consider the disadvantage and prejudice the Petitioners' delay in bringing this action has caused the co-trustees was clearly erroneous.

[¶40] It is clear that, since the 2013 Hearing, all parties had actual knowledge that the co-trustees continued to charge a 5% fee as previously deemed reasonable by the court. N.D.C.C. § 59-09-04 states "a person has knowledge of a fact if the person has actual knowledge of a fact; has received notice or notification of a fact; or from all the facts and circumstances known to the person at the time in question, has reason to know a fact." Following the 2013 Order, the co-trustees sent a letter dated March 4, 2013 to the beneficiaries regarding their intention to maintain the 5% fee and their plan to assess their fees going forward. Rocky testified he received this letter from the co-trustees and that he was aware of the 5% rate since 2013:

[Smith]:	So the Bates numbering on the bottom of the corner is 1458.
[Rocky]:	Okay. That's a letter from James and Dennis.
[Smith]:	Okay. And you recall that letter?
[Rocky]:	Yes.
[…]	
[Smith]:	**So is it your understanding that they've provided you with written notice of what their compensation was going to be?**
[Rocky]:	**Yes.**
[Smith]:	And that if that compensation was changed, they were going to do what?
[Rocky]:	Notify the beneficiaries.
[Smith]:	Okay. And were you ever notified of a change?
[Rocky]:	Of any change?
[Smith]:	Correct.

(Trans. 91:2-7, 16-25) (emphasis added).

[Rocky]: No.
[Smith]: You were aware they were charging 5 percent after the Court's order; correct?
[Rocky]: Correct.
[Smith]: You were aware every month.
[Rocky]: Yes.
[Smith]: Because you also did the calculations yourself.
[Rocky]: Right.

(Trans. 92:1-8) (emphasis added).

[¶41] In addition, all communication in the form of tax returns, clearly specifies the 5% fee charged by the co-trustees. The beneficiaries have always received accounting and tax returns for the trust:

[Smith]: But as far as the accounting, is there information that you are not being provided by the trustees for the accounting.
[Rocky]: No.

(Trans. 86:11-14).

[Smith]: Have you ever not received a K-1 from the trust?
[Rocky]: No.
[Smith]: Have you ever not received a tax return?
[Rocky]: No.

(Trans. 94:4-7).

[¶42] Petitioners had actual knowledge every month since the court's 2013 Order of the co-trustees' fees, but waited **six and a half years** to raise the matter with the court. The 2013 proceeding constitutes clear evidence the Petitioners were aware of their legal options. The delay between when Petitioners had knowledge, and when they brought action against the co-trustees in 2019 is unreasonably long.

[¶43] This delay has created significant consequences for the co-trustees. The co-trustees have paid tax on their trustees' fees for the last six years, and are unable to amend their tax returns and recover taxes paid for their compensation as trustees. Because the reasonableness of the co-trustees' fees was not raised for more than six years, the co-trustees continued to administer the trust and pay taxes on compensation. Their time and tax dollars were expended in justifiable reliance on the ruling from the 2013 proceeding regarding the reasonableness of their 5% compensation rate. It would be inequitable and severely disadvantage the co-trustees to unwind these transactions after so many years. Petitioners' delay has caused prejudice to the co-trustees and their position has changed so that they cannot be restored to the status quo. The District Court erred in the application of the doctrine of laches which precludes the Petitioners' stale claims.

CONCLUSION

[¶44] For the foregoing reasons, the co-trustees respectfully request this Court to reverse the District Court's *Memorandum Decision and Order for Judgment* and *Judgment* as it relates to any repayment by the co-trustees of trustee compensation.

ORAL ARGUMENT REQUESTED

[¶45] The co-trustees request oral argument. Oral argument is appropriate due to the complexity of the issues presented for review.

Dated: December 22, 2021.

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CERTIFICATE OF COMPLIANCE

[¶46] The undersigned certifies that the Brief of Respondents and Appellants Dennis Henderson and James Henderson complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure and contains a total of 28 pages.

Dated: December 28, 2021.

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CERTIFICATE OF SERVICE

[¶47] I hereby certify that a true and correct copy of the foregoing brief was filed electronically with the Clerk of the North Dakota Supreme Court on the 28th day of December, 2021, and e-mailed to **Michael T. Andrews** (mandrews@andersonbottrell.com), **Ellie M. Steffes** (esteffes@andersonbottrell.com), **Penny Pitman** (penny@pitmandrilling.com), and mailed to **Patsy Gabbert** (P.O. Box 19, Hermosa, SD 57744), **Donna Foreman** (2683 122nd Ave. NW, Watford City, ND 58854), **Larry Henderson** (81148 South Fork Walla Walla River Road, Milton Freewater, OR 97682), **Kimber Henderson** (2454 106th Ave. NW, Keene, ND 58847), and **Lyleen Henderson** (2235 East Flamingo 152, Las Vegas, NV 89119).

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