

**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

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

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INTRODUCTION

[¶1] James Henderson and Dennis Henderson (collectively “co-trustees”), individually and as trustees of the Rose Henderson Peterson Mineral Trust (the “RHPMT”), submit this *Reply Brief* in further support of their appeal of the District Court’s *Memorandum Decision and Order for Judgment*, dated July 22, 2021 (“2021 Order”), and *Judgment*, dated August 18, 2021 (“Judgment”).

[¶2] Based on the *Brief of Petitioners/Appellees*, clarification regarding the scope of the instant appeal is warranted. As explained by their initial brief, the co-trustees are challenging the portion of the 2021 Order and Judgment ordering the repayment of trustee compensation. (See Docket No. 14). While the Petitioners attempt to expand the scope of this appeal to other issues adjudicated by the District Court, such matters are not before this Court on appeal. (*Id.*)

[¶3] First, the District Court committed reversible error in ordering the repayment of trustee compensation by failing to enforce the exculpation clause of the RHPMT. The District Court further erred in ordering the repayment of trustee compensation without regard to the *Order for Judgment* entered on February 25, 2013 (“2013 Order”) and doctrine of laches. Lastly, because this Court has directed the Appellants “to indicate in their reply brief whether the paid attorneys’ fees are at issue on appeal and respond to the Appellees’ briefing about the impact of the partial payment on appealability[,]” the same is also discussed below. (Docket No. 18). As explained, the co-trustees are not precluded from appealing the issue of their ordered reimbursement of trustee compensation, and respectfully request a reversal of the 2021 Order and Judgment accordingly.

LAW AND ARGUMENT

I. The co-trustees' partial satisfaction of the Judgment as to attorney's fees (not at issue on appeal) does not preclude the instant appeal.

[¶4] In recognizing the general rule that “a party who voluntarily pays a judgment against him waives the right to appeal from the judgment[,]” this Court has further held that an appellant's partial satisfaction of a judgment does not preclude an appeal where the partially satisfied portion of the judgment is not at issue on appeal. See State ex rel. Storbakken v. Scott's Electric, Inc., 2014 ND 97, ¶ 6, 846 N.W.2d 327. In Storbakken, this Court declined to preclude an appeal of a partially satisfied judgment reasoning that the partial payment which had been made by the Appellant was related to damages not disputed in the appeal. Id. at ¶¶ 6-8 (“We need not resolve the issue here because cases addressing the question generally involve situations where the partially satisfied portion of the judgment remains disputed in the appeal.”); (Also explaining the Appellant could only challenge the judgment in excess of the “undisputed” amount which had been satisfied).

[¶5] As in Storbakken, this is not a case where the partially satisfied portion of the Judgment remains at issue on appeal. The only portion of the Judgment which has been partially satisfied by the co-trustees is found in paragraph 2.G. stating: “The Rose Henderson Peterson Mineral Trust shall reimburse both Petitioners and Trustees for their attorneys' fees.” (App. 47). As explained above, the co-trustees are not appealing or challenging the ordered payment of attorney's fees from the RHPMT; they are appealing the portion of the Judgment ordering the repayment of trustee compensation. (App. 46-47); (Docket No. 14). Accordingly, the co-trustees' partial satisfaction of the attorney's

fees portion of the Judgment does not preclude their appeal of the ordered repayment of trustee compensation.

[¶6] In addition to the foregoing, this Court has also distinguished between a satisfaction of judgment on the merits as opposed to costs incidental to the judgment. See Twogood v. Wentz, 2001 ND 167, ¶ 7, 634 N.W.2d 514 (“A judgment consists of two parts, — one on the merits, and the other for the costs. The payment and satisfaction of the latter is no bar to error proceeding to obtain the reversal of the former.”); See also St. Vincent’s Nursing Home v. Department of Labor, 168 N.W.2d 265, 266 (N.D. 1969) (“the payment of costs which are only incidental to the judgment and do not in any way go to the merits of the case will not defeat the right to appeal”). Here, the ordered payment of attorney’s fees from the RHPMT relates to costs and not the underlying merits of the case. Under North Dakota law, the payment and satisfaction of such costs is not a bar and does not defeat the co-trustees’ right of appeal on the merits – in this case, the ordered repayment of trustee compensation.

[¶7] The Petitioners attempt to argue the co-trustees’ partial satisfaction should constitute a complete bar to an appeal is misguided and contrary to this Court’s holding in Storbakken. (Docket No. 22 at ¶¶ 35-36) (citing Valley Service, Inc. v. Himle Plumbing & Excavating, Inc., 151 N.W.2d 301 (N.D. 1967); Lyon v. Ford Motor Co., 2000 ND 12, 604 N.W.2d 453). In Valley Service, the Court addressed the issue of appealing from the whole of an indivisible and inseparable judgment under N.D.C.C. § 28-27-32 explaining the statute (repealed in 1971) permitted appeals from a part of a judgment or order if the part was severable from the remainder. See Valley Service, Inc., 151 N.W.2d 301, 303-304 (N.D. 1967). Here, the ordered payment of attorney’s fees

from the RHPMT and the ordered repayment of trustee compensation are separate and distinct portions of the Judgment; they are not indivisible or inseparable as contemplated by Valley Service which involved an indivisible judgment denying claims and counterclaims arising from the same transactions. Moreover, the Valley Service case does not concern the issue before this Court of a partially satisfied judgment. As discussed above, this Court has recognized the appealability of a partially satisfied judgment in which the satisfied portion of the judgment is not at issue on appeal. Storbakken, 2014 ND 97, ¶ 8, 846 N.W.2d 327.

[¶8] Lastly, the Petitioners attempt to rely upon the footnote from Lyon v. Ford Motor Co. discussing the “acceptance-of-benefits” rule of waiver. See 2000 ND 12, 604 N.W.2d 453, 459 at FN 1. However, the Court further explains the limited application of the rule, particularly to domestic relations appeals:

Even though the acceptance-of-benefits rule of waiver is conceptually related to the voluntary-payment-or-satisfaction-of-judgment rule of waiver, we have sharply limited the acceptance-of-benefits rule to promote a strong policy in favor of reaching the merits, particularly in domestic relations appeals. The limited application of the acceptance-of-benefits rule is justified in divorce cases because it is unreasonable for an appellant to have to choose between economic adversity and the right to appeal. Because of the obvious dissimilarity between satisfying a judgment in total and merely accepting some benefit of a multifaceted divorce judgment, and because of the absence of the policy considerations present in divorce cases, we find the acceptance-of-benefits cases unhelpful in resolving the issue in this case.

Id. (internal citations omitted). While the co-trustees contend they did not accept a benefit from the Judgment by being ordered to pay Petitioner’s attorney’s fees from the RHPMT (i.e. the satisfied portion of the Judgment), the acceptance-of-benefits rule has limited

application to domestic relation/divorce cases and is not applicable to the instant appeal.
Id.

[¶9] Lastly, the Storbakken holding permitting the partial satisfaction of issues not challenged on appeal reflects efficient and economical public policy. For example, the RHPMT and its beneficiaries benefit from the co-trustees' prompt repayment of the attorney's fees to avoid interest on such fees being assessed following the Judgment, and throughout the duration of this appeal. For the foregoing reasons, the Petitioners' arguments are without merit and the partial satisfaction of the attorney's fees portion of the Judgment (not at issue on appeal) does not preclude the co-trustees appeal of their ordered repayment of trustee compensation.

II. The District Court erred in ordering the repayment of trustee compensation.

A. Exculpation Clause of the RHPMT.

[¶10] While the District Court concluded the co-trustees breached the trust by accepting a large sum of trustee compensation over the last six years, the court did not order the removal of the co-trustees. (App. 42). In determining the co-trustees' acceptance of the compensation did not warrant their removal; the District Court evaluated the requirements for removal under N.D.C.C. § 59-15-06. (See App. 42). Section 59-15-06, in relevant part, states:

2. The court may remove a trustee if the trustee has committed a serious breach of trust; if lack of cooperation among cotrustees substantially impairs the administration of the trust; if because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, **the court determines that removal of the trustee best serves the interests of the beneficiaries**; or if there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, **the court finds that removal of the trustee best serves**

the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(emphasis added). “Because N.D.C.C. § 59-15-06(2) (U.T.C. § 706) states that a court “may” remove a trustee for a serious breach of trust, it confers discretion on the court in deciding the issue.” Dixon v. Dixon, 2018 ND 25, ¶ 19, 905 N.W.2d 748.

[¶11] Section 59-15-06, N.D.C.C., is codified from § 706 of the Uniform Trust Code. The comments to § 706 provide insight into the policy underlying the removal of a trustee:

A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. **A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries.** The term “interest of the beneficiaries” means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. **Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee.**

(internal citations omitted) (emphasis added). Accordingly, the main reason a court should remove a trustee is if the continuation of the trustee in that role would be detrimental to the interests of the beneficiaries.

[¶12] In 2013, Judge Nelson ruled the co-trustees’ 5% compensation rate was reasonable. (App. 26). The co-trustees relied, in good faith, on the court’s determination that their rate was reasonable based on their responsibilities and labors in administering the RHPMT. (Trans. 172:12-16); (Trans. 173:1-16, 22-25; 174:1-2). Since then, the co-trustees have followed the 2013 Order by continuing to assess their fees. (Trans. 129:1-13). After the 2013 Hearing, James met with bankers, attorneys, businessmen who also serve as a trustee, and his accountant to confirm the co-trustees’ compensation rate was

reasonable. (Trans. 177-179). All of these individuals confirmed that a 5% rate was reasonable. (Id.) The co-trustees also increased their communication with the beneficiaries, remained transparent regarding their fees, and advised the beneficiaries they would continue to charge the 5% rate and costs (\$100 per month) as determined reasonable by the court in 2013. (Trans. 91:2-7, 16-25).

[¶13] As stated above, the District Court did not find the co-trustees' receipt of the large sum of compensation warranted their removal. (App. 42). Specifically, the District Court held:

It is not a serious breach and does not require removal. The Trustees have also not committed any other act which would necessitate removal. There is no evidence of a lack of cooperation that substantially impairs administration of the trust. There is no evidence they have become unfit or unwilling or persistently failed to administer the trust. There had not been a substantial change in circumstances warranting removal. Finally, all the qualified beneficiaries have not requested removal.

(Id.) Here, Petitioners argue the co-trustees were not acting primarily in the best interests of the beneficiaries, and therefore, the exculpation clause does not apply. (Docket No. 22 at ¶ 52). However, upon the conclusion of the 2021 Hearing in which the District Court reviewed evidence, heard witness testimony, and assessed witness credibility, the court exercised its discretion to not remove the co-trustees. (Id.) Notably, the District Court did not find the co-trustees failed to act in the best interests of the beneficiaries, nor did the court determine that it was in the best interests of the beneficiaries to remove the co-trustees. In accordance with the RHPMT, the co-trustees' good faith conduct relieves them from liability for compensation received in the administration of the trust. The District Court misapplied the law when it failed to enforce the statutorily valid

exculpation clause absolving the co-trustees for their good-faith conduct in administering the RHPMT. See N.D.C.C. § 59-18-08.

B. 2013 Order and doctrine of laches.

[¶14] The District Court erred when it ordered the co-trustees to repay past compensation received for their administration services; effectively denying to follow Judge Nelson’s 2013 Order in this case. (See App. 26) (“Trustees shall not be required to return any amount of past compensation received.”). Petitioners argue the law of the case doctrine does not apply here because there has not been a previous appeal in this case. (Docket No. 22 at ¶ 56). This argument is flawed, however, for this doctrine also applies when there has been an earlier ruling in the same case. 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).

[¶15] The underlying purpose of the law of the case doctrine is to promote efficiency, certainty, and consistency in the judicial system. Ellis, 313 F.3d 636 at 647. As stated earlier, Judge Nelson ruled the co-trustees’ compensation rate of 5% was reasonable and the co-trustees did not have to repay any compensation. (See App. 26). At the 2021 Hearing, the RHPMT included five times (5x) as many active wells than in 2013. (Trans. 174:9-11). Although the co-trustees’ responsibilities and labors increased with this change, they decided to maintain the 5% compensation rate deemed reasonable by Judge Nelson. They were also supported in this determination when multiple professionals stated this rate was reasonable. (Trans. 177:20-24, 178:4-14 24-25, 179:1-9). As the number of wells increased, the amount of income increased, as did the work and responsibility of the co-trustees. Like in this case, oil leases, the number of active wells,

and income generated in a trust generally change over time. Placing a burden on a trustee to continually evaluate his compensation rate with every change would be unreasonable, and opens the door to constant litigation regarding reasonableness of trustee's fees. No one would want to step into this role when being sued is a likely reality for a trustee. Here, the co-trustees justifiably relied on a judge's determination that their rate was reasonable. Judge Nelson ruled the co-trustees were not required to repay any past compensation received for charging a 5% fee, and this Court should find that the District Court erred when it failed to follow the law of this case.

[¶16] Lastly, the Petitioners' stale claims are 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." Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, ¶12, 844 N.W.2d 892 (internal citations omitted). Petitioners argue the co-trustees have not been disadvantaged; rather the co-trustees have disadvantaged the RHPMT, and ultimately the beneficiaries. (Docket No. 22 at ¶ 59). This is untrue. Since 2013, Petitioners have sat on their claims and waited six and a half (6 ½) years to raise this matter with the court. This is an unreasonably long time. All communication between the co-trustees and the beneficiaries in those six and a half years clearly specified the 5% rate charged by the co-trustees. (Trans. 86:11-14); (Trans. 94:4-7). On March 4, 2013, the co-trustees sent a letter to the beneficiaries regarding their intention to continue to charge a 5% fee as previously deemed reasonable by the court. (Trans. 91:2-7, 16-25); (Trans. 92:1-8). Every month the beneficiaries received accounting of the trust with the co-trustees' rate. Every month the beneficiaries received tax returns stating the co-trustees' rate. For six and a

CERTIFICATE OF SERVICE

[¶20] 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 17th day of February, 2022, 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).

Dated: February 17, 2022.

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