

**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

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

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BACKGROUND

[¶1] James Henderson and Dennis Henderson (collectively the “Trustees”), individually and as trustees of the Rose Henderson Peterson Mineral Trust (the “RHPMT”), submit this supplemental 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”), and in response to the District Court’s Order After Remand, dated July 5, 2022.

[¶2] In Matter of Rose Henderson Peterson Mineral Trust, this Court remanded the matter to the District Court with instruction to “make specific findings of fact concerning the application of the exculpatory provision and the issue of whether the doctrine of laches applies.” 2022 ND 92, ¶ 30, 974 N.W.2d 372. The District Court issued an order indicating it would decide the remaining issues based on the existing evidentiary record and did not schedule an additional hearing. (R221). On July 5, 2022, the District Court entered its Order After Remand concluding the trustee exculpation clause of the RHPMT did not apply based on the amount of compensation received by the Trustees. (R224). The District Court further found the doctrine of laches does not preclude Petitioners’ claims. (Id. at ¶ 10). For the reasons explained herein, the District Court failed to apply the appropriate exculpation standard as instructed by this Court, and the record is devoid of facts that the Trustees’ acceptance of compensation in reliance upon the 2013 Order was committed in bad faith or with reckless indifference to the purpose of the RHPMT.

LAW AND ARGUMENT

- I. **The District Court failed to apply the correct standard to the trustee exculpation issue as instructed by this Court.**

[¶3] In Matter of Rose Henderson Peterson Mineral Trust, this Court narrowly framed the issue to be addressed by the District Court regarding trustee exculpation as focusing on the Trustees’ level of culpability; specifically, whether the breach of trust in receiving compensation in accordance with the 2013 Order was “committed in bad faith or with reckless indifference to the purposes of the trust.” 2022 ND 92, ¶¶ 21, 26, 974 N.W.2d 372. This Court noted that while the District Court “found the Trustees breached the trust of their beneficiaries by charging and accepting excessive fees[,]” it “made no findings as to the Trustees’ level of culpability.” Id. “**Resolution of the issues requires a factual determination as to the Trustees’ level of culpability.**” Id. at ¶ 26 (emphasis added). “**Exculpation is prohibited when a breach of trust was committed in bad faith or with reckless indifference to the purposes of the trust.**” Id. at ¶ 21 (emphasis added).

[¶4] Contrary to this Court’s instruction, the District Court in its Order After Remand applied three different “reckless indifference” standards. (R224). First, the court held the Trustees’ mere acceptance of the trustee compensation rate of 5% based on the 2013 Order establishes “a reckless indifference *to the purposes of the trust*, which is that each grandchild shall receive no more or less share of the income, regardless of the group of grandchildren they are in.” (Id. at ¶ 7) (emphasis added). Second, the District Court found the Trustees were “recklessly indifferent *to their duties as trustees*” when, despite the fact that they were aware the RHPMT was receiving far more income in 2014 than in previous years, the Trustees continued to accept the same 5% rate of compensation. (Id. at ¶ 3) (emphasis added). Lastly, the court determined the Trustees acted with “reckless indifference *to the 2013 Court’s order*” by ignoring its direction to review and evaluate their compensation rate. (Id. at ¶ 5) (emphasis added).

[¶5] In applying the incorrect standards, the District Court found the Trustees were “recklessly indifferent to their duties as trustees” for accepting the large sum of compensation, and “recklessly indifferent to the 2013 Court’s Order” by not evaluating their compensation rate. (R224:2:¶¶3, 5). However, the Trustees relied in good faith on the 2013 Order establishing the rate of 5% as reasonable trustee compensation. (Trans. 173:1-4, 199:19-24); (R41). The Trustees did follow the 2013 Order by reviewing their compensation rate and communicating with the other beneficiaries. The Trustees were transparent and notified the beneficiaries of their intent to continue to charge the judicially-established rate. (Trans. 91:5-22). The Trustees met with professionals, including attorneys, bankers, another trustee of several trusts, and an accountant, who all agreed that the 5% rate was reasonable compensation. (Trans. 177:20-24, 178:4-14 24-25, 179:1-9). In fact, the Trustees have relied upon third parties’ professional recommendations regarding their fees as far back as 2012-2013. (See R42:34:19-24, R42:35:11-19) (detailing conversations with Attorney Dennis Johnson and CPA Tara Hill). Additionally, the Trustees discussed their fees with several other beneficiaries of the RHPMT (Penny Pitman, Patsy Gabbert, and Kimber Henderson) who indicated their 5% compensation rate was acceptable. (Trans. 180:4-14). Not only were the Trustees’ fees deemed acceptable by professionals and several beneficiaries, but also by the ruling of a district court judge. (R41); (Trans. 177:20-24, 178:4-14 24-25, 179:1-9, 180:4-14). Nevertheless, the District Court ignored this Court’s directive on remand by applying multiple, inapplicable culpability standards to the Trustees’ conduct.

[¶6] The correct standard to be applied is whether the breach of trust was “committed in bad faith or with reckless indifference *to the purposes of the trust.*” Matter of Rose

Henderson Peterson Mineral Trust, 2022 ND 92, ¶ 21, 974 N.W.2d 372. In this regard, the District Court applied the appropriate culpability standard **only once**. (R224:3:¶7). The District Court determined, in conclusory fashion, that the Trustees acted with “reckless indifference to the purposes of the trust” by receiving more trust income, as “Paul Henderson Grandchildren,” than the “Lyle Henderson Grandchildren.” (Id.) However, this conclusion fails to distinguish the Trustees’ separate and distinct roles as both beneficiaries and trustees of the RHPMT. Under the RHPMT, it is undisputed the Trustees are entitled to reasonable compensation for their trustee administration services. (R13). It is also undisputed that the Trustees, in their capacity as beneficiaries, are entitled to the same trust distributions as all other beneficiaries. (R124). In comparison to the other beneficiaries, the Trustees are lawfully entitled to receive two (2) sources of income from the RHPMT based on its express terms. Accordingly, the District Court erred when it determined the Trustees acted with reckless indifference to the purposes of the trust by accepting more income than the other group of grandchildren for their services as trustees. All beneficiaries of the RHPMT, in their capacity as beneficiaries, have received the same amount of trust distributions.

II. Because the record is devoid of specific facts that the Trustees’ acceptance of compensation in reliance upon the 2013 Order was committed in bad faith or with reckless indifference to the purposes of the trust, the District Court erred in finding the trustee exculpation clause does not apply.

[¶7] Even if this Court concludes the District Court applied the correct trustee exculpation standards on remand, the District Court failed to make specific factual findings regarding the Trustees’ justifiable reliance on the 2013 Order. The special concurrence of this Court’s Opinion provided guidance as to specific facts required to

support a finding of bad faith or reckless indifference to the purposes of the trust, and that any such findings should be premised on facts known at the time:

...[I]f on remand the district court finds there was a ‘breach of trust committed in bad faith or with reckless indifference to the purposes of the trust ...its findings should explain what specific facts support this finding and at what point in time the trustees had constructive or actual knowledge of these facts.

A finding that the trustees acted in bad faith or with reckless indifference should be premised on facts known at the time of the act taken in bad faith, and repayment for acts of the trustee should not extend back in time further than the facts supporting a finding of bad faith.

Matter of Rose Henderson Peterson Mineral Trust, 2022 ND 92, ¶ 33, 974 N.W.2d 372.

The concurrence goes on to explain that “[i]t is not apparent to me what facts became known to the trustees before January 1, 2014, that would support a finding of bad faith for an act taken in reliance on the February 25, 2013 order.” Id.

[¶8] The Trustees relied in good faith on the 2013 Order establishing the rate of 5% as reasonable compensation. (Trans. 173:1-4, 199:19-24); (R41). On March 4, 2013, the Trustees sent a letter to the beneficiaries indicating their intent to follow the 2013 Order:

As for our compensation as Trustees, Judge Nelson said that current rate of 5% of Trust income (split between James and Dennis; each receives 2.5%) is common and “reasonable under the circumstances.” Judge Nelson said that the combined 8% that we received from October 2011 through March 2012 was on the high side, but not unreasonable, as some trustees (including banks) charge as much as 10%. We plan to continuously assess these rates based on a number of factors provided by the Uniform Trust Code. We will notify the beneficiaries whenever a change to our compensation is made.

(Trans. 91:5-22); (R158 at Bates No. H1459). Even Rocky relied upon Judge Nelson’s 2013 Order, and communicated to the Trustees the importance of complying with his

ruling in a December 2013 email. (See R158 at Bates No. H1468). How can it be determined that the Trustees could not reasonably rely upon the 2013 Order on January 1, 2014, when only a month earlier Rocky had communicated his own reliance on the 2013 Order? The record does not contain specific facts known to the Trustees before January 1, 2014, to support a finding of bad faith or reckless indifference to the purposes of the trust for their actions taken in reliance on the 2013 Order.

[¶9] The District Court’s analysis and denial of the Petitioners’ request for removal further support the Trustees’ administration of the RHPMT in good faith reliance on the 2013 Order. Specifically, the District Court found:

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...

(R165:7:¶ 40) (emphasis added). 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 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.”) (emphasis added). The culpability standards that apply in this case are higher levels of culpability than the grounds for removing a trustee under North Dakota law. Yet, the District Court found the Trustees’ conduct did not warrant their removal, while it simultaneously held the Trustees’ conduct met the higher culpability standard of reckless indifference which no longer provides the Trustees with exculpation clause protection. In the absence of a serious breach or other grounds for removal, the record before this Court is devoid of specific facts as would be required to support a finding of bad faith or reckless indifference for the Trustees’ actions in reliance on the 2013 Order. Accordingly, the exculpation clause of the RHPMT applies relieving the Trustees from liability for repayment of compensation received in reliance upon the 2013 Order.

III. The District Court failed to make specific findings of fact on remand regarding the doctrine of laches.

[¶10] This Court remanded this case to address the issue of whether the doctrine of laches applies. Matter of Rose Henderson Peterson Mineral Trust, 2022 ND 92, ¶¶ 29-30, 974 N.W.2d 372. The evidentiary record shows the Petitioners’ substantial delay in asserting their claims has prejudiced the Trustees. At trial, Rocky acknowledged he has always been aware of the compensation rate charged by the Trustees since the February 2013 Hearing. (Trans. 94-8-10). Immediately following the 2013 Order, Rocky expressed issues with the Trustees’ fees by email in December 2013 and July 2014. (See R156 at

Bates No. H1488; R158 at Bates No. H1468). **Furthermore, Rocky consulted with his attorney, Michael Andrews, back in October 2015 regarding the issues in this case.** (See R169, Exhibit A to the *Declaration of Michael T. Andrews in Support of Application for Attorneys' Fees and Costs*). Petitioners waited six and a one-half (6 ½) years to bring this action. (R44). This is an unreasonable amount of time. Although Petitioners could have brought this action years ago, they chose to sit on their claims. They failed to act on their rights until it became prejudicial to the Trustees. The Trustees paid substantial income taxes on the compensation they received, and their tax returns for 2014-2019 cannot be amended. See IRS Instructions for 1040-X – Amended U.S. Individual Income Tax Return (“Generally, for a credit or refund, you must file Form 1040-X within 3 years (including extensions) after the date you filed your original return or within 2 years after the date you paid the tax, whichever is later.”). In its initial Opinion, this Court mentioned the possibility that the Trustees could receive a tax deduction or credit under 26 U.S.C. § 1341, but that issue was not considered on remand by the District Court. Matter of Rose Henderson Peterson Mineral Trust, 2022 ND 92, ¶ 29, 974 N.W.2d 372.

CONCLUSION

[¶11] The Trustees respectfully request this Court to reverse the District Court’s Judgment as it relates to any repayment by the Trustees of trustee compensation.

Dated: August 19, 2022.

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CERTIFICATE OF COMPLIANCE

[¶12] The undersigned certifies that the Supplemental Brief of James Henderson and Dennis Henderson complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure and contains a total of 12 pages.

Dated: August 19, 2022.

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CERTIFICATE OF SERVICE

[¶13] 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 19th day of August, 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).

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