IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE LOYAL W. SHEEN FAMILY TRUST

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IN RE LOYAL W. SHEEN FAMILY TRUST.

JANENE M. FEIKERT, BENEFICIARY, AND ALLEN W. SHEEN, BENEFICIARY, APPELLEES,
V.
J.H. SCHROEDER, TRUSTEE, APPELLANT.

Filed January 18, 2011. No. A-10-236.

Appeal from the County Court for Buffalo County: GRATEN D. BEAVERS, Judge. Reversed and remanded for further proceedings.

Mark D. Raffety, of Domina Law Group, P.C., L.L.O., and, on brief, Jeffery R. Kirkpatrick, of McHenry, Haszard, Roth & Hupp, P.C., L.L.O., for appellant.

Kent A. Schroeder and D. Brandon Brinegar, of Ross, Schroeder & George, L.L.C., for appellees.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

J.H. Schroeder, trustee of the Loyal W. Sheen Family Trust, appeals from the decision of the county court for Buffalo County removing him as trustee of the trust. Because we conclude that the decision to remove Schroeder as trustee does not conform to the law and is not supported by competent evidence, we reverse the decision of the county court and remand the cause for further proceedings.

PROCEDURAL BACKGROUND

The trust was formed in 1979 and funded with the property of Loyal W. Sheen and his wife Veona G. Sheen, later known as Veona G. Sheen Barnes. The purpose of the trust was to

preserve family assets and provide income for living expenses for Loyal and Veona. Loyal died in August 1982, and Veona died in August 2008. At the time of the present proceedings, the trust assets consisted primarily of agricultural real estate located in Buffalo County, Nebraska. The beneficiaries were Loyal and Veona's children: Elena Schmidt (Elena), Janene M. Feikert (Janene), and Allen W. Sheen.

The trust was the subject of an earlier removal proceeding and trust administration action. See *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). In that case, the county court, among other things, removed Veona and Elena as trustees and determined that the trust would not terminate 25 years from its establishment but would be renewed until the time of Veona's death. The Nebraska Supreme Court affirmed the county court's decision in that case.

Schroeder became a trustee for the trust in January 1999 and has been primarily responsible for the administration of the trust since that time.

On July 22, 2008, Janene and Allen filed a petition seeking to remove Schroeder and "John Doe(s) and/or Jane Doe(s)" as trustees of the trust. Janene and Allen alleged that the trustees had committed a serious breach of trust; were unfit; were unwilling, and had persistently failed, to administer the trust effectively; and had been guilty of misconduct while in office. Janene and Allen also alleged that removal of the trustees would best serve the interests of the beneficiaries. They filed an amended petition November 12, adding Kenneth Woolery to the list of trustees, whom they also sought to remove.

Elena, as a beneficiary of the trust, and Schroeder and Woolery, as trustees, filed an answer to the amended petition for removal and a counterclaim. They generally denied the substantive allegations of the petition, and in their counterclaim, they alleged that the trustees had diligently and adequately performed their fiduciary duties in administering the trust; that the trustees were fit, able, and willing to administer and wind up the trust effectively; and that it would be in the beneficiaries' best interests for the trustees to continue in office until the trust was wound up. They further alleged that the trustees had managed and performed their assigned duties, had adequately fulfilled their fiduciary responsibilities, and had accounted and managed all assets and reported to the beneficiaries to the best of their ability as required by the trust. They asked that the petition be dismissed and that Schroeder and Woolery be allowed to continue as trustees. We note that at some point during the course of these proceedings, Woolery was replaced as Schroeder's cotrustee by Denzel Snow.

Schroeder and Snow sent a letter to the trust beneficiaries, dated January 30, 2009, advising the beneficiaries that they had engaged certain land brokers to sell the real and personal property of the trust. In the letter, the trustees explained that they felt it was an appropriate time to sell in order to obtain the highest possible prices for the trust property in connection with closing out the trust as soon as possible after Veona's estate was settled. They also explained that if the property was not sold by spring, the trustees would be required to rent out the farm property for another season, thereby delaying the time when the trust could be closed and funds disbursed to the beneficiaries.

On February 9, 2009, Janene and Allen filed a motion concerning the sale of trust property. They alleged that the trustees did not possess sufficient powers to sell the trust assets and that such a sale would incur a substantial income tax liability that could otherwise be avoided. Janene and Allen further alleged that they wanted their beneficial interest in the trust to

be distributed in kind. They asked the court to order the trustees to cease and desist from selling the trust property, to prepare a final accounting, and to distribute the trust assets in kind. On March 4, the court entered an order, restraining the trustees from disposing of the real or personal property of the trust until further order of the court.

On June 24, 2009, Janene and Allen filed a motion, asking the county court to order the trustees to "expeditiously distribute the trust property to the beneficiaries," which motion was subsequently denied by the court.

Following a hearing on December 16, 2009, the county court granted summary judgment in Snow's favor and dismissed him as a party to this action.

The removal action proceeded against Schroeder only, and a hearing was held before the county court on December 17, 2009.

REMOVAL EVIDENCE

Schroeder testified generally regarding his actions as trustee and the transactions that occurred concerning the trust property. Schroeder indicated that money was paid out from the trust to Veona during her lifetime to reimburse her for her living expenses. The trust forwarded reimbursements to Veona based primarily upon canceled checks she presented to the trustees. According to Schroeder, at the time of the removal hearing, Veona had still not been reimbursed for all of the living expenses which she had submitted to the trust prior to her death. He explained that the two primary reasons that the trust had fallen behind in reimbursing Veona were attorney fees incurred for the prior litigation involving the trust and a farm operating loan taken by Allen, which loan the trust assumed prior to Schroeder's becoming a trustee.

Spreadsheets were received into evidence that showed all of the income and expenses incurred by the family trust from 2002 through 2008. Schroeder testified that he had not been able to print off spreadsheets prior to 2002, because of problems with the spreadsheet software. Copies of bank statements and canceled checks from some of the years were also received. A review of the trust account was performed in 2009 for the period of 2002 through 2007 by a firm of certified public accountants. The court received a draft report, which revealed a number of keystroke errors and checks that were shown on the spreadsheet that did not clear the bank account in the time recorded. Schroeder reviewed the discrepancies with the firm of certified public accountants, and a corrected report was prepared. The corrected report was not offered into evidence.

There was evidence concerning Schroeder's communications with the trust beneficiaries. Allen testified that at some point, he began receiving annual spreadsheets from Schroeder which laid out the financial situation of the trust. Allen testified that he never called or wrote to Schroeder or any cotrustee to ask questions about the information on the spreadsheets. Janene testified that she began receiving spreadsheets from Schroeder regarding trust income and expenditures in 2007. Janene recalled receiving a document from Schroeder in 2002 that she had to sign and return. There was also evidence of ongoing tension and strained communications between Janene and Schroeder dating back to the time of the previous removal proceedings. According to Schroeder, when he tried to mail Janene information by certified mail, it came back unclaimed.

Considerable evidence was adduced concerning transactions that occurred in 2004. In February and March, Veona received five checks from the family trust in the amounts of $2,609.40; $2,582.15; $10,000; and $25,000. Schroeder testified that this money was paid to Veona as reimbursement for past living expenses and that even after these payments, the trust still owed Veona money for her past living expenses. The $10,000 and $25,000 checks to Veona were paid on March 22, 2004. According to Schroeder, the reason why the trust was able to make these reimbursement payments to Veona on March 22 was that on March 3, it had received a payment of $42,850.41, which was the final balloon payment on some real estate which the trust had sold in 1993.

At this same time, Veona became involved in a North Dakota real estate transaction. The property in question was the family farm on which Schroeder's wife was raised. In March 2004, Veona agreed to loan money to assist the R&I Memorial Trust in purchasing the property in North Dakota from the Ralph Dietz Family Trust. Ralph Dietz is the father of Schroeder's wife. Schroeder's wife and the Schroeders' sons are trustees of the R&I Trust, and Schroeder's wife is a beneficiary. The R&I Trust did not have enough money for a downpayment on the purchase and needed a bridge loan, which was provided by Veona. Schroeder testified that Veona became involved in the transaction for personal reasons because of her relationship with his wife.

The money for the North Dakota real estate transaction came from Veona's personal bank account. The record contains copies of three checks written by Veona on this account, all dated March 22, 2004: a check for $341 to Schroeder's wife for "loan," a check for $32,300 to the Ralph Dietz Family Trust for "bal[ance] on land purchase," and a check for $1,000 to Farm Credit Services of America (Farm Credit) for "stock." Also on March 22, Veona wrote a $49 check for recording fees in North Dakota and a $310 check for legal fees associated with the real estate closing.

Veona signed a loan agreement, promissory note, and mortgage with Farm Credit in the amount of $102,700 to purchase the 240 acres of property in North Dakota. Veona served as a nominee of the R&I Trust in connection with the transaction. Warranty deeds were executed from the Ralph Dietz Family Trust to Veona. Veona also received a $1,000 stock certificate from Farm Credit. According to Schroeder, all of the payments on the Farm Credit promissory note were made by the R&I Trust and Veona's investment was protected because the land was placed in her name until the note was paid off. Schroeder indicated that the $32,300 check Veona wrote in March 2004 to the Ralph Dietz Family Trust for the balance on the land purchase was the only money she paid to that trust. In April 2004, she received and deposited two checks from the R&I Trust totaling $10,000 as partial repayment of this loan. Upon Veona's death, her estate was paid back the outstanding balance of the loan with the agreed-upon interest. None of the Loyal W. Sheen Family Trust real estate was put up as collateral for the Farm Credit loan.

Following Veona's death in August 2008, the R&I Trust took over the Farm Credit loan, and Veona's estate was refunded the $1,000 stock purchase from Farm Credit.

There was some evidence about whether Veona completely understood the North Dakota real estate transaction. Elena, who was named as Veona's guardian and conservator sometime in 2006 or 2007, testified that in 2004, at the time of the North Dakota real estate transaction, Veona seemed to be mentally alert and appeared capable of managing her financial affairs. Schroeder testified that Veona was insistent on making the loan. There were also letters admitted

into evidence, over Schroeder's foundation, hearsay, and relevance objections, which letters Veona wrote in 2006 and 2007 to the Nebraska Attorney General making various allegations against Schroeder. The letters are rambling and accuse Schroeder of such things as taking all of Veona's housing and property away from her, thinking he owns her property, stealing and lying to two other families, having a fight with his only brother at his mother's funeral, and playing a fraudulent trick on Veona after taking her on a ride to Broken Bow (in apparent reference to paperwork signed in connection with the North Dakota real estate transaction).

With regard to compensation for his services as trustee, Schroeder testified that he had been paid "[s]ome" for acting as trustee, but he was not sure how much. Schroeder testified that he had not intended to charge for his services, but began doing so in response to the litigation and the efforts required in producing documents. Schroeder also testified about various reimbursements he received for trust-related expenses, none of which appear exorbitant or unusual. Schroeder also used trust funds to pay his wife for her assistance in helping with recordkeeping for the trust. His wife was paid based on the number of lines of data that she entered into the spreadsheet with the payments ranging from $50 to $125 depending on the amount of data she put into the spreadsheet. Our review of the record reveals eight checks to Schroeder's wife for working on spreadsheets, totaling $643, plus an additional $50 check written to her for accounting.

Evidence was adduced that in 2004, prior to the original end date contained in the trust, Schroeder drafted a resolution, upon the advice of counsel, seeking to continue the trust for 25 years.

COUNTY COURT ORDER

The county court entered an order on February 9, 2010, removing Schroeder as trustee of the trust. The court noted Schroeder's alleged renewal of the trust prior to Veona's death, stating that while the renewal was not the subject matter of this action, it appeared contrary to the court's order, as affirmed by the Nebraska Supreme Court, in the previous removal proceeding. The court discussed the North Dakota real estate purchase, noting that the loans involved in that transaction appeared to have been repaid to Veona's estate after her death in August 2008, but the court made no specific findings regarding the repayment of these loans. The court found that the evidence further reflected that Veona did not completely understand the effect and interest of those involved in these transactions. The court also noted Schroeder's payments to his wife for performing bookkeeping duties for the trust. The court found that this conduct reflected a willingness on Schroeder's part to use resources at his disposal to benefit himself and his wife. The court further found that Schroeder did not keep all of the beneficiaries, particularly Janene and Allen, informed of the activities of the trust. Accordingly, the court found that Schroeder had committed serious breaches of trust and had persistently failed to administer the trust effectively and that his removal was in the best interests of the beneficiaries. Schroeder subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Schroeder asserts, consolidated and restated, that the county court erred in (1) removing him as a trustee and (2) allowing the admission of prejudicial hearsay in letters written by Veona.

STANDARD OF REVIEW

Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). Trust administration proceedings are brought before the appellate court pursuant to the Nebraska Probate Code. See Neb. Rev. Stat. § 30-3821 (Reissue 2008). In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in county court. *In re Trust of Rosenberg, supra.* See, also, *In re Trust Created by Socha*, 18 Neb. App. 471, 783 N.W.2d 800 (2010) (noting conflicting standards of reviewing actions involving removal of trustees but consistent application of error on the record standard of review).

When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Trust of Rosenberg, supra.* An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings. *Id.*

ANALYSIS

Schroeder asserts that the county court erred in removing him as a trustee and allowing the admission of prejudicial hearsay in letters written by Veona.

Neb. Rev. Stat. § 30-3862 (Reissue 2008) provides:

> (a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
>
> (b) The court may remove a trustee if:
>
> (1) the trustee has committed a serious breach of trust;
>
> (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
>
> (3) 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
>
> (4) 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.
>
> (c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under subsection (b) of section 30-3890 as may be necessary to protect the trust property or the interests of the beneficiaries.

The language of § 30-3862 is identical to that of Unif. Trust Code § 706, 7C U.L.A. 575 (2006). The comments to § 706 of the Uniform Trust Code (UTC) are helpful in evaluating whether a trustee has committed a "serious breach of trust." The comment to § 706 provides:

> The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may

> also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.

7C U.L.A. at 576. See also, *In re Charles C. Wells Revocable Trust*, 15 Neb. App. 624, 734 N.W.2d 323 (2007).

With respect to a "persistent failure to administer the trust effectively," the comment provides that this "might include a long term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts." 7C U.L.A. at 577. And although this is not a case involving "lack of cooperation among cotrustees," we note the comment concerning subsection (b)(2) of § 706 of the UTC, which provides:

> Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable.

7C U.L.A. at 576.

Although the county court clearly relied heavily on the evidence of the North Dakota transaction in removing Schroeder as trustee of the trust, we are not convinced that this evidence, or any of the other evidence referenced by the county court, establishes a serious breach of trust. While the date of the North Dakota real estate transaction corresponded with the dates of two large reimbursement checks from the trust to Veona for living expenses, there is nothing in the record to contradict Schroeder's testimony that such expenses were in fact owed to Veona. The record is clear that the money for the North Dakota transaction was drawn from Veona's personal checking account, and although the county court declined to make a specific finding about the repayment of the resulting loans, the record supports a conclusion that the money was repaid with interest to Veona's estate.

The county court questioned whether Veona understood the effect and interest of those involved in the North Dakota transaction. The court apparently relied on letters written by Veona to the Nebraska Attorney General in December 2006 and September 2007, in which Veona raised concerns over various things, including, apparently, paperwork she was asked to sign in connection with the North Dakota transaction. We note that these letters were written around the time that Elena was named as Veona's guardian and conservator. There is nothing in the record to contradict Elena's testimony that Veona seemed to be mentally alert and appeared capable of managing her financial affairs at the time of the North Dakota real estate transaction.

In sum, there is no competent evidence in the record to indicate that Schroeder's actions, in apparently facilitating Veona's involvement in the North Dakota real estate transaction, caused significant harm to the trust or its beneficiaries, involved flagrant misconduct, or otherwise amounted to a serious breach of trust.

At oral argument, Janene and Allen's counsel argued that the payments from the trust to Veona amounted to a distribution of the trust principal, as opposed to income, and were in violation of the trust instrument. The record shows that the money paid to Veona in March 2004 came from a final balloon payment on real estate that had been sold by the trust in 1993. Our review of the record and the trust instrument does not support a finding that these payments to Veona were in contravention of any restrictions in the trust instrument.

The other matters mentioned by the county court in support of its decision for removal included Schroeder's payment to his wife for her bookkeeping services, his resolution concerning continuation of the trust prior to Veona's death, and his failure to keep all beneficiaries informed of the activities of the trust. We conclude that the record does not contain competent evidence to support a finding that these actions either amounted to a serious breach of trust or show that Schroeder was unfit, unwilling, or persistently failed to administer the trust.

First, the record shows that services of Schroeder's wife were utilized to help effectively administer the trust and that the amount of money paid to her was very minimal. In addition, payment by the trust for these services was authorized by the trust document. Second, Schroeder's resolution concerning continuation of the trust was essentially of no import following Veona's death, and Schroeder clearly took action to attempt to wind up the trust following Veona's death. Third, the record shows that Schroeder, at least after 2002, attempted to supply the beneficiaries with records pertinent to the trust. There is nothing in the record to indicate that requests for additional information were made to Schroeder by any beneficiary.

Finally, the record does not indicate that there has been a substantial change of circumstances supporting removal. While there is clearly ongoing discord between Schroeder and Janene and Allen, the record does not support a conclusion that this discord has been caused solely by Schroeder. And, it is noteworthy that one of the beneficiaries supports continued service by Schroeder as trustee. What the record does show is that Schroeder has made an attempt to wind up the trust following Veona's death, has proposed that the real estate in the trust be sold, but that Janene and Allen have attempted to block this sale.

We conclude that the decision of the county court to remove Schroeder as trustee does not conform to the law and is not supported by competent evidence. Accordingly, we reverse the decision of the county court and remand the cause for further proceedings. Because of this resolution, it is not necessary for us to decide whether the county court erred in admitting the letters from Veona to the Nebraska Attorney General into evidence. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

CONCLUSION

The decision of the county court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.