IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF WILLIAM POWELL LEAR, A/K/A WILLIAM P. LEAR, W.P. LEAR AND BILL LEAR.

PATRICK CHRISTOPHER LEAR,
Appellant,
vs.
ESTATE OF WILLIAM POWELL LEAR,
Respondent.

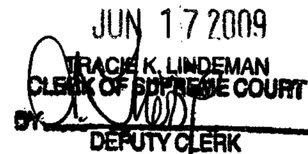
LORIN LEAR; VANESSA BERTELLI; JENNIFER LEAR; VALENTE BERTELLI; MARA BERTELLI; JESSE JACKSON; LUKE JACKSON; AND CHLOE JACKSON,
Appellants,
vs.
ESTATE OF WILLIAM POWELL LEAR,
Respondent.

ESTATE OF WILLIAM POWELL LEAR,
Appellant,
vs.
PATRICK CHRISTOPHER LEAR; LORIN LEAR; VANESSA BERTELLI; JENNIFER LEAR; VALENTE BERTELLI; MARA BERTELLI; JESSE JACKSON; LUKE JACKSON; CHLOE JACKSON; AND SHANDA LEAR-BAYLOR,
Respondents.

WILLIAM POWELL LEAR, JR.; PAT LEAR; AND DAVID RICHARD LEAR,
Appellants,
vs.
LORIN LEAR; VANESSA BERTELLI; JENNIFER LEAR; VALENTE

No. 49684

FILED



09-14956

BERTELLI; MARA BERTELLI; JESSE JACKSON; LUKE JACKSON; CHLOE JACKSON; AND SHANDA LEAR-BAYLOR,
Respondents.

ORDER AFFIRMING IN PART AND REVERSING IN PART[1]

This is an appeal and cross-appeal from a district court order settling several years of trust accountings, dismissing breach of fiduciary duty claims, and awarding attorney fees in an action concerning a trust.[2] Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

This case involves a multimillion-dollar family trust (LFT) that the grantors, William P. and Moya Olsen Lear, established in 1978. The district court addressed the following relevant issues: (1) the remainder beneficiaries' notice; (2) the trustees' management of the trust; and (3) the trustees' petition for approval of extraordinary fees and an increase in the trustees' annual fees and the awarding of attorney fees to the trustees, Shanda Lear-Baylor, and the remainder beneficiaries. Addressing these issues, we affirm the district court's order in part and reverse in part.

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[1]The Honorable James W. Hardesty, Chief Justice, and the Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

[2]This is the third case in a series of three related cases. We refer to this case, In re Estate of Lear, Nevada Supreme Court Docket No. 49684 as "Lear III." We refer to the related case, the consolidated case of In re Estate of Lear, Nevada Supreme Court Docket No. 45856 and No. 46388, as "Lear I" and In re Estate of Lear, Nevada Supreme Court Docket No. 47379, as "Lear II."

For the following reasons, we affirm the district court's decision except for the following two issues. First, we reverse the district court's denial of the trustees' request for extraordinary fees and an increase in annual fees because the Trust instrument grants the trustees authority to establish their compensation, and the district court failed to cite any evidence that the trustees abused their discretion. Second, we reverse the district court's vacating its previous sanction order against Patrick because it lacked subject matter jurisdiction over the issue, which was on appeal. Therefore, the district court's original sanction order against Patrick stands.

The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Discussion

I. Notice

Regarding notice of the Trust accountings, the remainder beneficiaries raise two arguments. First, they argue that the trustees were required to provide them with notice prior to 1999. Second, they argue that the district court improperly applied the doctrine of laches to their claims.

A. The remainder beneficiaries' notice prior to 1999

In August 2005, the district court found that Patrick was a contingent beneficiary not entitled to notice, and Patrick appealed this decision. In April 2006, the district court also found that the trustees adequately notified minor and nonresident beneficiaries and that the remainder beneficiaries were not entitled to notice. It also concluded that the remainder beneficiaries received notice of the 14th through the 18th accountings. The remainder beneficiaries now argue that the district court erred in finding that they were not entitled to notice prior to 14th

accounting. We disagree with the remainder beneficiaries' contentions for the following two reasons: (1) the district court lacked subject matter jurisdiction to rule on the issue and, (2) pursuant to Patrick's appeal of his petition to set aside accountings, the remainder beneficiaries were not entitled to notice before Moya's death in December 2001.

First, the district court lacked subject matter jurisdiction to decide the issue because it was already on appeal in Lear I. A timely appeal to this court divests the district court of jurisdiction over a matter and vests jurisdiction in this court. Smith v. Emery, 109 Nev. 737, 740, 856 P.2d 1386, 1388 (1993). In Lear I, Patrick appealed the district court's August 2005, order, which held that he was not entitled to notice because he had a contingent remainder interest. The district court itself recognized that any of its orders on appeal deprived it of jurisdiction to change the order. Thus, we conclude that the district court lacked subject matter jurisdiction to address this issue. Id.

Second, we conclude that pursuant to our decisions in Lear I and II, the remainder beneficiaries were not entitled to notice before Moya's death in December 2001 because their interest was contingent upon the condition precedent of survival. As a result, the remainder beneficiaries lack standing to challenge all accountings before the 14th accounting in 2000.

B. The doctrine of laches

Because we conclude that the remainder beneficiaries lack standing to challenge all accountings before the 14th accounting in 2000, we do not address the portion of the district court's ordering regarding laches.

II. The Trustees' Management

This section discusses the remainder beneficiaries' petition to remove the trustees, certain discovery issues, and the remainder beneficiaries' breach of fiduciary duty claims.

A. Removal of the trustees

The trustees argue that the remainder beneficiaries never filed a petition to remove them for breach of trust or fiduciary duty as required by NRS 163.115 and 164.010 or 164.015. Further, the trustees argue that the remainder beneficiaries did not comply with NRS 155.010's notice requirements. We agree because the remainder beneficiaries failed to follow certain procedural requirements.

According to NRS 163.115, a proceeding to remove a trustee requires the filing of a petition under NRS 164.010 and 164.015. The remainder beneficiaries assert that they filed several pleadings or documents that gave all interested parties actual notice of their claims to remove the trustees.[3] The remainder beneficiaries also argue that they complied with the notice requirements of NRS 155.010 because they served five of the six initial pleadings at least ten days before the trial.

After reviewing the proffered documents, we conclude that none of the pretrial pleadings discussed or requested removal of the

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[3]The remainder beneficiaries cite to the following pleadings: (1) a petition for redress for breach of trust and an errata to the petition for redress; (2) a motion for a clarification order regarding Patrick's petition to set aside accountings and a reply in support of the clarification motion; (3) a renewed petition for redress of breach of trust, which they filed twice; (4) a statement of trial issues; (5) a supplemental hearing statement; (5) a second list of trial issues filed during the trial; and (6) a supplement to their statement of trial issues.

trustees, and therefore the issue was not properly before the court. No beneficiary presented or suggested the removal request in a pleading until the January 5, 2007, statement of issues, which was after the trial had already begun. See George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 524 (2d ed. 1993) (stating that alleging breaches of trust is insufficient to initiate a removal proceeding). Further, NRS 155.010 requires notice of a hearing on a petition at least ten days before the hearing. Here, the trial started on October 25, 2007, and although the district court continued the trial in November 2007 and February 2008, notice of removal during the trial is insufficient notice under NRS 155.010. Although NRS 165.200 provides for removal of a trustee who fails to perform his duties under NRS Chapter 165, the district court cannot remove the trustees if the parties do not follow the proper procedural requirements. Therefore, the issue of the trustees' removal was not properly before the district court.

B. Discovery issues

The remainder beneficiaries also argue that the district court improperly denied them the opportunity to conduct discovery. We disagree because the parties failed to comply with the applicable statutory scheme and the Nevada Rules of Civil Procedure.

According to NRS 164.005, the regulation of estate matters under NRS Chapters 132, 153, and 155 apply to trusts so long as the estate regulations do not conflict with NRS Chapters 162 through 167. In other words, NRS Chapter 132, 153, and 155 apply to and supplement trust proceedings unless the relevant estate regulations are expressly inconsistent with the trust regulations. Since no provision in NRS Chapters 162 through 167 address discovery, the estate discovery rules apply to this matter.

NRS Chapter 155 addresses the estate discovery rules. Accordingly, NRS 155.150 and 155.180 state that during a trial addressing probate issues of fact, the NRCP apply unless specifically stated otherwise in NRS Chapter 155. Further, NRCP 81 states that the Nevada Rules of Civil Procedure do not apply to special statutory proceedings, such as probate matters, if the applicable statutes are inconsistent or conflict with the rules of civil procedure. We conclude that, read together, NRS 155.150, 155.180, and NRCP 81 clearly state that the Nevada Rules of Civil Procedure apply to this matter unless expressly stated otherwise in NRS Chapter 155. Since no provision in Chapter 155 excludes discovery under NRCP 26(b)(1), the general rules of discovery apply to probate proceedings.

In requesting discovery, all parties must comply with the Nevada Rules of Civil Procedure. In particular, NRCP 26(a) allows discovery by depositions, interrogatories, production of documents and other requests, physical and mental examinations, and requests for admissions. In order to use these methods, however, the parties must file either a joint case conference report or a separate case conference report and comply with NRCP 16.1(a) regarding disclosure. NRCP 26(a).

Here, the evidence shows that neither Patrick nor any other remainder beneficiary requested discovery. Patrick requested the production of certain documents under NRCP 34. Addressing the request, the district court ordered the trustees to make available for Patrick all of the Trust's financial records for 2000 though 2003, which the trustees did. Later, Patrick filed a motion to compel production of documents and "things." Patrick's document requests, however, were contained in letters mailed in September 2006, approximately one month before the trial. The separate letters were addressed to (1) co-trustee Murphy; (2) co-trustee

Tucker; (3) trust attorney David Reese; (4) attorney William Sanford, who represented the Richard Rowley estate; and (5) attorney Jeffrey Rahbeck, who represented the Harold Dayton estate. Trust attorney William Peterson, responding on behalf of the trust, argued that pursuant to the Nevada Rules of Civil Procedure Patrick: (1) was not allowed to directly or indirectly contact parties represented by counsel, (2)had not followed NRCP 16 or 16.1, and (3) had not followed the formal discovery rules when making discovery requests. In addition, attorney Rahbeck responded that the Dayton estate was not a party to the action under NRCP 33 and the district court had already quashed Patrick's previous attempt to join Dayton. On the first day of trial the district court denied Patrick's motion to compel discovery. The district court found that none of the beneficiaries, including Patrick, had complied with the discovery rules and that it was inappropriate to request enforcement of informal discovery on the first day of trial.

Neither Patrick nor the remainder beneficiaries provide any evidence of compliance with NRCP 16 or 16.1. In addition, neither party provides evidence of properly requested discovery that the trustees denied or ignored. Thus, we conclude that the district court acted within its discretion when it denied Patrick's motion to compel discovery because Patrick failed to comply with the formal discovery requirements.

The remainder beneficiaries also argue that they had the right to inspect the Trust's records without formal discovery because they are beneficiaries of the trust. Further, they argue that the district court erred by limiting Patrick's access to records from 2000 through 2003 because the trial addressed issues outside those periods. We conclude that, based on our conclusions in Lear I and Lear II, the remainder beneficiaries' interest is contingent on the condition precedent of survival, and they are not

entitled to challenge any Trust actions prior to Moya's death in December 2001. Therefore, the parties are not entitled to review any of the Trust's records prior to 2001 because these documents are not relevant to the valid subject matter of the remainder beneficiaries' claims. NRCP 26(b)(1); Schlatter v. District Court, 93 Nev. 189, 192, 561 P.2d 1342, 1343 (1977).

C. Breach of fiduciary duty claims

Before we address the remainder beneficiaries' substantive claims, we discuss the district court's scope of review and its subject matter jurisdiction over the Silver Lake Water Company sale and the Bombardier royalty settlement.

In 1993, the district court issued an order allowing the trustees to sell the LFT's real estate as underproductive property and divide the sale proceeds between the income and remainder beneficiaries.[4] The order approved the trustees' formula, which split the sales as follows: 60 percent of the proceeds to the income beneficiaries and 40 percent of the proceeds to the remainder beneficiaries. The district court also held that the LFT instrument granted the trustees the necessary discretion, and the formula treated both groups of beneficiaries impartially and fairly. Following the sale, the income beneficiaries received six percent per year of the sold property's 1992 assessed value.

In May 1996, the district court issued another order confirming a settlement agreement between the LFT trustees and Canadair Limited (now Bombardier, Inc.) regarding the LFT's 43 percent

[4]The district court found that without this distribution scheme the income beneficiaries would receive none of the proceeds even though they had to pay their share of the taxes and costs.

interest in royalties due from Bombardier. The agreement liquidated the LFT's interest.

In 1999, the trustees sold the Silver Lake Water Company to Sierra Pacific Water Company. Prior to the sale, co-trustees Murphy and Dayton were directors of Silver Lake and co-trustee Rowley was a corporate officer. At the time of the sale, Murphy was a shareholder and director of Sierra Pacific, and Rowley was a director of Silver Lake. The district court's order ratifying the sale did not mention the trustees' relationship with Silver Lake.

1. The district court's scope of review

The LFT's provisions and applicable law limit the district court's scope of review.

First, the LFT provides the trustees with broad discretion. LFT Article Sixth grants the trustees the authority to do the following:

- "to do all such acts, take all such proceedings and exercise all such rights and privileges in the management of the trust estate as if they were individuals and the absolute owners thereof." The article proceeds to outline some of the specific actions the trustees may take, but it does not limit the trustees' actions to those listed. In addition;
- to prudently invest in every kind of property;
- to allocate receipts, expenses, and assets between the income and principal accounts without any inference of imprudence or partiality;
- to manage the Trust's oil, gas, and mineral rights;
- to borrow money for any trust purpose from anyone including the trustees;

- to manage the various trust investments including developing aircraft parts; and
- to exercise shareholder rights.

Finally, the LFT instrument supplements the express grants of power by granting the trustees all powers included in NRS 163.265 through 163.410, so long as the statute does not conflict with the express grants of power set forth in the LFT. Second, "[w]hen a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion." Restatement (Third) of Trusts § 87 (2003). Therefore, we conclude that the district court can only review whether the trustees' "conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties." Id. at cmt. b.

In sum, we conclude that the trust instrument provides the trustees with broad discretion, and the district court's review of that discretion is limited to the reasonableness of the trustees' decisions.

2. The district court's subject matter jurisdiction over the Silver Lake Water Company sale and the Bombardier royalty settlement

The remainder beneficiaries argue that the district court lacked subject matter jurisdiction over the Silver Lake Water Company sale and Bombardier settlement because the parties did not present the issues for trial, and the issues were on appeal in Lear I. We disagree because the issues were not before this court in Lear I and the remainder beneficiaries placed these transactions at issue.

As discussed above, the district court's prior order regarding Patrick's petition to set aside accountings addressed the notice of accountings and not the Silver Lake sale or Bombardier settlement, and therefore those issues were not before this court in Lear I. In addition, the

remainder beneficiaries challenged the trustees' management, including the trustees' allocation of Trust assets, the trustees' treatment of the various beneficiaries' interests, the six-percent formula, and other investment and management decisions. As a result, we conclude that the remainder beneficiaries placed the validity of the sale and settlement at issue when they alleged the trustees had a conflict of interest and breached their fiduciary duties when performing these transactions.

3. The remainder beneficiaries' substantive claims

The remainder beneficiaries argue that the trustees breached their fiduciary duties by mismanaging trust assets, favoring the income beneficiaries over the remainder beneficiaries, failing to prudently invest in growth assets, and entering into transactions involving conflicts of interest. For the reasons set forth below, we conclude that the remainder beneficiaries' arguments lack merit.

a. The trustees' management of the Trust assets

The remainder beneficiaries make three arguments regarding the trustees' management of the Trust assets.

First, the remainder beneficiaries argue that the district erred in finding market forces caused the diminution in the Trust's value between 2001 and 2005 because there is insufficient evidence to support the district court's findings. Second, the remainder beneficiaries argue that the trustees failed to prudently invest in growth assets. Third, the remainder beneficiaries argue that the district court could not adequately analyze the Trust's value because the trustees kept records based on cost basis and not fair market value. We conclude that each of these contentions is without merit and address each in turn below.

The remainder beneficiaries have the burden of proving that a trustee breached a fiduciary duty, but once they establish a prima facie

case, the burden shifts to the trustees to defend their action. Bogert & Bogert, supra, at § 871. "Evidence which merely shows a decrease in the value of the trust property, without showing that the trustee wrongfully caused the decrease, does not make a case." Id. Finally, Trust Article Sixth(b) and Nevada law both apply the prudent investor rule to the trustees' investments. NRS 164.740 and 164.745.

When evaluating a trustee's investment under the prudent investor rule, the district court must determine the reasonableness of the actions including the following factors:

> (a) General economic conditions;
>
> (b) The possible effect of inflation or deflation;
>
> (c) The expected tax consequences of decisions or strategies;
>
> (d) The role that each investment or course of action plays within the overall trust portfolio;
>
> (e) The expected total return from income and the appreciation of capital;
>
> (f) Other resources of the beneficiaries;
>
> (g) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
>
> (h) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

NRS 164.745(3). Finally, the district court must examine the prudent investor rule "in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." NRS 164.765. And we review the district court's findings of facts for substantial evidence. Hannam v. Brown, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998).

(i) The diminution in the Trust's value between 2001 and 2005

The district court made the following findings of fact regarding the diminution of the Trust's assets from 2001 through 2005: (1) there was evidence that market turmoil arising out of corporate scandal and the 9-11 attacks affected the Trust's devaluation; (2) there was evidence that the payment of income to the income beneficiaries and the auditing, accounting, and settlement costs totaled over $500,000; and (3) the devaluation did not rise to the level of a breach of trust or fiduciary duty or neglect. Thus, the district court concluded that the devaluation of the trust resulted from market forces.

The remainder beneficiaries make two arguments regarding the district court's findings of fact. First, they claim that according to trial exhibit 29, of the approximately $3 million in market losses only $496,028 in securities losses are actually due to market forces, leaving $2,592,475 of nonmarket-related losses. Second, they assert that the trustees intentionally misrepresented the UBS accounts or worse, falsified them. We disagree.

Although trial exhibit 29 does not contain information on the UBS accounts, trial exhibit 103 does list security sale losses at $469,938. Since the fact that one accounting record does not contain the data of other accounting records does not suggest misrepresentation or falsification, we conclude that the two exhibits are relatively consistent and suggest that the total losses due to market investment are $1.3 million, or approximately one-third of the Trust's net losses from 2001 through 2005. Because the district court heard testimony on the issue, reviewed the trial exhibits, and determined there was insufficient evidence to suggest a breach of fiduciary duty, we conclude that there is substantial evidence to support the district court's findings of fact.

(ii) The trustees' investment in growth assets

Under NRS 164.710 and 164.735, the prudent investor rule governs trustees unless the trust instrument specifically states otherwise. Restatement (Third) of Trusts § 90 cmt. a (2003). LFT Article Sixth(b) also applies the prudent investor standard to the trustees' investment decisions, and requires the trustees to consider both generating income and protecting principal. Id. at § 90 cmt. e.

At trial, co-trustee Murphy testified that without the shift from growth equity to fixed income investment, the Trust's principal would have suffered greater losses from market forces. Further, the record shows that the trustees have distributed approximately $29 million in income payments and increased the Trust's principal from approximately $3 million to $22 million. In opposition to Murphy's contentions, the remainder beneficiaries' expert witness, another trust management company, presented conflicting testimony regarding whether its investment strategies would have outperformed the trustees' strategy.

Based on this evidence, we conclude that the district court properly found that the trustees had prudently invested the Trust assets because there were both testimony and trial exhibits supporting their strategy, and the district court did not find that the remainder beneficiaries' expert testimony adequately showed the trustees invested imprudently.

(iii) The trustees' cost basis approach to record keeping

In addition, Murphy testified about the cost basis accounting, and he also testified that fair market value accounting is difficult because the fair market value for stocks changes on a daily basis. Further, he testified that the UBS reports, which were not included in the auditing reports, illustrated some of the portfolio's fair market value. The

remainder beneficiaries fail to cite to any evidence in the trial record which overcomes the reasonableness of the trustees' decision. Thus, the remainder beneficiaries have not met their burden of proof regarding whether the trustees' approach was unreasonable.

(iv) The trustees' treatment of the remainder and income beneficiaries' interests

The remainder beneficiaries argue the following two points regarding the trustees' treatment of their interest: the trustees unfairly converted over $1.2 million in the Trust's principal assets into income and the Trust instrument does not provide the trustees the discretion to favor the income beneficiaries. We conclude that the remainder beneficiaries' arguments lack merit because the trustees acted within their discretion.

First, regarding the conversion of principal assets, LFT Article Sixth(c) provides that the Nevada Principal and Income Act applies to the trust administration except when the trustees are exercising their discretion conferred by the LFT. The LFT grants the trustees discretion in approving and allocating Trust property between the principal and income accounts and states that "[n]o inference of imprudence or partiality shall arise from" the trustees' exercising this discretion, including allocating assets contrary to the Nevada Revised Uniform Principal and Income Act. In other words, the trustees' discretion regarding principal/income allocation controls over the Nevada Principal and Income Act. Further, the district court's 1993 order ruled that under the terms of the LFT instrument, the trustees have complete discretion to determine what is principal or income assets and to apportion and allocate receipts and expenses and other charges between the two accounts.

Therefore, we conclude that the district court properly found that the trustees did not violate the LFT instrument when they converted $1.2 million of the principal into income because the allocation was within

their discretionary power and there is no evidence of favoritism. See Restatement (Third) of Trusts § 79 cmt. g (stating that the need to maintain income productivity may require investing heavily in fixed-income assets as opposed to growth assets).

Second, regarding the trustees' exercise of their discretion, an independent auditor testified that, regarding expense allocation, the trustees were "pretty much following the Principal and Income Act related to how items were being allocated." Co-trustee Murphy also testified that the trustees considered the remainder beneficiaries' interest, including investments in growth assets, but they did not communicate these considerations to the remainder beneficiaries.

We conclude that although the LFT instrument does not allow the trustees to favor the income beneficiaries over the remainder beneficiaries, the instrument does expressly provide that any allocation undertaken by the trustees cannot give rise to an inference of imprudence or partiality. Therefore, trustees' allocation of $1.2 million of the principal into income was not improper, as held by the district court.

b. Conflicts of interest

The remainder beneficiaries argue that in three Trust transactions the trustees had an impermissible conflict of interest. First, the remainder beneficiaries argue that the trustees' investing in the Dunham Trust common fund created a conflict of interest because co-trustee Tucker is a corporate officer of the Dunham Trust Company. Second, the remainder beneficiaries argue that co-trustee Murphy's dual role created a conflict of interest and the sale was not in the Trust's best interest. Third, the remainder beneficiaries argue that co-trustee Murphy's association with the Trust's accounting firm, Grant Thornton,

violated his duty of loyalty because he received third-party compensation from Grant Thornton. For the reasons set forth below, we disagree.

(i) The trustees investing in the Dunham Trust common fund

The trustees invested approximately $1.5 million with Dunham Trust. At the time of this investment, co-trustee Tucker was the President and Chief Trust Officer of Dunham Trust, and he continues in this capacity. Co-trustee Tucker testified that as a trust officer/trustee he could invest in a common fund under Nevada law.

The district court made the following findings of fact regarding the Dunham Trust investment: although the trust instrument permitted the investment and it benefited the Trust, the trustees should liquidate the investment in a reasonable time and manner and reinvest the proceeds in an investment unconnected to the trustees. The district court, however, found that the trust instrument, NRS 163.275(e), and 164.070 et seq. permitted the investment.

Under NRS 163.050(1), a trustee cannot buy or sell property to itself or an affiliate without court approval. But NRS 163.050(2), allows a corporate trustee to buy or sell property, except real property, to itself or an affiliate "[i]f authorized by the trust . . . or consented to by all beneficiaries." Further, under the Uniform Common Trust Fund Act, a trust company may establish a common trust fund and a trustee associated with the fund may invest in the common trust fund so long as the trust instrument or a court order does not prohibit the investment. NRS 164.080(1).

In addition, LFT Article Sixth(b) provides the trustees with broad investment authority, and neither that article nor any other provision in the Trust instrument prohibits such an investment. Further,

there is no court order prohibiting the LFT's investment in the Dunham Trust Fund.

We conclude that the district court properly held that the trustees did not did not breach their fiduciary duties regarding the Dunham Trust investment because the investment was permitted under Nevada law and the trust instrument, and co-trustee Tucker is a corporate trustee who, under NRS 163.050, may invest in his company's common trust fund.

(ii) The purchase of secured notes held by the Moya Olsen Lear Trust

Co-trustee Murphy is also the sole trustee of the Moya Olsen Lear Trust (MLT). While serving in his dual role as a trustee of the LFT and the MLT, Murphy sold the MLT's 50 percent interest in certain jointly held first deeds of trust to the LFT. The deed of trust had an interest rate of 7.5 percent at a time when the market rate was about 5 percent. Co-trustee Murphy testified that the notes were performing perfectly, with no defaults.

Under NRS 163.050(1), a noncorporate trustee cannot buy trust property for himself or an affiliate nor sell the trust property owned by himself or an affiliate without prior court approval. In addition, NRS 163.060(1) states that a noncorporate trustee of two trusts may not buy or sell property from one trust to the other trust without prior court approval. Murphy is a noncorporate trustee.

Although Nevada law does not allow Murphy to engage in the relevant transaction, LFT Article Sixth(e)(1) grants the trustees the power "[t]o borrow money for any trust purpose from any person including the Trustees . . . [and] to lend money of one trust to any other trust created hereunder or to any other person, including but not limited to the Trustees." (Emphases added.) Thus, the trust instrument overrides NRS

163.050(1) and 163.060(1) and controls the buying and selling of trust property between the LFT and another trust or the trustee or his affiliate.

Here, Murphy testified that the notes were performing perfectly, with no defaults, and therefore the Trust agreed to buy the MLT's 50-percent interest in the secured notes. The district court held that the purchase benefited the Trust because of the attractive interest rate, and the transaction was within the trustees' discretion.

We conclude that the district court correctly held that Murphy did not breach his fiduciary duty regarding the purchase of secured notes held by the MLT because the Trust instrument gave him the authority to participate in the transaction, and the investment was reasonable because it had adequate rates of return, security, and potential performance.

(iii) Co-trustee Murphy's relationship with the Trust's accounting firm

The remainder beneficiaries argue that co-trustee Murphy violated his fiduciary duty by retaining Grant Thornton as the Trust's accounting firm while he was a full-time partner or associated with the firm and by receiving approximately $20,000 a year from Grant Thornton for his Trust-related accounting work. We disagree because the district court has discretion to allow the trustee to receive accounting fees.

Murphy, as a trustee, has a duty of loyalty "to administer the trust solely in the interest of the beneficiaries." Restatement (Third) of Trusts § 78(1) (2003). A trustee violates his duty of loyalty if he receives a bonus, commission, or other compensation from a third person for services connected to the administration of the trust. Id. at cmt. d(1). In such circumstances, the trustee must disgorge the compensation received. Id. However, in limited situations, a trustee may be entitled to compensation for extra services, such as legal or accounting services, but the district court must approve this extra compensation. See id. at cmt. c(1).

Here, LFT Article Twelfth states "[t]he trustees shall receive reasonable compensation for services rendered in connection with the administration of th[is] trust." Murphy testified that he performed some of the accounting activities for the LFT in his partner capacity at Grant Thornton. He also testified that he does not get a commission or share of the profits, but he does get $75 for every hour he bills. Finally, he testified that from 2000 through 2005 he received approximately $15,000 to $20,000 a year from Grant Thornton for his LFT-related accounting activities.

In 2003, the district court ordered co-trustee Murphy to stop this practice, it subsequently allowed the practice to continue through 2005 because of transition difficulties. Murphy testified that the trustees followed the district court's order. Because the district court has the discretion to allow accounting fees, we conclude that the district court properly held that co-trustee Murphy did not breach his fiduciary duties regarding his relationship with Grant Thornton.

III. Attorney fees and costs

Our discussion here proceeds as follows. First, we discuss the district court's award of attorney fees and costs to the trustees. Second, we discuss the district court's denial of the trustees' request for extraordinary fees and an increase in annual fees. Third, we discuss the district court's award of attorney fees to Shanda Lear-Baylor (Shanda) and the remainder beneficiaries. Fourth, and finally, we discuss the district court's vacating its previous sanction order against Patrick Lear.

As to these contentions, we conclude the following: (1) the district court properly awarded the trustees' attorney fees and costs because Nevada law and the Trust instrument authorize the trustees' litigation-related actions and their actions benefitted the trust; (2) the

district court erred in denying the trustees' request for extraordinary fees and an increase in annual fees because it failed to find that the trustees' request abused their discretion under the LFT instrument; (3) the district court properly awarded attorney fees to Shanda and the remainder beneficiaries because the award was consistent with either the common-fund doctrine or the substantial-benefit doctrine; and (4) the district court erred in vacating its sanction order against Patrick Lear because it lacked jurisdiction to vacate the sanction. We will now address each of these issues in turn below.

A. The trustees' attorney fees and costs

The district court approved all the trustees' attorney fees and costs as reasonable and beneficial to the LFT. The remainder beneficiaries argue that the trustees incurred attorney fees and costs while defending their own reputations and obstructing the remainder beneficiaries' right to information, and therefore the district court abused its discretion when it held their litigation benefited the Trust. We disagree because both Nevada law and the Trust instrument permitted the trustees' litigation-related actions, and there is sufficient evidence to support the district court's award.

This court reviews a district court's award of attorney fees for abuse of discretion unless the award requires an interpretation and application of the law, in which case this court's review is de novo. Thomas v. City of North Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). Here, we first review de novo whether Nevada law and the Trust instrument allow for the award, and then we review for abuse of discretion, the district court's award finding that the fees were reasonable.

Under NRS 163.023, "[a] trustee has the powers provided in the trust instrument." LFT Article Sixth(h) grants the trustees the

powers provided in NRS 163.265 to 163.410, which includes the power to sue on or defend the "trust as the fiduciary deems advisable, and the fiduciary's decision shall be conclusive between the fiduciary and the beneficiaries of the" trust so long as there is no fraud, bad faith, or gross negligence. NRS 163.375. In addition, NRS 163.305 allows the trustees to pay expenses related to the trust's administration and protection. Further, NRS 163.380 allows the trustee to employ legal counsel in defense of the trust. Finally, LFT Article Ninth expressly states that "[t]he Trustees are hereby authorized to defend, at the expense of the trust estate, any contest or other attack of any nature of this trust o[r] any provisions of this trust agreement."

Interpreting both Nevada law and the Trust instrument de novo, we conclude that the trustees' decision to defend against Patrick's initial petition, to appeal the district court's decision regarding the remainder beneficiaries' interest, and to defend against this matter, conclusively benefit the LFT so long as there is no fraud, bad faith, or gross negligence by the trustees. Here, the trustees successfully defended against the various lawsuits, and the district court did not find any evidence of fraud, bad faith, or gross negligence. Pursuant to Nevada law and the Trust instrument, which allow the trustees to pay the expenses related to the litigation, the district court acted within its discretion when it awarded the trustees' attorney fees.

Also, the remainder beneficiaries incorrectly rely on Whittlesey v. Aiello, 128 Cal. Rptr. 2d 742 (2002), to argue that the trustees' defense did not benefit the Trust and, therefore, they should not receive attorney fees. Whittlesey is distinguishable both legally and factually.

Legally, California Probate Code § 15684 states that, "[a] trustee is entitled to the repayment out of trust property for the following: (a) Expenditures that were properly incurred in the administration of the trust. (b) To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust." Whittlesey, 128 Cal. Rptr. 2d at 745 (quoting Cal. Prob. Code § 15684). Nevada law, however, states that the trustee's decision to sue or defend against a lawsuit is conclusive so long as there is no fraud, bad faith, or gross negligence. NRS 163.375. In addition, neither NRS 163.305 nor 163.380 contains the benefit of the trust language expressed in California Probate Code § 15684. As a result, Whittlesey is legally distinguishable and inapplicable under Nevada law.

Finally, the district court acted within its discretion when it found that the trustees' attorney fees were reasonable. The remainder beneficiaries provide no proof, other than mere allegations, that the district court did not properly consider the reasonableness of the fees. Conversely, the trustees' application for attorney fees and costs provides an affidavit from the trustees' attorneys and 40 pages detailing hourly time schedules and costs. Consistent with Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 350, 455 P.2d 31, 34 (1969), the trustees' application showed that their counsel competently and skillfully discharged his services. We conclude that this evidence supports the district court's findings, and therefore the district court properly awarded the trustees' attorney fees.

B. The trustees' request for extraordinary fees and an increase in their annual fees

The trustees argue that the district court improperly denied their request for extraordinary fees. We agree because the district court

failed to cite to any evidence that the trustees abused their discretion in setting their own fees.

This court reviews the district court's factual determinations for substantial evidence. Hannam v. Brown, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998). Trust Article Sixth(h) grants the trustees all powers under NRS 163.265 to 163.410 so long as those powers do not conflict with the trust instrument's provisions.[5] In this case, NRS 163.305 grants the trustees the power to determine their compensation because Trust Article Twelfth states "[t]he Trustees shall receive reasonable compensation for services rendered in connection with the administration of this trust." Since the Trust instrument and NRS 163.305 grant the trustees the power to determine their compensation, the district court cannot deny an award of extraordinary fees or an increase in annual fees unless the trustees abused their discretion. Humane Society v. First Nat'l Bk. of Nev., 92 Nev. 474, 477, 553 P.2d 963, 965 (1976).

The district court found that the trial evidence did not justify extraordinary fees or additional fees. Thus, the district court denied the trustees' petition for extraordinary fees and an increase in annual fees. In the district court's order, however, the court did not cite to any evidence supporting its conclusion. Because the district court's decision is not supported by substantial evidence, it abused its discretion.

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[5]The remainder beneficiaries argue that under NRS 153.070 the district court determines if compensation for a trustee's services are reasonable. The trust instrument, however, does not incorporate NRS Chapter 153. Thus, we conclude that NRS 153.070 does not apply.

C. Shanda's attorney fees and costs

There are two cross-appeals regarding the district court's award of attorney fees to Shanda and the remainder beneficiaries.

First, the trustees argue that Nevada law denies the award of attorney fees unless specifically authorized by agreement, statute, or rule. Thus, the district court improperly awarded attorney fees to Shanda and the remainder beneficiaries because there is no agreement, statute, or rule authorizing the recovery of attorney fees by a beneficiary in trust litigation. We disagree because the award is valid under either the common fund doctrine or the substantial benefit doctrine.

Second, the income beneficiaries argue that estoppel bars the remainder beneficiaries from requesting attorney fees because they declined to ask for fees during the trial. They also argue that the award to Shanda was improper because her litigious efforts did not result in any tangible benefit to the Trust and her claims conflict with the other income beneficiaries' interests. For the reasons discussed below, we conclude that the income beneficiaries' arguments lack merit because estoppel does not apply to the remainder beneficiaries, and Shanda's efforts did benefit the Trust and did not conflict with the other income beneficiaries' interests.

1. The trustees' cross-appeal

The trustees challenge the legal basis for the district court's award of attorney fees to both Shanda and the remainder beneficiaries. Generally, this court reviews a district court's award of attorney fees for abuse of discretion, but if the award requires an interpretation and application of the law, then this court's review is de novo. Thomas v. City of North Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). Since we must determine the authority on which the award relies, we review de novo the district court's award. Id.

The district court concluded that "the payment of costs and attorney fees in connection with presenting and defending against issues raised in these proceedings is authorized by the trust instrument and by applicable statute, and are just and reasonable, benefited the trust and should be paid." The LFT provisions and incorporated statutes, however, only apply to the trustees' attorney fees. Thus, the district court's conclusion applies to the trustees and not the beneficiaries. As a result, the beneficiaries' award must rely on some other statute or rule.

Although no Nevada statute authorizes the district court's award, "it is well established that this court may affirm rulings of the district court on grounds different from those relied upon by the district court." Milender v. Marcum, 110 Nev. 972, 977, 879 P.2d 748, 751 (1994). Looking to judicial rules, we conclude that the district court's award was proper under either the common fund doctrine or the substantial benefit doctrine.

a. The common-fund doctrine

Under the common-fund doctrine, a district court may award attorney fees to "a litigant 'who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits [to] require those passive beneficiaries to bear a fair share of the litigation costs.'" Guild v. First Nat'l Bank of Nev., 95 Nev. 621, 623, 600 P.2d 238, 239 (1979) (quoting Quinn v. State, 539 P.2d 761, 764 (Cal. 1975)). This doctrine has two requirements: the litigant must actually prevail on at least one significant issue and the prevailing litigation must benefit other passive parties with common interests. Valley Elec. Ass'n v. Overfield, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005). We conclude that under this doctrine the district court's award to both Shanda and the remainder beneficiaries was proper.

Regarding Shanda's attorney fees, the district court found that her expenditure benefited the Trust because her challenge resulted in an order for updating the Trust's accounting methods, liquidating and reinvesting the Dunham Trust investment, and impacting the trustees' future administration of the Trust. After considering these benefits, the district court reduced her requested amount by approximately $93,000 to a total award of $85,000. Thus, we conclude that the district court adequately considered the benefits conferred on the Trust, and therefore the court's award was proper under the common fund doctrine.

Similarly, the district court's awarding the remainder beneficiaries' attorney fees was proper. Like with Shanda, the district court found that remainder beneficiaries' litigation benefited the Trust for comparable reasons and it reduced their attorney fee award to $50,000, a reduction of approximately $72,000, which reasonably reflects the benefit conferred.

b. The substantial-benefit doctrine

The substantial benefit doctrine also applies to the remainder beneficiaries. "This doctrine allows recovery of attorney fees when a successful party confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Thomas v. City of North Las Vegas, 122 Nev. 82, 91, 127 P.3d 1057, 1063 (2006) (internal quotations omitted). Parties requesting an attorney fee award under this doctrine must show: (1) there is a small class of identifiable beneficiaries, (2) the benefit is traceable, and (3) the benefited class bears the costs. Id. at 91, 127 P.3d at 1063-64.

Here, the benefited class is the Trust beneficiaries, which is a relatively small and identifiable class. Further, the benefits of enhanced accounting, disinterested investments, and clarifications on proper trust management are traceable benefits to the Trust. Finally, the cost of the $50,000 award applies to the Trust's principal, and therefore burdens the remainder beneficiaries only. As a result, we conclude that the remainder beneficiaries would qualify for an attorney fee award under the substantial benefit doctrine.

2. The income beneficiaries' cross-appeal

The income beneficiaries seek to apply estoppel to the remainder beneficiaries' request for attorney fees, and they argue that the district court improperly awarded Shanda attorney fees.

a. The remainder beneficiaries' attorney fees

The income beneficiaries assert that either judicial estoppel or equitable estoppel prevents the remainder beneficiaries from requesting attorney fees because they declined to ask for their fees during the trial. We disagree because neither doctrine applies to this case.

A court may sua sponte raise the doctrine of judicial estoppel, but the doctrine requires that the same party intentionally take two inconsistent positions in a judicial proceeding with that party successfully asserting the first position. Marcuse v. Del Webb Communities, 123 Nev. 278, 287-88, 163 P.3d 462, 468-69 (2007). This court has held, however, that district courts should only apply the doctrine when the intentional wrongdoing sabotages the judicial process or creates an unfair advantage. Id. at 288, at 469.

Here, the remainder beneficiaries' counsel did not request attorney fees during closing remarks. At this time, both the trustees and Shanda planned to apply for attorney fees. The district court decided to

have the parties requesting attorney fees file an application, which allowed other parties to file an opposition. Later, the remainder beneficiaries applied for attorney fees and expressly stated that they had reconsidered their position. Consistent with the district court's order, the income beneficiaries had the opportunity to, and in fact did, oppose the remainder beneficiaries' application.

We conclude that judicial estoppel does not apply to the facts of this case because the remainder beneficiaries did not act with the intent to sabotage the judicial process or take an unfair advantage. Their application was within the district court's ordered time frame and the income beneficiaries had the opportunity to oppose the application.

Likewise, equitable estoppel does not apply. Equitable estoppel requires a party who knows the true facts to intentionally act in manner which induces or seeks to induce detrimental reliance by a party ignorant of the true facts. Cheqer, Inc. v. Painters & Decorators, 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982). Here, there was no finding that the remainder beneficiaries sought to induce detrimental reliance, and the income beneficiaries were not ignorant of the true facts because they were aware of the remainder beneficiaries' application for attorney fees and filed an opposition to the fees.

b. Shanda's attorney fees

The income beneficiaries assert that Shanda should not receive attorney fees because her litigious efforts did not result in any tangible benefit to the Trust. In addition, the income beneficiaries argue that Shanda's diversification argument is contrary to her interest and the interest of the other income beneficiaries, and therefore the income beneficiaries should not pay her $85,000 in attorney fees simply because Shanda is pursuing her own claims against the Trust. We disagree.

As discussed previously, the common-fund doctrine applies to Shanda's litigious efforts, which benefited the Trust. The district court properly reduced her requested amount to reflect that benefit. Further, the income beneficiaries previously raised their arguments in their opposition to Shanda's application, and therefore the district court already considered these arguments. We therefore reject the income beneficiaries' contentions regarding this issue.

D. The district court's previous sanction order against Patrick Lear

The district court issued two orders regarding Patrick's sanction. In August 2008, it ordered Patrick to pay the Trust's attorney fees arising from Patrick's petition to set aside accountings and the discovery dispute between Grant Thornton and Patrick. In October 2005, the district court ordered that Patrick to pay attorney fees in the amount of $8,621.73. In December 2005, Patrick appealed both orders. The district court issued an order vacating its sanctions based on its jurisdiction to modify nonfinal orders. But the trustees argue that the district court had no jurisdiction to vacate its sanction order against Patrick because the order was on appeal. We agree.

"An appeal may be taken . . . [f]rom a final judgment in an action or proceeding commenced in the court in which the judgment is rendered." NRAP 3A. A timely appeal to this court divests the district court of jurisdiction over a matter and vests jurisdiction in this court. Smith v. Emery, 109 Nev. 737, 740, 856 P.2d 1386, 1388 (1993).

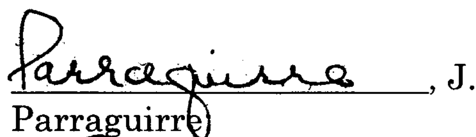
We conclude that the district court's August 2005 and October 2005 orders were final appealable orders. Thus, Patrick's appeal of these orders divested the district court of jurisdiction, and therefore it lacked jurisdiction to vacate the sanction.

Conclusion

In conclusion, we affirm the district court's order except on the following two issues. First, we reverse the district court's denial of the trustees' request for extraordinary fees and an increase in annual fees because the Trust instrument grants the trustees authority to establish their compensation, and the district court failed to cite any evidence that the trustees abused their discretion.

Second, we reverse the district court's vacating its previous sanction order against Patrick because it lacked subject matter jurisdiction over the issue, which was on appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.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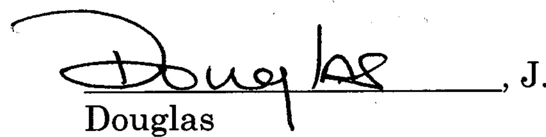
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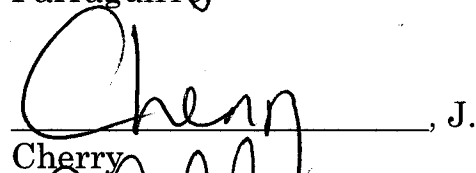
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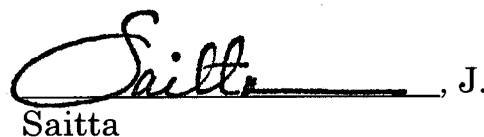
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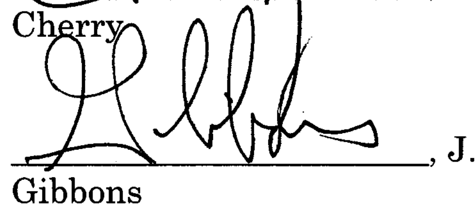
, J.
Gibbons

cc: Chief Judge, Second Judicial District
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Law Office of Lisa Rasmussen
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