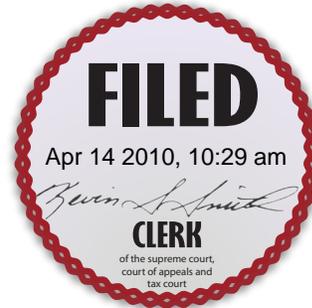


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

CHRISTOPHER S. RILEY
Barnes & Thornburg LLP
Elkhart, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE REVOCABLE)
TRUST AGREEMENT OF)
BEVERLY J. SHERCK)
)
JAMES A. SHERCK,)
)
Appellant/Petitioner,)
)
vs.)
)
RONALD G. SHERCK, TRUSTEE OF THE)
REVOCABLE TRUST OF BEVERLY J.)
SHERCK,)
)
Appellee/Respondent.)

No. 20A03-0908-CV-395

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0611-TR-3

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Respondent James Sherck appeals from the trial court's denial of his motion to Docket Trust and Remove Trustee. James contends that the trial court erred in (1) ruling that Appellee/Respondent Ronald Sherck, DDS ("Dr. Sherck) could transfer to himself land owned by a corporation of which he and the Beverly J. Sherck revocable trust ("the Trust") were major shareholders, (2), failing to remove Dr. Sherck as trustee of the Trust, and (3) concluding that actions taken at a certain shareholder's meeting of the land corporation were valid. We affirm in part and reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Beverly Sherck (who passed away on August 20, 2003) and Dr. Sherck are the parents of James, Rev. Ronald Sherck II, John Sherck, and Sarah Yoder. (Appellant's App. 15, 129). Upon Beverley's death, Dr. Sherck became trustee of the Trust, which had been created on May 11, 2003. (Appellant's App. 33). At the time of Beverly's death, the only asset held by the Trust was stock in R&B Sherck Land, Inc. ("R&B"), a family-held C-corporation whose principal assets are several undeveloped parcels of land in Elkhart County. (Appellant's App. 15). Although the exact tally is in dispute, the Trust and Dr. Sherck each hold between forty and forty-two shares of R&B, and the four children each hold between one and four shares. Among other things, the Trust provides for the creation of a "Credit Shelter Trust" and directs Dr. Sherck to fund it with "that amount, if any, that can pass free of the Federal Estate Tax[.]" an amount which all parties agree is one million dollars. Appellant's App. p. 28. The Trust instrument does

not specify that Dr. Sherck is required to fund the Credit Shelter Fund in any particular fashion.

As of January 2008, the Sherck children were officers of R&B. (Tr. 115, 145, 171). Dr. Sherck requested a shareholders' meeting on January 19, 2008. (Tr. 431). Dr. Sherck contended that a quorum existed because his stock and the Trust's stock, over which he had control, amounted to well over seventy percent of the outstanding stock. (Respondent's Ex. E.) Yoder, however, who was acting as corporation Secretary and Inspector at the time, declared that a quorum did not exist due to doubts about control of R&B stock generated by the litigation, and the four children left the meeting. Respondent's Ex. E (Tr. 433). Dr. Sherck nonetheless continued the meeting, and R&B adopted a resolution that, *inter alia*, (1) removed all of the children from their positions as officers and directors in R&B, (2) installed Dr. Sherck as President, (3) provided for the conveyance of a 69.9 acre parcel of land to Dr. Sherck that he had previously deeded to R&B for no consideration, (4) approved the sale and transfer of R&B stock in order to fund the Credit Shelter Trust, and (5) provided that R&B would enter into negotiations to develop the real estate still held by R&B. (Respondent's Ex. E.) At no point has R&B been named as a party in this lawsuit.

Meanwhile, on October 2, 2006, James had filed a motion to docket the Trust and remove Dr. Sherck as trustee, and, at some point, filed a *lis pendens* notice pertaining to land held by R&B. (Appellant's App. 23-32). On November 15, 2006, Dr. Sherck filed a response to James's motion and petitions to sell certain assets or make them income producing and to remove the children as trustees of the Credit Shelter Trust. (Appellant's

App. 33). On February 9-11, 2009, a bench trial was held. (Appellant's App. 8-9). On August 4, 2009, the trial court issued an order denying James's motion and granting Dr. Sherck's motions. (Appellant's App. 22). Specifically, the trial court's order dissolved the *lis pendens* notice, permitted Dr. Sherck to sell R&B's assets to fund the Credit Shelter Trust, and ordered him to fund the Credit Shelter Trust in an amount equal to one million dollars or the entire value of the Trust, whichever is less, within a reasonable time. (Appellant's App. 9).

DISCUSSION AND DECISION

Standard of Review

At the outset, we note that Dr. Sherck has not filed an Appellee's brief. In such cases, we do not need to develop an argument for Dr. Sherck, and we apply a less stringent standard of review. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We may reverse the trial court if James is able to establish prima facie error, which is error at first sight, on first appearance, or on the face of it. *Id.*

Where, as here, the trial court *sua sponte* enters specific findings of fact and conclusions, we review its findings and conclusions to determine whether the evidence supports the findings, and whether the findings support the judgment. *Id.* We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake was made. *Id.* We neither reweigh the evidence nor assess the witnesses' credibility, and consider only the evidence most favorable to the judgment. *Id.* Further, "findings made *sua sponte* control only ... the issues they cover and a general

judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence.” *Id.*

**I. Whether the Trial Court Erred in Allowing Dr. Sherck to Transfer
Real Estate From R&B to Himself and to Sell R&B’s Real Estate
Holdings to Fund the Credit Shelter Trust**

James contends that Dr. Sherck violated his fiduciary duty as majority shareholder in R&B when he transferred the 69.9-acre parcel to himself for no consideration and that he would also violate that duty by implementing his plan to sell or develop R&B real estate holdings. The “majority shareholder owes fiduciary duties to the minority shareholders.” *Galligan v. Galligan*, 741 N.E.2d 1217, 1228 (Ind. 2001). Shareholders must deal fairly, honestly, and openly with the corporation and other shareholders. *Fleming v. Int’l Pizza Supply Corp.*, 676 N.E.2d 1051, 1056 (Ind. 1997). Under the business judgment rule, there is “a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *G & N Aircraft Inc. v. Boehm*, 743 N.E.2d 227, 238 (Ind. 2001). In judging fiduciary breach allegations, “there must be a balance struck between the majority’s fiduciary obligations and its rights.” *Id.* at 240. Moreover, it is “the policy of the law to leave corporate affairs to the control of corporate agencies except in a plain case of fraud, breach of trust, or such maladministration as works a manifest wrong to [the shareholders].” *Id.* at 240-41. Indiana’s business judgment rule is management-friendly, designed to protect corporate managers and directors from undue judicial interference. *Id.* at 238.

A. Transfer of 69.9-Acre Parcel

We have little trouble in concluding that Dr. Sherck's decision (as controlling R&B shareholder) to transfer real estate to himself (as an individual) for no consideration was a breach of his fiduciary duty to the other R&B shareholders. While we hasten to observe that there is no evidence that Dr. Sherck was attempting to defraud the other R&B shareholders,¹ the fact is that he voted to transfer R&B assets to himself without compensating the corporation. According to estimates by real estate appraiser Iverson Charles Grove, the transfer depletes R&B's assets by approximately thirty-seven percent,² thereby also decreasing the value of each outstanding share by the same amount. We see little difference between this case and one in which a majority shareholder has wrongfully appropriated the profits of a corporation for his own salary. *See, e.g., Cole Real Estate Corp. v. Peoples Bank & Trust Co.*, 160 Ind. App. 88, 95-96, 310 N.E.2d 275, 279 (1974). Here, Dr. Sherck appropriated a large portion of R&B's assets for his personal benefit. In our view, the transfer works a manifest wrong to the other shareholders and, as such, represents a clear breach of Dr. Sherck's fiduciary duty to the other R&B shareholders.

B. Sale or Development of Land Holdings

James contends that Dr. Sherck's plan to sell R&B's real estate holdings is also a breach of his fiduciary duty to fellow shareholders. James, however, did not advance this

¹ The record indicates that Dr. Sherck had previously deeded the parcel to R&B for no consideration and therefore felt justified in voting to transfer it back to himself on the same terms.

² Grove estimated the unimproved value of all of R&B's real estate holdings at \$3,039,600 with the value of the 69.9-acre parcel at \$1,118,400.

argument below, limiting his corporate fiduciary duty claim to the transfer of the 69.9-acre parcel. (Appellant’s App. 54-85). James may not now raise this issue for the first time on appeal. *See McGill v. Ling*, 801 N.E.2d 678, 687 (Ind. Ct. App. 2004) (“Generally, a party may not raise an issue on appeal that was not raised to the trial court[.]”), *trans denied*.

II. Whether the Trial Court Erred in Not Removing Dr. Sherck as Trustee of the Trust

A court’s power to remove a trustee is set forth in IC 30-4-3-29. The language of the statute reveals that the power is discretionary, since the “trustee may be removed by the court.” IC 30-4-3-29(a) (emphasis added); *see In re Brown*, 436 N.E.2d 877, 884 (Ind. Ct. App. 1982). This section, however, does not prescribe when the court should exercise such power. *In re Brown*, 436 N.E.2d at 884.

Indiana enacted IC 30-4 (the “Trust Code”) to govern trusts in Indiana. The Trust Code sets forth rules to create, govern, and administer a trust. Specifically, it defines the rights, powers, duties, liabilities, and remedies of the parties to the trust, IC 30-4-3, and provides the trustee with guidelines for administering the trust. IC 30-4-5.

A trust is a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held. IC 30-4-1-1(a). A “breach of trust” is a violation by the trustee of any duty that is owed to the beneficiary. IC 30-4-1-2(4). These duties are established both by statute and by the terms of a trust.

Davis v. Davis, 889 N.E.2d 374, 379 (Ind. Ct. App. 2008) (footnote omitted).

James argues that Dr. Sherck has failed to perform his duties as trustee of the Trust and should therefore have been removed. Specifically, James contends that (1) Dr. Sherck has failed in his duty under the terms of the Trust by failing to fund the Credit Shelter Trust immediately and (2) Dr. Sherck’s statutory fiduciary duty as trustee dictates that the only way in which he can fund the Credit Shelter Trust is with a transfer of R&B

stock, whereas Dr. Sherck intends to sell R&B's assets and fund the Credit Shelter Trust with the proceeds.

A. Immediate Funding

James contends that the Trust instrument evidences Beverly's intent that the Credit Shelter Trust be funded immediately following her death and that allowing Dr. Sherck to fund it through the proceeds of a sale of R&B assets impermissibly frustrates this intent.

In construing a trust instrument, the primary objective is to ascertain and carry out the settlor's intent. [*Goodwine v. Goodwine*, 819 N.E.2d 824, 829 (Ind. Ct. App. 2004).] If the settlor's intent is clear from the plain language of the instrument and is not against public policy, we must give effect to that intent. *Id.* Indeed, if the rules of law and the terms of the trust conflict, the terms of the trust shall control "unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." Ind. Code § 30-4-1-3.

We examine the trust document as a whole to determine the plain and unambiguous purpose of the settlor as that intent appears within the four corners of the instrument. *Goodwine*, 819 N.E.2d at 829. To determine the settlor's intent, courts look first to the language used in the trust instrument. *Id.* If the terms of the trust instrument are not ambiguous, a court may examine only the document itself to determine the settlor's intent. *Id.*

In re Trust Created Under Last Will and Testament of Stonecipher, 849 N.E.2d 1191, 1195 (Ind. Ct. App. 2006).

James contends that Article IV of the Trust requires that the Credit Shelter Trust be funded immediately. Article IV provides, in relevant part, as follows:

Subject to the following limitations, upon and after [Beverly's] death, [Dr. Sherck] may ... pay out of the Trust property ... those amounts necessary to pay all the legal debts of [Beverly] enforceable as claims against [Beverly's] estate, any expenses of [Beverly's] last illness, funeral, and burial, any expenses of administering [Beverly's] estate (including attorney and executor fees), and all taxes which are payable by reason of [Beverly's] death.

* * * *

If [Dr. Sherck] survives [Beverly], [Dr. Sherck is] directed to distribute to [his children], as Co-trustees of ... the Credit Shelter Trust, that amount, if any, that can pass free of Federal Estate Tax under this provision[.]

* * * *

The assets distributed to this Credit Shelter Trust shall be held, administered, and disposed by the Co-trustees according to the following terms and conditions:

- A. The Co-trustees shall invest and reinvest the Credit Shelter Trust and shall collect the income therefrom and shall pay the entire net income therefrom to [Dr. Sherck] during his respective lifetime in convenient periodic installments, not less frequently than quarterly.
- B. In addition, whenever the Co-trustees determine[] that the income of [Dr. Sherck] from all sources known to Co-trustees is not sufficient for his reasonable support and maintenance or in case of medical expenses, or the reasonable support, maintenance and education ... of [his children], then the Co-trustees, in [their] discretion, may pay or use for the benefit of [Dr. Sherck] and descendants so much of the principal of the Credit Shelter Trust as the Co-trustees determine[] to be required for those purposes in maintaining [Dr. Sherck] with the same standard of living he enjoyed during [Beverly's] lifetime.
- C. Upon the death of [Dr. Sherck], the balance held in [the Credit Shelter Trust] shall be distributed to [his] legal issue equally, by right of representation.

Appellant's App. pp. 28-29.

James contends that this language compels Dr. Sherck to fund the Credit Shelter Trust immediately following Beverly's death and argues that the time it would take to sell or develop R&B's assets runs counter to this intent. We cannot agree with this interpretation. First, the Trust instrument is devoid of any language indicating that the Credit Shelter Trust must be funded by any certain time following Beverly's death or that time is of the essence. Moreover, Article VIII of the Trust provides as follows: "[Dr. Sherck] shall have all powers enumerated under IC § 30-4-3-3 and any other power that may be granted by law, to be exercised without the necessity of Court Approval, as [Dr.

Sherck], in [his] sole discretion, determine[s] to be in the best interests of the beneficiaries.” Indiana Code section 30-4-3-3 (2009) provides in relevant part as follows:

(a) Except as provided in the terms of the trust and subject to subsection (c), a trustee has the power to perform without court authorization ... every act necessary or appropriate for the purposes of the trust including, by way of illustration and not of limitation, the following powers:

(1) The power to:

(A) deal with the trust estate;

(B) *buy, sell, or exchange and convey or transfer all property (real, personal, or mixed) for cash or on credit and at public or private sale with or without notice;* and

(C) invest and reinvest the trust estate.

(Emphasis added). In our view, because Article VIII contemplates that Dr. Sherck would be able to sell Trust property at his discretion, it also contemplates that he would be able to take the time necessary to do so. We conclude that the Trust instrument does not require Dr. Sherck to fund the Credit Shelter Trust so quickly that the only acceptable method is the direct transfer of R&B stock.³

B. Method of Funding the Credit Shelter Trust

James also contends that the sale of R&B assets, as Dr. Sherck proposes to do, represents a violation of his fiduciary duty to his children, who are the Credit Shelter Trust remainder beneficiaries. Indiana Code section 30-4-3-6 (2009) defines the duties of a trustee and provides, in part, as follows:

³ James makes much of the fact that Dr. Sherck has not funded the Credit Shelter Trust despite over six years having passed since Beverly’s death. We observe that, for at least the last few years, Dr. Sherck has been unable to pursue his preferred method of funding the Credit Shelter Trust due to this litigation and a *lis pendens* notice regarding all of R&B’s land. Indeed, the record as a whole supports a reasonable inference that the only reason Dr. Sherck has not yet funded the Credit Shelter Trust is the ongoing dispute with his children over how it is to be done. Quite simply, James can point to no evidence that Dr. Sherck’s delay is due to anything other than the dispute that gave rise to this litigation.

- (a) The trustee has a duty to administer a trust according to its terms.
- (b) Unless the terms of the trust provide otherwise, the trustee also has a duty to do the following:
 - (1) Administer the trust in a manner consistent with [the Indiana Uniform Prudent Investor Act].
 - (2) Take possession of and maintain control over the trust property.
 - (3) Preserve the trust property.
 - (4) Make the trust property productive for both the income and remainder beneficiary. As used in this subdivision, “productive” includes the production of income or investment for potential appreciation.

James contends that Dr. Sherck’s proposed sale of the R&B land for purposes of funding the Credit Shelter Trust would have severe tax consequences for the children and would therefore violate Dr. Sherck’s fiduciary duty to them. James points to evidence that the proceeds of any sale of R&B land would be taxed at a forty percent rate and that the children would then be taxed at twenty percent when they received their remainder shares of the Credit Shelter Trust, for an overall reduction in value of fifty-two percent. (Tr. 267).

What James does not explain, however, is how even a forty percent tax on the sale of land which is paid by R&B affects the children in the slightest, so long as the Credit Shelter Trust is fully funded. Without citation to the record, James claims that, under Dr. Sherck’s plan, the children will receive less when the Credit Shelter Trust is dissolved and distributed. The evidence most favorable to the judgment, however, indicates otherwise. Dr. Sherck produced evidence at trial that a 115.9-acre R&B parcel he plans to sell or develop in order to finance the Credit Shelter Trust had a 2003 value of \$1,854,400. (Tr. 290). Even if one assumes that the parcel is worth no more in 2010 than it was in 2003, a sale (or sales) taxed at a forty percent rate would still generate

approximately \$1,112,640, far more than needed to fully fund the Credit Shelter Trust.⁴ Moreover, James does not argue that funding the Credit Shelter Trust with R&B stock based on the real estate, as opposed to cash, would alter the children's tax burden upon receipt of the remainder, and there is no evidence in the record that it would.

Even if some negative consequences to the children of selling R&B's land could be shown, we would still be strongly inclined to affirm the trial court's decision in this regard. When we read Section IV of the Trust as a whole, it is clear that Beverly's primary intent in providing for the creation of the Credit Shelter Trust was to provide for Dr. Sherck's support in the event that he survived her, with the welfare of the remainder beneficiaries a secondary concern. Dr. Sherck has the statutory duty to make the Credit Shelter Trust productive for himself *and* the children, *see* Ind. Code § 30-4-3-6(b)(4), and James has failed to show how his stated plan to develop R&B's land reflects a dereliction of that duty. We agree with the trial court that conversion of R&B's assets from mostly idle real estate into cash that can readily be invested seems to be a perfectly reasonable strategy to generate income, especially in light of evidence that R&B's land holdings are not currently generating *any* income. To the extent that Dr. Sherck has "exhibited a penchant for acting in his own best interests" and taking "self serving [sic] actions[.]" Appellant's Br. pp. 18, 19, he is fully justified in doing so. We conclude that Dr. Sherck has not violated his fiduciary duty as a trustee and the record contains no evidence that he would if he carried out his plan for funding the Credit Shelter Trust.

⁴ Although Dr. Sherck apparently does not intend to develop the 69.9-acre parcel, it could be developed if the 115.9-acre parcel fails to generate sufficient revenue to fully fund the Credit Shelter Trust.

III. Whether We May Address James's Contentions Regarding the Actions of R&B

Despite the fact that James now challenges actions taken by R&B at the January 19, 2008, shareholders' meeting, including the declaration of a quorum and the adoption of a resolution allowing the sale of assets, R&B has never been a party to this suit. The proper way for an aggrieved minority shareholder to seek redress against a corporation is through a direct shareholder's action.

A direct action is "[a] lawsuit to enforce a shareholder's rights against a corporation." Black's Law Dictionary 472 (7th ed. 1999). This action may be brought in the name of the shareholder "to redress an injury sustained by, or enforce a duty owed to, the holder." 2 Principles of Corporate Governance § 7.01, at 17 (A.L.I. 1994). Direct actions are typically appropriate to enforce the right to vote, to compel dividends, to prevent oppression or fraud against minority shareholders, to inspect corporate books, and to compel shareholder meetings. *Id.*

G & N Aircraft, 743 N.E.2d at 234. James never added such a count to his complaint, and so we conclude that neither we nor the trial court have, or ever have had, jurisdiction over R&B and cannot review the corporate actions of which James complains. We reverse and remand with instructions to vacate any portions of the order addressing James's allegations of improper action by R&B.

Conclusion

We affirm the trial court's judgment to the extent that it leaves Dr. Sherck in place as trustee of the Trust and concludes that his plan to sell R&B's holdings in order to fund the Credit Shelter Trust is not a breach of his fiduciary duty as trustee. We reverse the trial court's judgment to the extent that it allows Dr. Sherck to vote to transfer R&B property to himself for no consideration and addresses James's allegations of impropriety

by R&B. We remand with instructions to order Dr. Sherck to transfer the 69.9-acre parcel to R&B and to vacate those portions of the judgment evaluating the corporate activities of R&B.

The judgment of the trial court is affirmed in part and reversed and remanded with instructions.

RILEY, J., and MATHIAS, J., concur.