

NOTICE

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2016 IL App (5th) 140441-U

NO. 5-14-0441

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JIMMY R. DILLARD,

Plaintiff-Appellant,

v.

GARY D. DILLARD, GREGORY D. DILLARD,
LISA McGUIRE, MARY ANN DILLARD, and
DILLARD FARM FAMILY LIMITED
PARTNERSHIP, L.P.,

Defendants-Appellees.

) Appeal from the
) Circuit Court of
) Gallatin County.
)
) No. 04-CH-6
)
)
) Honorable
) T. Scott Webb,
) Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.

Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The court erred in determining that a trust permitted its trustee to transfer all of the real estate out of the trust where one provision mandated that all of the real estate shall be held in trust for 10 years after the grantor's death even though another provision authorized trustees to convey or exchange real estate. Section 4.09 of the Trusts and Trustees Act did not provide a defense in an action seeking to rescind the transfers and recover the property and any income derived from it. The court did not abuse its discretion in refusing to appoint a receiver where there were no allegations that the current trustee was involved in the transfer and no evidence that there was an imminent risk of loss of trust property as a result of the current trustee's conduct.

¶ 2 This appeal involves the interpretation of a trust established by Catherine Dillard, the mother of plaintiff Jimmy Dillard and defendant Gary Dillard and the grandmother of defendants Gregory Dillard and Lisa McGuire. Gary, Gregory, and Lisa each served as trustee of the Catherine Dillard Trust at different times. While Gregory was the trustee, he transferred all five pieces of real estate out of the Catherine Dillard Trust into trusts set up for Jimmy, Gary, and Gary's wife, Mary Ann Dillard. The property transferred to the Jimmy Dillard Trust consisted of woodland and pasture, while the property transferred into the Gary and Mary Ann Dillard Trusts consisted of income-producing farmland. Jimmy filed a complaint, alleging that this transaction violated the express terms of Catherine's trust and constituted a breach of fiduciary duty by Gary and Gregory. Jimmy filed a motion for partial summary judgment on these claims, in which he also asked the court to appoint a receiver. The court denied the motion. Jimmy appeals, arguing that (1) the trust expressly prohibited the transaction at issue; and (2) the court abused its discretion in refusing to appoint a receiver. The defendants argue that because Gregory consulted with an attorney before making the transaction at issue, section 4.09 of the Trusts and Trustees Act (760 ILCS 5/4.09 (West 2008)) provides a defense. We affirm in part and reverse in part.

¶ 3 In October 1992, Catherine Dillard created the Catherine Dillard Revocable Trust. Two sections of the trust document are at issue in this appeal. Section 7 of the trust document governed the distribution of trust property upon Catherine's death, and section 12 set forth the powers of the trustee. Section 7 provided that upon Catherine's death, her two daughters were to receive specified cash gifts from the trust property, and that

Catherine's personal effects, household items, and cattle were to be distributed to Jimmy. The remainder of the property in the trust was to be distributed to Gary and Jimmy as tenants in common, with the exception of the real estate. Section 7 further provided:

"All real estate, including coal, oil, gas and other mineral rights owned by the trust shall continue to be held in trust and administered as follows:

- (a) All net income shall be distributed to Jimmy R. Dillard and Gary D. Dillard on an annual or more frequent basis.
- (b) The trust shall continue for a term of ten (10) years after the death of the Grantor, unless both Jimmy R. Dillard and Gary D. Dillard *** agree or direct otherwise." (Emphases added.)

¶ 4 Section 12 of the Catherine Dillard Trust granted the trustee and successor trustees several enumerated powers. In pertinent part, section 12(I) authorized the trustees "to sell, convey *** release, mortgage, encumber, lease, partition, improve, manage, protect, and subdivide any real estate *** and *** to partition or to exchange said real estate, or any part thereof, for any real or personal property ***." Section 12 provided that trustees were "hereby empowered with, given and granted the [enumerated] powers to be construed broadly, *** which powers are in addition to and not in limitation of their common law and statutory powers (unless otherwise specified herein)."

¶ 5 The trust named Catherine as the sole trustee. It provided that, after Catherine's death, her two sons, Gary and Jimmy, were to act as successor cotrustees. The trust was subsequently amended to name Catherine and Gary as cotrustees.

¶ 6 In December 1992, Catherine created the Jimmy R. Dillard Trust and amended the Catherine Dillard Trust. In relevant part, the amendment provided that any distributions of income or property from the Catherine Dillard Trust that were to go to Jimmy individually under the original terms of the trust would instead go to the Jimmy Dillard Trust. The amendment also provided that Jimmy could not serve as a successor trustee. Instead, Gary would serve as the sole trustee upon Catherine's death. Gary was also named as the sole trustee of the Jimmy Dillard Trust.

¶ 7 Catherine died in September 2003, and Gary became the sole trustee of both trusts. In April 2004, Jimmy filed a petition seeking an accounting of income, expenses, and assets in both trusts. Jimmy alleged that Gary refused to provide an accounting of income and expenses for both trusts and failed to provide an inventory of the items of personal property that were to be distributed to the Jimmy Dillard Trust upon Catherine's death. He did not allege any additional wrongdoing. He requested that the court (1) order Gary to provide accountings and inventories for both trusts; (2) appoint a successor trustee for both trusts; and (3) enter judgment against Gary for any amounts found to be owed to Jimmy or his trust. The original complaint remained pending with little action for the next few years.

¶ 8 In September 2007, the court entered an order setting the matter for a telephone conference on October 5, 2007, and stated that if the parties did not comply, the matter would be dismissed for want of prosecution. Apparently the parties complied, and the matter was referred to mediation.

¶ 9 In March 2009, the transactions at issue took place. By this time, Gregory was serving as the trustee of both trusts. The Catherine Dillard Trust included five pieces of real estate. Three tracts consisted primarily of productive farmland, while the other two tracts consisted primarily of woodland and pasture. Jimmy lived in the farmhouse on one of the tracts of farmland. His trust paid rent to the Catherine Dillard Trust for use of the house. All three tracts of farmland were leased to Greenwood Farms. As previously stated, Catherine's trust provided that half of the trust income was to be distributed to the Jimmy Dillard Trust, including rental income.

¶ 10 The Jimmy Dillard Trust owned one piece of real estate before the land swap. Approximately 72% of that tract consisted of tillable farmland. The trust's interest in the property included a one-half interest in the oil, gas, and mineral rights, exclusive of coal rights.

¶ 11 On March 26, 2009, Gregory transferred the three tracts of productive farmland in the Catherine Dillard Trust—including the tract on which Jimmy resided—into trusts set up for his parents, Gary and Mary Ann Dillard. He transferred the two remaining tracts into the Jimmy Dillard Trust. In addition, Gregory transferred the tract of land that was in the Jimmy Dillard Trust to the Gary and Mary Ann Dillard Trusts. The Gary and Mary Ann Dillard Trusts each received a one-half interest in each of the four tracts conveyed to them.

¶ 12 Prior to making the transfers, Gregory retained an attorney to prepare the necessary trustee's deeds. He also asked the attorney to determine whether the terms of the trust permitted him to make the transfers. Pursuant to the advice of counsel, Gregory

also hired a real estate appraiser to value all six properties involved in these transactions. Based on these appraisals, Gregory also paid \$290,000 into the Jimmy Dillard Trust from the Gary and Mary Ann Dillard Trusts as an equalization payment. All parties refer to these transactions as "the land swap."

¶ 13 In December 2009, Jimmy filed an amended petition naming both Gary and Gregory as defendants. He alleged that both Gary and Gregory failed to provide accountings of the income and expenses of both trusts and failed to provide an inventory of the assets of both trusts. He further alleged that both Gary and Gregory breached their fiduciary duties as trustees by (1) using assets of the Catherine Dillard Trust for their own benefit, (2) charging unreasonable fees for administering both trusts, (3) engaging in real estate transactions for their own benefit to the detriment of the trusts, (4) withholding distributions from the trusts to Jimmy, and (5) failing to fully disclose material facts. Jimmy requested that both Gary and Gregory be ordered to provide accountings of the income, expenses, and assets of both trusts.

¶ 14 In April 2011, Gregory resigned as trustee of both trusts, and Lisa became the successor trustee of both trusts. In December 2012, the tracts of land transferred into the Gary and Mary Ann Dillard Trusts were transferred by those trusts to the Dillard Farm Limited Partnership (Dillard Farm), a business owned by Gary and Mary Ann. Jimmy filed four more amended petitions adding Lisa, Mary Ann, and Dillard Farm as defendants.

¶ 15 In the fifth amended petition, filed on August 15, 2013, Jimmy alleged that the Gary and Mary Ann Dillard Trusts and Dillard Farm were unjustly enriched as a result of

the land swap. He further alleged that Gary, Gregory, and Lisa all breached their fiduciary duty by charging unreasonable rent to the Jimmy Dillard Trust for use of the farm house, charging unreasonable fees for their services as trustees, making insufficient distributions from the trusts, failing to adequately maintain the farm house, and failing to fully disclose to him relevant information. In addition, Jimmy alleged that Gregory consulted with Gary prior to making the land swap transactions and that Gary encouraged Gregory to make the transactions. This, Jimmy asserted, constituted an additional breach of fiduciary duty by both Gary and Gregory. As relief, Jimmy requested that Gary, Gregory, and Lisa be ordered to provide accountings for both trusts; that Gary and Mary Ann (as trustees of the Gary and Mary Ann Dillard Trusts) and Dillard Farm be ordered to provide accountings related to the real estate after it was transferred; that the real estate itself and any proceeds derived from it be placed into constructive trust; and that an independent successor trustee be appointed to manage both trusts. Jimmy also requested damages.

¶ 16 On February 3, 2014, Jimmy filed a motion for partial summary judgment. He argued that the land swap violated the express terms of the Catherine Dillard Trust and, as such, constituted a breach of fiduciary duty by Gregory as a matter of law. Jimmy alleged that Gregory admitted in a deposition that he was a remainder beneficiary under his parents' trusts. As such, Jimmy argued, the transaction is presumed to be fraudulent. See *In re Estate of Miller*, 334 Ill. App. 3d 692, 698 (2002). He requested an order finding that the land swap constituted a breach of fiduciary duty by Gregory, rescinding the trustee's deeds transferring the properties, and ordering the disgorgement of any profit

derived from the properties after the land swap. In addition, Jimmy requested the appointment of a receiver. In support of this request, he alleged that Gary and Gregory's discussions of the land swap indicated collusion and that the facts of the case "clearly demonstrate" the need for a receiver. We note that the motion did not include any allegations that Lisa, who was then serving as trustee, participated in the land swap transaction in any manner.

¶ 17 On April 25, 2014, the court entered a detailed written order denying Jimmy's motion for partial summary judgment. The court found that there were genuine issues of material fact concerning Jimmy's allegations of self-dealing on the part of the trustees. We note that this finding has not been challenged in this appeal. The court further found that the land swap did not violate the terms of the Catherine Dillard Trust. In reaching this conclusion, the court emphasized that section 7 contained detailed directions for the distribution of Catherine's property upon her death. The court acknowledged that this section also "makes a special provision for the distribution of real estate. Specifically, the real estate shall continue in the trust for a period of 10 years." The court noted, however, that there was no express provision in section 7 limiting the powers of the trustee. The court concluded that section 7 "contains directions for the distribution of trust assets upon the death of the Grantor, nothing more, nothing less." Finally, the court denied Jimmy's request for the appointment of a receiver, noting that "no untoward allegations" had been made against Lisa, who was then serving as the trustee, and that the court found that Gregory had not exceeded his authority as trustee.

¶ 18 On May 27, 2014, Jimmy filed a motion for a finding pursuant to Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010). The court granted Jimmy's Rule 304 motion on August 7, and Jimmy filed the instant appeal on September 3.

¶ 19 Before addressing the parties' contentions, we note that the defendants filed three separate briefs. Gary and Mary Ann filed their own brief; Gregory and Dillard Farm filed a joint brief; and Lisa filed a separate brief. Lisa addresses only the question of the court's ruling on Jimmy's request for the appointment of a receiver. For the sake of simplicity, we will refer to the arguments raised in each of these briefs as the arguments of "the defendants."

¶ 20 In ruling on a motion for summary judgment, the trial court must consider the pleadings, depositions, and affidavits on file, and must determine whether there are genuine issues of material fact to be resolved. *Gvillo v. DeCamp Junction, Inc.*, 2011 IL App (5th) 100262, ¶ 9. Summary judgment is appropriate only if there are no genuine issues of material fact remaining and the moving party is entitled to judgment as a matter of law. *Id.* (citing *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011)). Summary judgment is a drastic measure. Thus, in determining whether it is proper, courts must view the factual record in the light most favorable to the nonmoving party. *Id.* (citing *United National Insurance Co. v. Faure Brothers Corp.*, 409 Ill. App. 3d 711, 716 (2011)). Our review is *de novo*. *Id.*

¶ 21 Jimmy's first argument is that the court erred in finding that the land swap did not violate the terms of Catherine's trust. Resolving this issue requires us to interpret the trust provisions outlined above—section 7 and section 12(I) of the Catherine Dillard Trust.

Trust interpretation is a question of law. Thus, where the trust is not ambiguous, issues that can be resolved based solely on the interpretation of the trust are appropriately decided on a motion for summary judgment. *Mucci v. Stobbs*, 281 Ill. App. 3d 22, 29 (1996).

¶ 22 We interpret trusts using the same principles applicable to the construction of wills and contracts. *Id.* Our primary goal is to ascertain the intent of the grantor. The grantor's intent can be determined by reading the document creating the trust in its entirety. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). In construing the language of the trust, we must give the words used their plain and ordinary meaning. *Id.* We must also consider the trust document as a whole and construe its provisions so they do not conflict with each other if at all possible. *Mucci*, 281 Ill. App. 3d at 29.

¶ 23 This case requires us to consider a conflict between the provision in section 7 mandating that all of the real estate continue to be held in trust and the provision in section 12 authorizing the trustee to convey or exchange real estate. As the parties point out, where provisions conflict, the more specific provision takes precedence over the more general provision. *Brzozowski v. Northern Trust Co.*, 248 Ill. App. 3d 95, 99 (1993). Jimmy argues that section 7 contains instructions that are specific to Catherine's trust, while section 12 contains boilerplate language setting forth the powers of trustees. As such, he contends, section 7 is the more specific provision, and it therefore takes precedence over section 12. The defendants, by contrast, argue that section 12 is the more specific provision because it is far lengthier and more detailed than section 7.

¶ 24 The parties also argue over the significance of the phrase "unless otherwise specified herein." As stated previously, an introductory paragraph to section 12 provides that the trustees are "empowered with, given and granted the following powers to be construed broadly, *** which powers are in addition to and not in limitation of their common law and statutory powers (unless otherwise specified herein)." The defendants argue that the phrase "unless otherwise specified herein" modifies only the phrase that immediately precedes it—"which powers are in addition to and not in limitation of [the trustees'] common law powers." Jimmy contends that the phrase modifies the entire sentence, thus indicating that the trustees are empowered with the enumerated powers unless otherwise provided in the trust document.

¶ 25 We agree with Jimmy for three reasons. First, we find that section 7 is more specific and must prevail over the relevant portion of section 12. Second, we find that Jimmy's interpretation allows us to harmonize section 7 and section 12. Third, we find that Jimmy's interpretation is more in line with Catherine's intent.

¶ 26 Contrary to the defendants' contention and the trial court's finding, section 7 of Catherine's trust, which governs the disposition of trust property upon her death, also contains specific instructions for managing the real estate, which she directed to be held in trust for a period of 10 years following her death. The trust expressly provides that all of the real estate is to remain in the trust during this period unless Jimmy and Gary agree to terminate the trust sooner. Section 7 provides that the income derived from this property is to be distributed annually or more frequently to Gary and to the Jimmy Dillard Trust. That section also provides directions for the distribution of the real estate

upon termination of the trust. Specifically, it directs that the real estate is to be distributed to Gary and the Jimmy Dillard Trust as tenants in common at that time, a disposition that mirrors the distribution of most of the other trust property at the time of Catherine's death. These provisions are specific to the Catherine Dillard Trust, and they represent a clear expression of Catherine's intent. As such, we agree with Jimmy that section 7 is more specific than section 12(I). To the extent the provisions conflict, section 7 therefore prevails. See *Brzozowski*, 248 Ill. App. 3d at 99.

¶ 27 It is important to note that, contrary to the defendants' contentions, this finding does render section 12(I) superfluous or completely ineffective. Rather, when provisions of a trust document conflict, the more specific section must be given full effect, while the more "general provision [must] be subjected to such modification or qualification as the specific provisions make necessary." *Id.* Thus, in order to effectuate Catherine's specific intent expressed in section 7, we must interpret section 12(I) as authorizing the trustees to sell, convey, exchange, or partition the real estate only prior to Catherine's death, and authorizing the trustees to lease, encumber, manage, or improve the real estate at any time.

¶ 28 We further note that section 12 expressly incorporates such a limit by including the phrase "unless otherwise specified herein." The defendants argue that this phrase modifies only the phrase immediately preceding it and, as such, means only that the powers granted to the trustees under section 12 are "in addition to and not in limitation of" the trustees' common law powers unless the trust specifies that they are not. We disagree. Construing the phrase to refer to the entire sentence—meaning, the trustees are

granted the powers listed in section 12 unless otherwise specified elsewhere in the trust—allows us to construe the two provisions so they do not conflict. See *Mucci*, 281 Ill. App. 3d at 29.

¶ 29 Moreover, the land swap defeated Catherine's clearly expressed intent. With the exception of her personal effects and household goods, which were to be distributed to Jimmy, and the cash gifts to her daughters, Catherine explicitly directed that her property be distributed to Gary and the Jimmy Dillard Trust as tenants in common. The real estate was to be distributed in this manner when the trust was terminated. The remainder of the property was to be distributed in this manner at the time of her death. The land swap resulted in a much different distribution of trust property. In addition, by transferring all of the real estate out of the trust, Gregory effectively terminated the trust early without Jimmy's consent. The defendants argue that the trust was not officially terminated, and they assert that irrigation equipment remained in the trust after the land swap. However, this essentially turns the trust into a shell and defeats the purpose of keeping the property in the trust. By transferring all of the real estate out of the trust, Gregory rendered moot Catherine's explicit direction to distribute the income from the real estate annually to Gary and the Jimmy Dillard Trust. He also rendered moot her instructions for the distribution of the real estate upon termination of the trust. Thus, we find the interpretation urged by the defendants to be at odds with Catherine's intent.

¶ 30 The defendants argue, however, that this interpretation deprives the trustee of the authority to manage the trust property prudently because it prohibits the trustee from selling property even if property value is declining. We are not persuaded.

¶ 31 We first note that there are no allegations that this is what occurred in the instant case. We further note that the trustee would have two options if it were to occur. The trustee could persuade Gary and Jimmy to agree to terminate the trust early. They then would receive the property as tenants in common and would be able to sell the land and divide the proceeds. Alternatively, the trustee could petition the court to authorize a sale of the property pursuant to section 17.1 of the Trusts and Trustees Act (760 ILCS 5/17.1 (West 2008)). That statute provides that a court may authorize and order the sale of real estate where the property at issue is "liable to waste or depreciation in value" and the sale "will inure to the benefit and advantage of the persons entitled thereto" or the sale is "otherwise necessary for the conservation, preservation or protection of the property or estate." 760 ILCS 5/17.1 (West 2008). The statute allows the court to order the sale even if doing so is contrary to the terms of the trust. *American State Bank v. Kupfer*, 114 Ill. App. 3d 760, 768 (1983). However, the court may only order the sale if there has been a change in circumstances that the grantor could not have foreseen—such as a depreciation in value. Furthermore, "any resulting order must be tailored to implement the intention of the donor." *Id.* at 768-69.

¶ 32 Here, Gregory took neither course of action. Instead, he transferred the property in a manner that was inconsistent with Catherine's clearly expressed intentions. We conclude that the Catherine Dillard Trust expressly prohibited transfer of the real estate and that Gregory breached the terms of the trust by doing so.

¶ 33 The defendants argue, however, that section 4.09 of the Trust and Trustees Act provides a defense for Gregory because he relied upon the advice of an attorney and a

real estate appraiser in determining that the trust allowed him to dispose of all the real estate in the trust. That statute provides that trustees are empowered to:

"appoint attorneys, auditors, financial advisers and other agents and to pay reasonable compensation to such appointees. If the trustee uses reasonable care, skill, and caution in the selection of the agent, the trustee may rely upon the advice or recommendation of the agent without further investigation and *** shall have no responsibility for actions taken or omitted upon the advice or recommendation of the agent." 760 ILCS 5/4.09 (West 2008).

The defendants argue that the second sentence of this statute defeats Jimmy's claims. They point out that we may affirm the trial court's decision on any basis appearing in the record, even if it was not the basis relied upon by the trial court. See *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010). We do not believe this provision was intended to preclude an action to recover property transferred out of a trust in contravention of the terms of the trust.

¶ 34 The language cited by the defendants was added to section 4.09 in 1996. See Pub. Act 89-344, § 10 (eff. Jan. 1, 1996) (amending 760 ILCS 5/4.09). We are aware of no Illinois decisions interpreting this language. However, the legislative history indicates that the second sentence was added to the statute in order to encourage trustees to seek the advice and assistance of agents with expertise in investing trust property and managing assets that require knowledge that a lay trustee might not have.

¶ 35 At common law, a trustee did not have the authority to delegate any discretionary duty unless the trust document explicitly provided such authority. John T. Brooks,

William C. Weinsheimer, & Erika A. Swanson, *Delegation of Trustee's Duties to Advisors*, 121 Banking L.J. 141, 141 (Feb. 2004). Illinois courts recognized that in limited situations a trustee "must sometimes act through agents or attorneys." *In re Hartzell's Will*, 43 Ill. App. 2d 118, 136 (1963). However, the trustee was "responsible for the reasonable diligence of his agent or attorney." *Id.* This meant that the trustee was required to exercise reasonable care both in selecting an attorney or other agent to handle a ministerial matter *and* in supervising the actions of the attorney or agent. *Id.* at 136-37. The trustee was ultimately responsible to the beneficiaries for any losses that resulted from the advice or actions of the attorney or other agent. *Id.* at 137.

¶ 36 The modern trend is for trustees to have much greater authority to delegate duties. Brooks, Weinsheimer, & Swanson, 121 Banking L.J. at 141. This is largely due to a recognition that a trustee "should, and in some cases must, delegate functions in areas in which the trustee does not have expertise." *Id.* at 143. In keeping with this trend, the Illinois legislature enacted section 4.09 of the Trusts and Trustees Act in 1973. See Pub. Act 78-625, § 4.09 (eff. Sept. 10, 1973). The statute provides that trustees have the authority to hire "attorneys, auditors, financial advisors and other agents" unless the trust provides otherwise. 760 ILCS 5/4.09 (West 2008).

¶ 37 The second sentence of 4.09, the language relied upon by the defendants, was added in 1996. Pub. Act 89-344, § 10 (eff. Jan. 1, 1996). As amended, section 4.09 provides that if a trustee uses reasonable care in selecting an attorney or other agent, the trustee may reasonably rely on the agent's advice and recommendations, and the trustee will not be liable to beneficiaries for actions taken pursuant to the advice or

recommendations of the agent. 760 ILCS 5/4.09 (West 2008). During legislative debates on this amendment, the bill's sponsor, Representative Leitch, explained that the proposed amendment would "encourage[] trustees to use other experts if necessary in the execution and carrying out of trust accounts." 89th Ill. Gen. Assem., House Proceedings, April 21, 1995, at 90. He stated that the amendment would "make more clear that an administrator of a trust account has a flexibility to go to experts in the field." *Id.* at 93. Finally, Representative Leitch urged fellow legislators to approve the amendment because "[w]ith the world changing as rapidly as it is [it is] important *** to individuals throughout our society that they have the very best tailoring of their trusts and accounts." *Id.* at 94. In other words, the legislature wanted to insure that trustees would feel confident seeking advice and recommendations from professionals whose expertise is necessary to help them manage trust assets more effectively than trustees might be able to do without such advice or recommendations.

¶ 38 Here, the land swap transaction was Gregory's idea; it was not a course of action recommended to him by his attorney. Gregory consulted with an attorney, although it is not entirely clear whether he asked him to determine whether the trust allowed the transaction before or after the transaction was complete. The attorney's affidavit states that Gregory contacted him for assistance in preparing trustee's deeds to effectuate the land swap. Counsel further avers that Gregory asked whether the trust allowed the transaction, but does not indicate when this discussion took place. Counsel sent Gregory a letter in April 2009—after the transaction was complete. The letter stated that, in response to Gregory's question, counsel believed the trust allowed the transaction.

Gregory testified in his deposition, however, that he consulted with the attorney prior to the land swap, in part to determine whether the transaction was permitted under the terms of Catherine's trust. In any case, this was not a situation in which a trustee took an action based on the advice or recommendation of a carefully selected agent and the trust suffered a loss as a result.

¶ 39 It is worth noting that the only relief sought pursuant to Jimmy's motion for partial summary judgment is rescission of the land swap, return of property removed from the trust contrary to its terms, and the disgorgement of the proceeds from that property under theories of unjust enrichment and *quantum meruit*. The question of whether section 4.09 provides a partial defense to Gregory for any damages that might have arisen as an indirect consequence of the land swap is not before us. The only question is whether it provides an absolute defense that would leave Jimmy with no recourse. We find that the legislature could not possibly have intended such a result.

¶ 40 For these reasons, we find section 4.09 inapplicable to the facts before us. As such, we conclude that it does not provide an alternative basis for affirming the trial court's decision.

¶ 41 Finally, Jimmy argues that the trial court abused its discretion in denying his request to appoint a receiver. We disagree.

¶ 42 The appointment of a receiver is a harsh remedy which should only be granted if "the court has been convinced that such remedy is absolutely necessary to prevent irreparable losses." *Leib v. Toulin, Inc.*, 113 Ill. App. 3d 707, 718-19 (1983). A party requesting the appointment of a receiver must demonstrate that (1) he has a clear right to

the property at issue; and (2) " 'the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct or insolvency.' " *Citicorp Savings of Illinois, F.A. v. Occhipinti*, 136 Ill. App. 3d 835, 840 (1985) (quoting *Bagdonas v. Liberty Land & Investment Co.*, 309 Ill. 103, 110 (1923)). Speculative allegations about potential loss of assets are not a sufficient basis to justify the appointment of a receiver. *Id.* It is also improper to appoint a receiver if relevant facts are in dispute without first holding an evidentiary hearing to resolve those questions. *Id.* These standards are "exceptionally stringent." *Poulakidas v. Charalidis*, 68 Ill. App. 3d 610, 614 (1979). However, the decision to appoint a receiver is a matter within the sound discretion of the trial court, and we will not reverse its decision absent an abuse of that discretion. *Id.* at 613-14.

¶ 43 Here, the court held a hearing on the motion for summary judgment and heard the arguments of the parties relevant to Jimmy's request for a receivership. However, the court did not hear any evidence concerning the need for a receiver. Moreover, the allegations in support of the request for a receiver were highly speculative and insufficient to justify the request. In his written motion, Jimmy alleged only that a receiver was needed because the fact that Gregory discussed the land swap transaction with Gary showed that there was collusion between them. At the summary judgment hearing, Jimmy argued, as he does in this appeal, that Lisa is operating under a conflict of interest merely because she is the daughter and sister of the two previous trustees whose misconduct is at issue. He acknowledged at the hearing that Lisa was not involved in the land swap transaction.

¶ 44 These allegations are insufficient to require the appointment of a receiver. Jimmy has not alleged, much less demonstrated, any facts to support a finding that a receivership is necessary to prevent an imminent risk of loss to the trust property resulting from neglect or misconduct by Lisa. In fact, he has not made even a conclusory allegation that Lisa is likely to cause any loss to the trust property. Instead, he relies on what he characterizes as an inherent conflict of interest based on her relationship to Gary and Gregory. We are not persuaded. Even if we were to accept Jimmy's contention that Lisa is under an inherent conflict of interest because she is the daughter and sister of the previous trustees, we would have to reject Jimmy's contention. Catherine specifically directed that Gregory was to succeed Gary as trustee and that Lisa was to succeed Gregory. Thus, any conflict of interest was created and sanctioned by Catherine. Under such circumstances, no presumption of impropriety arises from the conflict of interest. *Dick v. Peoples Mid-Illinois Corp.*, 242 Ill. App. 3d 297, 304 (1993). Thus, the appointment of a receiver was not warranted.

¶ 45 Jimmy argues, however, that because the court's decision was "partially based on the mistaken conclusion that Gregory Dillard, the brother of the current Trustee, Lisa McGuire, did not exceed his authority as Trustee." Although we have concluded that Gregory did exceed his authority, this fact does not change our conclusion. As just discussed, the mere fact that Lisa is the sister and daughter of the previous trustees does not require the appointment of a receiver regardless of the propriety of *their* conduct. We find no abuse of discretion in the court's decision to deny Jimmy's request for the appointment of a receiver.

¶ 46 For the foregoing reasons, we reverse the portion of the court's order finding that Catherine's trust permitted the land swap and denying the motion for partial summary judgment on that basis. We affirm the order in all other respects.

¶ 47 Affirmed in part and reversed in part.