THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0817, In re Florence Mae Tarr Trust, the court on August 15, 2012, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The appellant, Ryk Bullock, appeals an order of the Nashua Probate Division denying his motion to reconsider its approval of a settlement agreement (agreement) resolving a petition by the Director of Charitable Trusts (director) to remove trustees and appoint a special trustee of the Florence Mae Tarr Trust (trust). The attorney for the trust executed the agreement on behalf of Bullock, who was a trustee, with Bullock's authority following a mediation in which he participated. On appeal, he argues that the agreement should not have been approved because: (1) the mediation was not a "meeting" under the terms of the trust's bylaws; (2) there was no quorum of trustees per the bylaws at the mediation; (3) there was no "vote" of the trustees for purposes of the bylaws; (4) Bullock and another trustee improperly delegated their fiduciary obligation to approve the agreement; (5) the agreement unlawfully alienated the trust's res and dissolved its existence; (6) the agreement unlawfully changed the use of the trust's property; and (7) Bullock was entitled to withdraw his assent.

The record reflects the following facts. The trust is a nonprofit 501(c)(3) entity registered with the director, owning land in Bedford and Goffstown, including approximately 252 acres in Bedford. The director filed the present petition to remove the trustees and appoint a special trustee after learning that the Town of Bedford (town) had acquired the Bedford property due to the failure of the trustees to pay real estate taxes. In a separate matter removed to federal court, the trust sued the town, alleging that the town had acquired its title to the trust's property unlawfully.

On August 5, 2011, Bullock attended a mediation scheduled by the probate court. The following persons also attended: (1) legal counsel for the trust; (2) Albert Johnson, trustee; (3) Veronica Tinker, trustee; (4) legal counsel to Marcia Marston, trustee; (5) the Director and Assistant Director of the Charitable Trust Unit; (6) counsel for the town; and (7) counsel to the trust's bonding carrier. Two other trustees did not attend.

Following the mediation, the parties executed the agreement, which resolved both the probate and federal court matters. Among other provisions,

the agreement obligated the town to re-convey the property it had acquired to the trust, and obligated the trust to convey all properties it owned in Bedford and Goffstown to a third party, the Bedford Land Trust, "upon the agreement of acceptable terms approved by the Probate Court." The conveyance of the trust's property was subject, however, to the probate division's approval of a cy pres petition to be filed by the director, and the parties recognized that the court might substitute the Bedford Land Trust with an equivalent trust. The agreement specifically provided that nothing within it would prevent any trustee from raising any objection to the cy pres petition. Although Bullock left the mediation prior to its conclusion, he authorized the trust's counsel, after reviewing the agreement with counsel by telephone, to execute the agreement on his behalf. The other parties likewise executed the agreement. On August 9, 2011, the probate division ordered that any objection to the agreement be filed by August 19, 2011.

No objections were filed by August 19, and on August 31, 2011, the probate division approved the agreement. On August 26, 2011, Bullock sent an email to counsel for the trust and the other trustees purporting to rescind his consent. On August 31, Bullock sent a letter to the clerk of court stating that he had been misled by his fellow trustees into believing that there would be another meeting "to discuss the proposed language in the proposed easement to whatever organization was finally determined to be the new steward of" the trust property, and that he was thus rescinding his consent. The clerk returned the letter on September 9, 2011, as an improperly-filed motion.

On September 7, 2011, an abutter to the trust property, Ayrshire Partners, Inc. (Ayrshire), filed motions to intervene and to reconsider the probate division's approval of the agreement. In the motions, Ayrshire claimed that the agreement was unlawful because it required liquidation of the trust, and because the cy pres doctrine did not apply. On September 22, 2011, the Bedford Taxpayers Association (Taxpayers) likewise moved to intervene and filed a memorandum in support of Ayrshire's motion for reconsideration. In its pleadings, Taxpayers asserted that the agreement did not address whether the trust was liable for property taxes, and that the agreement "violated both the Trust bylaws and the statutory provisions by dissolving the trust without proper notice of a trustee meeting or the required vote of four of the seven trustees." Finally, on October 5, 2011, Bullock filed a "motion and memorandum in support of motions to reconsider." In it, Bullock claimed that he "endorse[d] the pending Motions To Reconsider," and that he had withdrawn his consent to the agreement. He further argued that the other trustees had refused to convene a further meeting "to discuss suitable recipients of the [trust] property," that the plan of the Bedford Land Trust was contrary to the intent of the trust's settlor, that he had learned the trust may no longer be bondable, and that he believed someone acting on behalf of the Bedford Land Trust was trespassing on the trust property.

The probate division held a hearing on the pending motions. At the hearing, Bullock represented that there was no need for the probate division to hear evidence on his motion. On October 17, 2011, the probate division issued an order: (1) denying the motions to intervene and reconsider filed by Ayrshire and Taxpayers on the basis that neither party had a direct and apparent interest in the case; and (2) denying Bullock's motion for reconsideration on the basis that he had not proven a defect in the formation of the agreement or that his performance of it was excused due to misrepresentation, mutual mistake, or some other reason. On January 11, 2012, we declined the discretionary appeal filed by Ayrshire, but accepted Bullock's mandatory appeal.

Upon this record, we agree with the director that the first four issues raised in Bullock's brief are not preserved. "Issues must be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct claimed errors in the first instance." O'Hearne v. McClammer, 163 N.H. 430, 438 (2012) (quotation omitted). It is Bullock's burden to present this court with a record sufficient to demonstrate that he timely raised in the trial court the arguments he is now asserting. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). In none of his pleadings in the trial court did Bullock argue that the agreement was invalid because the mediation failed to comply with the trust's bylaws, or because the trustees had unlawfully delegated their fiduciary obligations. While Taxpayers submitted a memorandum purportedly in support of Ayshire's motion for reconsideration claiming that the agreement violated certain Trust bylaws and statutory provisions, neither Taxpayers nor Ayrshire were parties, the probate division denied their motions to intervene, and we declined Ayshire's discretionary appeal. Accordingly, those arguments were not properly before the court when Bullock claimed to "endorse" them. Cf. Town of Merrimack v. McCray, 150 N.H. 811, 812-13 (2004) (where trial court erroneously allowed member of board of selectmen to intervene and challenge vote to approve settlement, trial court's denial of motion to strike the settlement was not error). Because Bullock himself did not argue that the mediation was not a meeting, that there was no quorum, that there was no vote, and that the trustees improperly delegated their fiduciary duties, and because none of these arguments concern a plain error affecting substantial rights, see Sup. Ct. R. 16-A, we decline to address these arguments further.

We next address Bullock's argument that the probate division erred by not allowing him to withdraw his assent to the agreement, and by applying contract law principles to his request to withdraw. In New Hampshire, settlement agreements are contractual, and are governed by contract law principles. Poland v. Twomey, 156 N.H. 412, 414 (2007). Like any contract, a valid and enforceable settlement agreement requires an offer, acceptance, consideration, and mutual assent. Hogan Family Enters. v. Town of Rye, 157 N.H. 453, 456 (2008). Disputed questions of fact as to the formation of a contract are for the trier of

fact to resolve, whose findings and conclusions we will uphold unless they are unsupported by the evidence or tainted by error of law. Syncom Indus. v. Wood, 155 N.H. 73, 82 (2007).

We will not overturn the trial court's ruling that a valid settlement was reached unless it was clearly erroneous. Hogan Family Enters., 157 N.H. at 456. "In reviewing a settlement agreement, we are mindful of the strong public policy favoring the settlement of civil matters." Id. We are likewise mindful that decisions to set aside a settlement on grounds of surprise, mistake or duress rest within the trial court's sound discretion. Id. at 458. The probate division's findings of fact are final "unless they are so plainly erroneous that such findings could not be reasonably made." RSA 567-A:4 (2007).

We reject Bullock's argument that the probate division applied the wrong legal standard. In reviewing Bullock's motion, in which he asserted that he had withdrawn his consent and that the agreement was not enforceable because the other trustees reneged on a promise to convene a further meeting, the probate division properly considered whether there was a defect in the formation of the agreement, or whether the agreement was unenforceable due to mutual mistake, misrepresentation, or some other defense. See Hogan Family Enters., 157 N.H. at 456, 458; Poland, 156 N.H. at 414. To the extent Bullock argues that the trial court erred by not finding that he had proved misrepresentation or mutual mistake, the record reflects that Bullock presented no evidence in support of his motion. Moreover, we agree with the director that the record is devoid of evidence that counsel for the trust lacked authority to execute the agreement on its behalf. Norberg v. Fitzgerald, 122 N.H. 1080, 1082 (1982). Accordingly, the probate division properly concluded that Bullock did not prove either that there was a defect in the formation of the agreement, or that his performance was excused for misrepresentation or mutual mistake. Under these circumstances, the probate division's determination that a valid and enforceable agreement existed was neither clearly erroneous nor unsupported by the evidence. See Hogan Family Enters., 157 N.H. at 456; Syncom Indus., 155 N.H. at 82.

Finally, we address Bullock's arguments that the agreement unlawfully alienated the trust's res and dissolved the trust, and that the trustees unlawfully changed the use of the trust property. We assume, without deciding, that these arguments are preserved. The agreement belies these claims. The express language of the agreement makes the conveyance of the trust's property subject to the probate division's approval of a cy pres petition. The agreement likewise preserves the ability of the trustees to object to the cy pres petition. Nothing in the agreement expressly or implicitly changes the use of the trust's property. As the director correctly observes, the agreement expressly recognizes that "the Bedford Land Trust may be substituted by the probate court with an equivalent charitable land trust as approved by the court." To the extent Bullock claims,

therefore, that language in draft deeds is inconsistent with the settlor's intent in creating the trust, his arguments are premature.

Affirmed.

Dalianis, C.J., and Conboy and Lynn, JJ., concurred.

Eileen Fox,
Clerk

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