

IN THE COURT OF APPEALS OF IOWA

No. 6-330 / 05-1762
Filed July 26, 2006

**IN THE MATTER OF THE ELMER
VITALIS RESIDUARY TRUST**

**SHERRY NURMELA and DENNIS
VITALIS,**

Appellants.

Appeal from the Iowa District Court for Polk County, Michael Huppert,
Judge.

Two of the remainder beneficiaries of a trust appeal from district court
orders approving annual reports and accountings and extraordinary fees.

AFFIRMED.

Kathryn Barnhill, West Des Moines, for appellants.

Jack Hilmes and Eric Hoch of Finely, Alt, Smith, Scharnberg, Craig,
Hilmes & Gaffney, P.C., Des Moines, for appellee trustees.

Christine B. Long and Lynn M. Gaumer of Duncan, Green, Brown &
Langeness, Des Moines, for appellee beneficiaries.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Sherry Nurmela and Dennis Vitalis, two of the remainder beneficiaries under the Elmer Vitalis Residuary Trust (Under Will), appeal from district court orders in a probate proceeding, TR 2416, which approved the “Tenth and Eleventh Annual Reports and Accountings” (Tenth and Eleventh Reports), awarded extraordinary fees, and assessed those fees against Sherry’s and Dennis’s shares of the trust. The sole issue Sherry and Dennis raise in this appeal is whether the district court retained jurisdiction to enter such orders in light of the fact a summary judgment ruling in a related matter, CE 48852, was then on appeal. We affirm the district court.

We have fully set forth the extensive factual background of these matters in two recently filed opinions. See *In re Estate of Elmer Vitalis Residuary Trust*, No. 04-1319 (Iowa Ct. App. May 24, 2006); *Nurmela v. Elmer Vitalis Residuary Trust*, No. 05-0946 (Iowa Ct. App. May 24, 2006). For purposes of this appeal, we note only the following relevant facts.

The district court entered an order in TR 2416 approving the trustees’ “Ninth Annual Report and Accounting” (Ninth Report) and request for extraordinary fees and expenses. The court rejected Sherry and Dennis’s objections to the Ninth Report, including allegations that the individual trustees breached their fiduciary duties in the operation of a company for which the trust was the sole shareholder, and that the corporate trustee breached its fiduciary duty by colluding in these actions and failing to conduct independent oversight. Sherry and Dennis appealed.

The trustees' requests to approve the Tenth and Eleventh Reports and for extraordinary fees, also made in TR 2416, were transferred for hearing to a civil proceeding, CE 48852, in which Sherry and Dennis had alleged a breach of fiduciary duty by the trustees: they asserted the individual trustees had engaged in self-dealing and that the corporate trustee had colluded and acquiesced in this conduct. Following transfer, the district court entered summary judgment against Sherry and Dennis in CE 48852, and dismissed their claims for breach of fiduciary duty by the trustees "which are reported in the 10th and 11th Annual Reports respectively." Sherry and Dennis also appealed from this ruling.

While the appeals in TR 2416 and CE 48852 were both pending, the trustees again sought, in TR 2416, court approval for the Tenth and Eleventh Reports and for an award of extraordinary fees. The court set a hearing on the request, which was resisted by Sherry and Dennis on the basis the district court had been deprived of jurisdiction because "this matter," the "underlying litigation" that involved "claims of breach of fiduciary duty in the internal affairs of the trust as reflected in the tenth and eleventh annual reports," was on appeal.

The district court entered orders approving the Tenth and Eleventh Reports, awarding extraordinary fees, and assessing those fees against Sherry's and Dennis's shares of the trust. In relevant part, the court articulated Sherry and Dennis's claim as an assertion "the 2004 appeal regarding the ninth annual report divests this court from taking any further action regarding subsequent annual reports," and stated the issue before it was "whether this court retains jurisdiction following the appeal . . . of a prior order approving the ninth annual report" The court concluded "the issues regarding approval of the tenth and

eleventh reports are collateral to the approval of the ninth report, and this court retains jurisdiction over them.” No post-ruling motion was filed by Sherry and Dennis.

On appeal, Sherry and Dennis assert the district court erred “as a matter of law” because it did not retain jurisdiction over approval of the Tenth and Eleventh Reports and extraordinary fee request “while these very issues are on appeal.” See *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990) (providing a filed appeal deprives the district court of jurisdiction except for those issues “collateral to and not affecting the subject matter of the appeal”). A review of Sherry and Dennis’s brief indicates the only appeal on which they rely in support of this jurisdictional challenge is the one they filed in CE 48852. However, the district court never addressed or ruled on the issue of whether it was deprived of jurisdiction by the filing of an appeal in CE 48852.

Our rules of error preservation are well established. Before an issue may be raised and determined on appeal, it must have been raised before and decided by the district court. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). When the district court fails to rule on an issue properly raised by a party, that party must file a post-ruling motion bringing the omission to the court’s attention. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). If the party fails to do so, error will not be preserved. *Id.* Here, the district court did not rule on a claim that the appeal in CE 48852 deprived it of jurisdiction, and Sherry and Dennis did not bring the omission to the court’s attention via a post-ruling motion. Accordingly, error on this issue has not been preserved.

In addition, we perceive no error in the ruling the district court actually made—that it was not deprived of jurisdiction by the appeal from its order approving the Ninth Report. The prior probate appeal was directed towards actions allegedly performed by the trustees at an earlier time, as reflected in an earlier report. We accordingly agree the trustees' request to approve the Tenth and Eleventh Reports and for fees, and the objections thereto, were collateral to the issues in the then-pending probate appeal. See *Waterhouse v. Iowa Dist. Court*, 593 N.W.2d 141, 142 (Iowa 1999) (noting limitation on the district court's authority following an appeal applies to its ability “to revisit and decide differently issues already concluded by [the] judgment” on appeal). Finally, although Sherry and Dennis do not challenge the underlying merits of the district court's decision to approve the Tenth and Eleventh Reports and award extraordinary fees, we note that both the prior appeal in TR 2416 and the appeal in CE 48852 have been resolved adversely to them.¹

In light of all the foregoing, we affirm the district court's orders approving the Tenth and Eleventh Reports, and awarding and assessing extraordinary fees.

AFFIRMED.

¹ Procedendo issued in both *In re Estate of Elmer Vitalis Residuary Trust*, No. 04-1319 (Iowa Ct. App. May 24, 2006), and *Nurmela v. Elmer Vitalis Residuary Trust*, No. 05-0946 (Iowa Ct. App. May 24, 2006), on June 23, 2006.