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JEANNE A. SZULIM  
CLERK OF COURT



COURT OF THE SHAKOPEE MDEWAKANTON  
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT

STATE OF MINNESOTA

In the Matter of: )  
 )  
The Children's Trust Funds Created )  
Under Shakopee Mdewakanton Sioux )  
Community Ordinance Number 12-29-88-002 )  
With Trust Agreement Dated )  
September 9, 1992 )

File No. 374-99

MEMORANDUM OPINION AND ORDER

Summary

This matter concerns trusts which the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), as Settlor, established for certain children by a trust agreement ("the Trust Agreement") dated September 9, 1992.

The Trust Agreement is a fairly straightforward document. In its section 1.02, it recites that it establishes a trust pursuant to Section 6 of the Community's Ordinance No. 12-29-88-002 (commonly referred to as the "Business Proceeds Distribution Ordinance" or "BPDO"). In its section 1.01, it states that the Community has created individual trusts for individual children; and it provides that the assets of those separate trusts are to be combined, under the Trust Agreement, into a single trust for ease of administration. Its section 1.03(3) expressly makes the Trust Agreement and all the trusts created under it revocable "by a written instrument executed by the Business Council after such revocation is approved by a majority vote of those



voting members present at a General Council meeting in which a quorum exists". Its section 1.03(1) unambiguously reserves to the Business Council the power "[t]o appoint additional and successor trustees and to remove any acting trustee by a written instrument executed by the Business Council". And its section 5 provides--

Except as modified by this agreement, the rules of law and statutes of the Shakopee Mdewakanton Sioux Community and/or the State of Minnesota, insofar as legally possible, shall govern in all respects the validity, interpretation and enforcement of this agreement and all matters of trust administration under this agreement.

For more than seven years, from the date the Trust Agreement was originally signed until December 30, 1998 -- Merrill Lynch Trust Company of America ("Merrill Lynch") was the sole trustee. There is nothing in the record which suggests that Merrill Lynch experienced any particular concern relating to the Business Council's authority to execute the Trust Agreement in 1992, or any difficulty in interpreting the Trust Agreement or establishing appropriate legal frames of references for the investment and administrative functions required by the Trust Agreement. Nor is there anything suggesting that anyone found fault with Merrill Lynch's actions. To the contrary, in a Stipulation which the Community's Business Council and Merrill Lynch placed before this Court on October 26, 1999, it was agreed that all of Merrill Lynch's accountings, investment decisions, and distributions of trust assets should be confirmed by the Court -- save for two issues, which I decide today.

On August 29, 1998, the Business Council of the Community, acting under the above-noted express powers in the Trust Agreement, voted unanimously to replace Merrill Lynch as trustee, effective December 30, 1998, and to designate as successor trustee the person who is acting from time to time as the Community's Controller. The Business Council at that time also



decided to make certain changes in the trust arrangements, which are discussed below.

After receiving notice of the Business Council's decision, Merrill Lynch consulted the Minneapolis law firm of Leonard, Street, & Deinard, P.A. for advice on matters relating to the authority of the Community and the Business Council, the validity of the Business Council's decision, and other matters relating to the Trust Agreement. Eventually, Merrill Lynch initiated an action in the District Court for Hennepin County, Minnesota, asking that Court to exercise jurisdiction over the Community and the assets that were managed under the Trust Agreement, seeking a determination as to the Business Council's authority to execute the Trust Agreement, and the conformance of the Business Council's substitution of trustees with the Community's law and the Indian Gaming Regulatory Act of 1988.

The Community and the Business Council resisted that action, contending that neither the District Court for Hennepin County nor any other court of the State of Minnesota had jurisdiction over the Community or its officers, and that this Court was the appropriate forum for the resolution of any questions that might arise under the Trust Agreement. On June 1, 1999, the Community filed the present action before this Court.

During the period that led up to and followed the filing of the present action in this Court, Merrill Lynch and the Community engaged in discussions aimed at resolving the questions posed by Merrill Lynch in its Hennepin County District Court action. One issue which concerned Merrill Lynch was the extent to which notice of the Business Council's actions, and of the proceedings in this Court and in the Hennepin County District Court, should be given to various classes of children who were or who might be beneficiaries under the Trust Agreement. At least in part, this issue apparently arose because, when the Business Council



made its decision to replace Merrill Lynch as trustee, it also decided to alter the way in which trust assets pass in the event that a child for whom a trust account has been established dies before he or she attains the age of eighteen years. Before the Business Council took its actions, the estate of a deceased minor child would receive any trust assets that had been held in the trust for that child, whereas after the Business Council's action the trust assets that would have gone to the child pass to the Community. Inasmuch as the Trust Agreement is expressly revocable, the rights of minors to any monies held by the trust is contingent only. And, given that fact, the Business Council apparently took the position that no notice needed to be given to the children or the parents or guardians of the beneficiary children who were not yet eighteen years of age; and Merrill Lynch apparently was concerned about the correctness of that view<sup>1</sup>.

Eventually, the notice question was resolved without extensive briefing or argument: after conferring with the parties, this Court advised them that notice of the proceedings should be sent to all children (or their parents or guardians) who had contingent interests under the trusts, and the Business Council duly provided such notices. Conferences between the parties also produced an agreed-upon procedure by which this Court and the Hennepin County District Court each would be presented with a stipulation ("the Stipulation") consenting to the entry of an Order generally confirming Merrill Lynch's actions as trustee. Consequently, on October 26, 1999, in accordance with the Stipulation, this Court entered agreed-upon Findings of Fact, Conclusions of Law, and an Order; and on the same date the Hennepin County District Court entered a similar Order.

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<sup>1</sup> The word "apparently" in this sentence is used advisedly: the record before the Court contains references to these concerns, but it seems likely that a substantial amount of material was generated by the parties which was not filed with the Court.



These events resolved all matters that might have been at issue between the parties, save two. The Stipulation identified two remaining unresolved matters: (1) the extent to which legal fees incurred by Merrill Lynch after the August 29, 1998 notice should be charged to the trusts, and (2) the extent to which Merrill Lynch should receive the trustee's fees contemplated by the Trust Agreement, for the period after December 30, 1998.

The legal fees incurred by Merrill Lynch with the Leonard, Street, & Deinard firm totalled \$476,694.58. Merrill Lynch and Leonard, Street, & Deinard are of the view that the entirety of that amount should be paid by the trusts. The Community, on the other hand, contends that the vast bulk of the attorney's fees claimed by Merrill Lynch were incurred only to protect Merrill Lynch, not to protect either the trust assets or the beneficiaries' rights, and therefore those fees should not be reimbursed by the trusts.

The trustee's fees for the period December 31, 1998 through August 30, 1999<sup>2</sup> total an additional \$108,068.68. Merrill Lynch argues that it continued to perform the trustee's functions during that period, and therefore should receive the compensation which the Trust Agreement contemplates for such services. The Community argues that Merrill Lynch was unambiguously terminated as trustee under the Trust Agreement on December 30, 1998, received no additional assets from the Community after that date, made no distributions or investments after that date, and therefore is entitled only to any actual costs and expenses which it incurred in winding up its trustee's responsibilities.

In the Stipulation, the parties agreed that both of these issues would be submitted to this

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<sup>2</sup> Merrill Lynch waived any claim to trustee's fees for the period from September 1, 1999 through October 26, 1999.



Court for decision. Thereafter, Merrill Lynch submitted copies of the Leonard, Street, and Deinard billings; the Community submitted an affidavit of one of its attorneys outlining the manner in which the parties and their attorneys had interacted during the period in question. And both parties submitted three-page letter briefs discussing the fee issues.

I have reviewed all of the materials submitted by the parties, and have considered case law generally applicable to trustees' legal fees in Minnesota and other American jurisdictions. To some extent, as I will explain below, it has been difficult for me to ascertain, from the materials presented by the parties, what the nature was of significant amounts of work described by the itemizations in the Leonard, Street, and Deinard billings. But it is clear that Merrill Lynch and Leonard, Street, & Deinard have the burden of establishing that the trusts should pay the trustee's legal fees and, for most of those fees, they have not met that burden. Although some of the work done by Leonard, Street & Deinard clearly did relate to valid concerns about the rights of the trusts' beneficiaries, and arguably did bring a benefit to them, it seems to me that most of the firm's billings arose from work done to protect Merrill Lynch itself. In addition, it seems to me that the amount of legal work done was far out of proportion to the issues presented.

I also have concluded that the Community is correct when it argues that Merrill Lynch should not receive full trustee compensation for the period after it had unambiguously been terminated from that function by the Community entity which, under the Trust Agreement.

#### Discussion

In Minnesota, and in American jurisprudence generally, a trustee is entitled to



reimbursement from the trust for attorneys fees when the trustee is obliged to bring an action primarily for the benefit of the trust for the purpose of clarifying ambiguous language in the trust instrument, but this general principal is subject to clear limits:

In the sound and cautiously exercised discretion of the court, and not as a matter of right, attorney's fees and other expenses reasonably and necessarily incurred by all necessary parties to litigation may be allowed and properly charged to the trust estate where such litigation, with respect to substantial and material issues, is necessary to resolve the meaning and legal effect of ambiguous language used by the settler in the trust instrument, if adjudication is necessary to the proper administration of the trust, and if, without unnecessary expense or delay, the litigation is conducted in good faith for the benefit of the trust as a whole.

In re Atwood's Trust, 35 N.W. 2d 736, 740 (Minn. 1949); see also In re Great Northern Iron Ore Properties, 311 N.W.2d 488 (Minn. 1981).

Several elements of this rule deserve emphasis here. First, the decision as to whether attorney's fees should be awarded rests with the discretion of the court, which will consider whether the services of the applicant have been reasonable and of benefit to the estate. See generally, Bogert, The Law of Trusts and Trustees, at 559 (Rev. 2nd Ed. 1980). See also, In re Hormel, 504 N.W.2d 505, 513 (Minn. App. 1993); In re Vokal's Estate, 263 P.2d 64, 69 (Cal. App. 2d 1953); Phillips Exeter Academy v. Gleason, 157 A.2d 769, 777 (N.H. 1960); A.M. Swartout, Annotation, "Allowance of Attorneys' Fees in, or Other Costs of, Litigation by Beneficiary Respecting Trust", 9 A.L.R.2d 1132 (1950).

It is clear, under the Atwood doctrine and the stream of cases of which it is a part that where a trustee sues to construe a trust instrument no attorneys' fees should be allowed if the suit was unnecessary. Ferguson v. Rippel, 92 A.2d 647, 652-53 (N.J. Super. 1952), cert. denied 94 A.2d 548 (N.J. 1953). See also, Bank of Mississippi v. Southern Memorial Park, Inc., 677 So.2d 186, 191-92 (Miss. 1996); and 9 A.L.R.2d 15.



It also is clear, under Atwood and similar cases, that where a trustee employs an attorney for the trustee's benefit and not for the benefit of the estate, the trustee who must pay the attorney without reimbursement from the trust estate. Scott and Fratcher, The Law of Trusts, 188.4, at n. 10 (4th Ed. 1988).

To apply these doctrines in the present circumstances, I have carefully scrutinized the materials submitted by Merrill Lynch. The sole source of the documentation provided to the Court with respect to the legal fee issue is the collection of itemized monthly billing statements of the Leonard, Street & Deinard firm; I find that much of this documentation is sketchy as to the exact nature of the legal work done by the firm; and the materials which were filed of record in this case as it progressed do not shed substantial additional light on the matter. In short, it is extremely difficult for me to divine the nature of large amounts of the legal work that was undertaken.

Specifically, during November and December, 1998, the period immediately preceding the effective date of the Business Council's notification that Merrill Lynch was being replaced as trustee, the Leonard, Street & Deinard billings to Merrill Lynch totalled \$34,260.00. Some of the itemized work during that period had a clear purpose and some apparent relationship to a legitimate concern for the welfare of the trust's beneficiaries -- for example, in December, 1998 a number of work entries related to "Legal research regarding trustee duties", to "a trustee's duties to beneficiaries in a revocable trust", and to "notice requirements for revocation of a trust". But those entries account for only a very small portion of the law firm's bill during the period. The vast bulk of the billing appears under amorphous headings like "prepare legal strategy regarding response to Community's August 28, 1998 notice", and "Study and analysis



of various trust issues". Indeed, in the two months of November and December, 1998, those two descriptions or close variants of them accounted for at least the following hours of work: 6.00, 4.75, 4.00, 5.00, 5.00, 4.00, 4.75, 8.00, 9.00, 5.00, 9.00, 7.50, 2.00, 1.75, 7.25, 4.00, 5.25, 1.00, 5.00, 3.00, 2.00, 2.50, and 1.50. Those hours were generally billed at the rate of two hundred dollars per hour.

This same pattern continued in January, 1999. Research on "various trust issues" continued, and beginning on January 11, 1999, work began on preparation of a Petition for Discharge of the trustee. During January, those two descriptions covered at least the following hours: 10.00, 6.00, 9.00, 10.25, 1.50, 5.00, 4.00, 3.75, 3.50, 1.50, 4.75, 0.50, 2.00, 4.50, 6.00, 1.50, 4.50, 1.50, 7.75, 0.50, 7.50, 1.50, 8.00, 8.00, 0.50 and 8.00. Again, the general billing rates ranged from two hundred dollars to two hundred and forty dollars per hour. The total bill for the month was \$29,263.37.

During February, 1999, a considerable amount of the legal activity apparently was devoted to issues respecting notice to beneficiaries of the trusts. However, a considerable amount of activity also involved discussions with attorneys for the Community about "alternatives" to the Petition for Discharge that had been the subject of so much work in January, and research evidently was done on the question of whether or not a Minnesota state court had jurisdiction over the assets of the trust. In addition, a significant number of hours were spent analyzing a motion the Community evidently made to seal the file in the Hennepin County District Court proceeding. In all, 178 hours of legal work were billed, about half of which were at a rate of \$200.00 per hour or more. The total bill for the month was \$30,624.04.

During March, work relating to providing notice to trust beneficiaries appears to have



predominated. Substantial research was done aimed at obtaining addresses for beneficiaries and their families, and the dominant rates at which the work was billed was lower than in previous months -- from \$115.00 per hour to \$160.00 per hour. However, a substantial amount of work, totalling perhaps one-third of the \$28,393.91 total bill, involved "legal strategy" and assessing undefined "risks and benefits" of various possible tacks which Merrill Lynch might take.

April and May saw a remarkable increase in billing. The total bill for the work done in those two months was \$122,181.43. Included are such items as "outline arguments with respect to lack of tribal court jurisdiction; review Mdewakanton Sioux Community constitution and ordinances creating judicial court and defining jurisdiction", and "[s]tudy and analysis of Shakopee Ordinance creating judicial court". Considerable work was done in responding to a motion in which the Community evidently had asked the Hennepin County District Court to dismiss the Petition proceedings for want of jurisdiction. Dozens of hours were spent researching issues such as "subject matter jurisdiction". Tens of thousands of dollars were expended on memoranda. Some of this work apparently had to do with the potential recusal of the Hennepin County District Judge to whom Merrill Lynch's Petition had been assigned. Other aspects of the work had to do with notice should be given to trust beneficiaries. Other aspects, perhaps the dominant share of the work, seemingly had to do with resisting a motion to dismiss which the Community apparently had filed in response to Merrill Lynch's Petition in Hennepin County District Court. And the exact nature of other aspects of the work -- significant numbers of hours -- is just not clear from the billing records. It is clear, in any case, as late as May 11, 1999, research described as "Analyze U.S. Supreme Court decisions regarding state court jurisdiction over Indian tribes" -- work which one certainly would have expected to have been



comprehended in the substantial effort that preceded the filing of the Petition in Hennepin County -- was still being done. In all, in those two months, the firm billed a total of 646.5 hours of work, sixty percent of which was done at a rate of \$185.00 per hour or more.

In June, the work continued at the same great rate. Two hundred and fifty-six hours of work was billed. Some of this work still clearly had to do with ascertaining the nature of the interests of trust beneficiaries, and providing appropriate notice to them. Other aspects of the work had to do with responding to one or more subpoenas which apparently had been served upon Merrill Lynch by the Community. More work was done aimed at resisting the Community's motion to dismiss. Research was done on "case law regarding enforcement of contracts with Indian tribes in Public Law 280 jurisdictions and abstention doctrine issues raised in Community's reply memorandum". Work was done relating to a letter to the Secretary of the Interior "regarding request for clarification...with respect to Community's Constitution and other laws". Evidently, Freedom of Information Act requests were made to the United States Department of the Interior. On June 30, work was done to "[a]nalyze cases regarding exhaustion of tribal court remedies...". The bill for the month was \$52,471.30.

In July, a new high in billing occurred. The total of the fees billed in that month was \$77,661.25. Some billings related to "tribal exhaustion and challenge to enforcement of state court judgment" and "the rule in Williams v. Lee". Sixteen entries were simply denominated "Continue legal research". Many others entries are equally unspecific. Clearly, in any event, the dominant issue for Merrill Lynch and its attorneys in July continued to have to do with whether the Hennepin County District Court had jurisdiction over its Petition, and whether this Court had any legitimate role to play with respect to the Trust Agreement.



In August, settlement discussions with the Community appear to have dominated the legal work. The entry "Continue research regarding issues raised by Community's revised settlement proposals" appears nineteen times. The total bill for the month was \$60,145.76.

September saw a decrease in activity. Early in the month, this Court notified the parties that if a consent judgment were to be brought before it, notice should be provided to all trust beneficiaries -- both those who possess vested interests and those whose interests are contingent. This decision was communicated to the parties as a matter of judicial administration: the parties had not ever briefed or argued the issue to the Court. The legal work which followed appears mainly to have involved preparing the Stipulation, and the Findings of Fact, Conclusions of Law, and Order that were eventually presented to this Court and to the Hennepin County District Court. The total bill for the month was \$20,141.66.

October saw the conclusion of the dispute between the parties. Interestingly, at least one billing item for the month -- which was billed to Merrill Lynch -- is "telephone conference with Todd Zuckerbrod and Sara Fortunoff regarding billing issues; office conference regarding same". During the month, the final Stipulation and implementing documents were prepared, and short hearings were held in this Court and in the Hennepin County District Court, at which time the Stipulation was accepted and the Orders were entered. The total bill for the month was \$27,236.07.

As I remarked above, I find many of the billing entries for these months opaque. And clearly, when the purpose of a billing is unclear then the burden of the trustee to establish a trust-related purpose for the work has not been carried. In addition, I find that the bulk of the litigation expenses incurred by Merrill Lynch were for its own protection, and not for the benefit



of the trust; and I find that, in any event, these expenses were substantially higher than reasonably necessary to resolve the core issue that was of importance to the trust. It seems clear that an action was commenced in a State court, and long after commencement of that proceeding research still was being done on fundamental jurisdictional issues -- despite the fact that very significant research and drafting expenditures had been incurred before the filing.

In my view, the situation here is similar to that in In Re Corcoran Trusts, 282 A.2d 653 (Del. Ch. 1971), aff'd sub nom. Bankers Trust Co. v. Duffy, 295 A. 2d 725 (Del. 1972). There, the trustee sought leave of the court to account on behalf of itself and all predecessor trustees concerning their respective acts in the administration of three inter vivos trusts. No request for judicial accounting and settlement had been made by any trust beneficiaries, and none of the trust instruments required such an accounting, and in fact the beneficiaries and the guardian ad litem objected to certain parts of the accounting. Id. at 655-56. The court concluded that the request for accounting primarily desired by the trustee for its own protection, that is, for the protection of "the present sole and successor trustees and its predecessors from the risks of future suits". Id. at 653, 656. Consequently, the court allowed only twenty-five percent of the claimed attorneys fees--the amount attributable to legal work that the court determined actually benefited the trust. The Delaware Supreme Court subsequently affirmed the decision, concluding, "It seems patently clear that the immunization from liability of the trustees does not benefit the trust but only the trustees individually". 295 A.2d, at 727.

It is apparent to me here that, as in the Corcoran/Bankers Trust situation, the primary benefit of the litigation undertaken by Merrill Lynch in the Hennepin County District Court, and in this Court, for that matter, was to the trustee and not to the trust. Moreover, the legal issues



raised and the time expended in the wholly unnecessary (from the point of view of the trust) foray into state court, went well beyond the need to simply determine whether Merrill Lynch had been properly discharged and replaced. The only real issue in that regard was whether all of the beneficiaries, regardless of whether their interest was vested, were entitled to notice of these proceedings and an opportunity to be heard. That issue could have been resolved simply by petitioning this Court for guidance -- indeed, it in fact was resolved by this Court without the need for extensive argument or conflict.

I do think it is clear that some portion of the legal work performed during this period was directed at ensuring that the interests of trust beneficiaries were protected, and that all beneficiaries received appropriate notice. But it is impossible for me to precisely determine what amount of the work falls into that category, so I am obliged to be arbitrary, to some extent. I have spent a considerable period of time trying to get an accurate and fair sense for the billings and the work, and I am comfortable that fifteen percent of it had a purpose other than simply protecting Merrill Lynch. Therefore, I today hold that fifteen percent of Leonard, Street and Dienard's legal fees, or \$71,504.18 ( $\$476,694.58 \times .15$ ), should be reimbursed by the trusts.

That leaves only the issue of the Trustee's fees before me. The allowance of compensation to a trustee, like the allowance of attorneys fees, "lies within the discretion of the trial court". In re the Trust Created by Voss, 474 N.W.2d 199, 201 (Minn. 1991). One of the factors relevant to the exercise of this discretion is whether the trustee has performed "all of its duties." Id. As in the case of attorney's fees, a court may withhold all or part of a trustee's compensation if the trustee is "of any breach of conduct." Workman v. Workman, 118 N.W.2d 764, 782-83 (Neb. 1962). See also, Heller v. First National Bank of Denver, 657 P.2d 992,



993 (Colo. App. 1982). Application of these principles to the present case leads me to the conclusion that Merrill Lynch should be allowed some but not all of its claimed fees.

Specifically, it seems clear to me that the legal course which Merrill Lynch chose, and the striking amount of legal work undertaken along that course, complicated and delayed the resolution of this matter past what reasonably could be allowed, even assuming that there were issues relating to protecting the trusts' beneficiaries which required attention. In this regard, I think LaSalle Nat. Bank v. McDonald, 188 N.E.2d 664 (Ill. 1963) is instructive: where litigation brought by the trustee extended past the point of reason, trustees fees should be denied to the trustee who was responsible for the delay.

I note that from the date the Community filed its Petition before this Court, June 17, 1999 to the date that all matters save the fee issues were resolved between the parties, October 26, 1999, was just over four months; and I do not think it is unreasonable to use that period as the one for which trustee's fees should be paid.

The Community argues that trustee's fees also should be reduced because during most of the period during which the Community and Merrill Lynch were disputing matters in judicial forums, the Community was not making new deposits of funds with Merrill Lynch. That argument is not without force, but the fact remains that Merrill Lynch still managed and was responsible for the bulk of the trusts' assets; and there has been no suggestion made that those duties were performed in an inappropriate manner.

I therefore have concluded that Merrill Lynch should be paid full trustee's fees for a period of four months out of the nine months in dispute between the parties. It appears from the materials attached to Merrill Lynch's letter brief dated November 2, 1999, that the trustee's



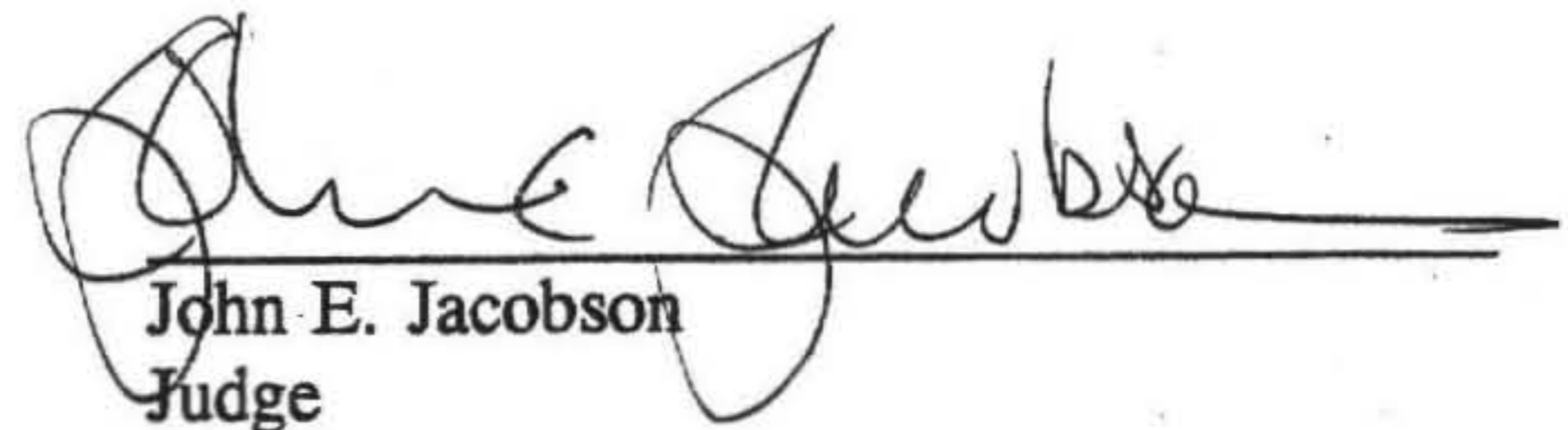
fees amount to about \$12,000 per month. Therefore the Court will direct that trustees' fees be paid from the trusts the amount of \$48,000.00.

Order

For the foregoing reasons, and based on all the materials and argument filed herein, it herewith is ORDERED:

1. That the trusts established under the Trust Agreement shall reimburse the attorneys' fees of Merrill Lynch Trust Company of America in the amount of \$71,504.18;
2. That the trusts established under the Trust Agreement shall pay trustee's fees to Merrill Lynch Trust Company of America in the amount of \$48,000.00.

February 7, 2000

  
John E. Jacobson  
Judge