This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1167

In the Matter of the Trust
Created Under Agreement By and Between
Eugene V. Stowell and Shirley Marie Stowell, Settlor,
and Richard Stowell and Gary Stowell, Trustee,
dated June 23, 1998

Filed April 2, 2018
Affirmed
Rodenberg, Judge

Carlton County District Court
File No. 09-CV-16-1720

Stephanie M. Balmer, Falsani, Balmer, Peterson & Quinn, Duluth, Minnesota (for appellant Linda Boyer)

Frank Yetka, Rudy, Gassert, Yetka, Pritchett & Helwig, P.A., Cloquet, Minnesota (for respondents Richard Stowell and Gary Stowell)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Linda Boyer appeals from the district court's order denying her objection to, and approving of, the administration of the Stowell Family Trust. We affirm.

FACTS

Eugene and Shirley Stowell had five children: Richard Stowell, Gary Stowell, Daniel Stowell, Randall Stowell, and appellant. Shirley Stowell created a trust on June 23, 1998, naming all of the Stowell children as beneficiaries, and designating herself and Eugene as trustees. The trust was amended and superseded a number of times, culminating in the Fifth Complete and Superseding Amendment to Revocable Trust Agreement of Shirley Marie Stowell dated November 29, 2010.[1] Her sons Richard and Gary Stowell were identified as the trust's successor co-trustees in an amendment dated November 29, 2012.

Eugene died on August 12, 2012. Shirley died on September 4, 2014, and Richard and Gary began administering the trust. When Shirley died, the trust assets included a shopping center that Eugene had purchased years earlier. The trust provided that any real property held by the trust "be sold as soon as reasonably possible" after Shirley's death. The trust directed the trustees to informally contact Shirley's children to determine if any were interested in purchasing trust real property, and that the children be given "a first opportunity to purchase said property." The trustees were required to poll the children, and "approval by a majority of [Shirley's] surviving children as to the terms and sale price of a piece of real estate shall absolutely authorize the trustee to sell on such terms." Other sections of the trust repeated the requirement that consent of a majority of the surviving

[1] Our references to the trust herein are to the fifth amendment of it, which the parties agree was operative at all times pertinent to the appeal.

children be obtained to sell the trust's real property. Richard sent a number of updates to his siblings regarding the status of the trust property and distributions.

Shortly after Shirley's death, Richard sent ballots to his siblings concerning the potential sale of trust assets to family members. Daniel purchased one of Eugene's rings and appellant purchased one of Shirley's rings and a necklace. Both of these sales were approved by all five of the siblings. Daniel bought the family's hunting shack, which had an appraised value of $114,000, for $100,000; this sale was also unanimously approved by the siblings. The homestead was sold to a non-family member on terms to which all siblings agreed.

On December 12, 2015, Richard proposed to purchase the shopping center—then the sole remaining trust asset. His proposal was designed to permit winding up the trust. Richard hoped to complete the transaction before the end of 2015 to avoid negative tax consequences for the trust. The shopping-center sale is central to this appeal.[2]

Richard had the shopping center appraised in November 2014. The appraisal valued the shopping center at $2.4 million as of the time of Shirley's death. In December 2015, the shopping center's debt was $2,275,000. Richard's proposal began with the appraised value[3] and assumed that the trust would have to accept a lower price for the shopping center if it was sold to a third party. Richard also subtracted $124,500 from the appraised value

[2] The purchase was of G & R Development LLC, which managed the shopping center. We refer to the purchase in question as being of "the shopping center," consistent with the briefing and argument on appeal.

[3] The initial appraisal originally had a typographical or transposition error, listing the appraised value at $2.54 million. Richard used this higher value in his initial proposal.

to account for the five-percent commission that would be expected if a realtor sold the shopping center. The resulting offer, taking into account the gross proceeds after these deductions, was $2,365,500, which would have resulted in $90,500 in net proceeds to the trust after Richard's assumption of the loan. Richard then added $37,500 to the gross offer to account for other assets (such as cash and receivables) owned by the shopping center, bringing the total net to the trust under his offer to $128,000. Richard proposed to pay the trust that amount and assume the shopping center's debt.

Richard's initial offer also included a provision for other siblings to participate in the purchase, in part because he was leery of assuming the entire mortgage balance. Appellant indicated some interest in participating, and Richard exchanged emails with appellant regarding the shopping center and its value. Richard also provided a number of financial documents in response to appellant's questions. Richard eventually rescinded the offer for his siblings to join in the purchase as partners. The four Stowell brothers submitted ballots authorizing the sale of the shopping center to Richard for $128,000 plus his assumption of the shopping center's debt. Appellant did not return a ballot on this proposal. Richard purchased the shopping center from the trust on December 31, 2015.

Richard then petitioned to terminate the trust. Appellant objected. After a hearing, the district court denied appellant's objection, approved the sale to Richard, and ordered appellant to pay the trustees' costs and disbursements.

This appeal followed.

D E C I S I O N

Appellant originally challenged the district court's order on six grounds. She argued that the district court erred by: (1) finding that Richard acted in good faith and with due regard for the interests of the beneficiaries in his purchase of the shopping center; (2) concluding that the shopping-center sale complied with the terms of the trust; (3) considering extrinsic evidence about the agreement resulting in lower property taxes and common-area maintenance (CAM) fees being paid to the shopping mall; (4) finding that Richard complied with his statutory duties; (5) excluding evidence of communications between the parties' attorneys regarding appellant's requests for information; and (6) ordering appellant to pay the trustees' costs and disbursements. At oral argument, appellant withdrew her challenge to the district court's exclusion of the attorneys' email communications. Additionally, the parties agreed at oral argument that the costs-and-disbursements issue is not properly before us because no costs have yet been taxed by the district court. We address the remaining issues.

I. The district court did not err in finding that Richard Stowell complied with the terms of the trust.

We first address appellant's argument that the district court erred in finding that Richard's purchase of the shopping center complied with the terms of the trust. Appellant's argument is without merit.

"The terms of a trust prevail over any provision of" chapter 501C except in certain enumerated areas, including the trustee's duty to act in good faith and in the interests of the beneficiaries and the effect of an exculpatory provision. Minn. Stat. § 501C.0105(b)

(2016). Section 6.2.1 of the trust directs that the real property, except for one house, be sold as soon as reasonably possible after Shirley's death. It directs the trustees to informally contact the Stowell children to determine which, if any, have an interest in purchasing trust property and directs that the Stowell children shall have the first opportunity to purchase the property if possible and reasonable. The trust requires a poll of the children, "and approval by a majority of [Shirley's] surviving children as to the terms and sale price of a piece of real estate shall absolutely authorize the trustee to sell on such terms." Additionally, section 8.3.2 authorizes the trustees, in the exercise of their administrative powers, to sell trust property under the condition that "[c]onsent of a majority of [Shirley's] surviving children must be obtained to authorize the sale of real estate or the sale of an interest in a business."

Appellant agreed at oral argument that the trust authorized the sale of trust property to a sibling upon a majority vote. Indeed, the trust not only permits the sale of trust property to a child of Shirley, such a sale is preferred. This provision resulted in the unchallenged sale of other trust assets to family members.

Shortly after Shirley's death, Richard asked his siblings to indicate their interest in the shopping center. None initially indicated any interest. Then, in 2015, Richard proposed to buy the shopping center under the terms described above. He sent ballots seeking approval to his siblings. The initial proposal indicated that Richard might be willing to accept his siblings as partners in this purchase. While appellant argues that Richard violated the terms of the trust by purchasing the shopping center alone after she expressed interest in allowing others to join in the purchase, nothing in the trust requires that a purchasing sibling take on partners. Eventually, Richard modified his offer to purchase and proposed to buy the shopping center himself. The trust requires that a proposed purchase receive majority approval by the beneficiaries. Four of the five sibling beneficiaries returned ballots approving the proposed sale to Richard. No sibling objected to the purchase; appellant abstained by not returning her ballot at all. Because the trust authorized the sale to a beneficiary, the district court did not err in finding that Richard's purchase complied with the terms of the trust agreement.

II. The district court did not err in concluding that Richard Stowell complied with his statutory duties as a trustee.

Appellant argues that Richard failed to comply with his statutory duties to act in good faith, with due regard for the interests of the other beneficiaries, and to keep the beneficiaries reasonably informed about the status of the trust.

A. The record supports the district court's determination that Richard complied with the duty of good faith.

As the district court correctly noted, its proper role is not to determine the value of the shopping center. Rather, the district court's role upon appellant's objection is to determine whether the co-trustees acted in good faith by selling the shopping center to a trust beneficiary by majority vote consistent with the terms of the trust. The district court found that they did so act. We review that determination for abuse of discretion. *In re Estate of Sullivan*, 868 N.W.2d 750, 754 (Minn. App. 2015) (quotation omitted).

A trustee's duty to "act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries" is mandatory and cannot be eliminated by the terms of the trust. Minn. Stat. § 501C.0105(b)(2). This duty is concurrent with a trustee's duty of loyalty, which requires that a trustee "not place the trustee's own interests above those of the beneficiaries." Minn. Stat. § 501C.0802(a) (2016). "If a trust has two or more beneficiaries, the trustee shall administer the trust impartially, giving due regard to the beneficiaries' respective interests." Minn. Stat. § 501C.0803 (2016). The trustee must "exercise reasonable care, skill, and caution" in prudently administering the trust. Minn. Stat. § 501C.0804 (2016). "A trustee shall . . . manage trust assets as a prudent investor would," and may consider "general economic conditions." Minn. Stat. § 501C.0901, subd. 2(a), (c)(1) (2016). "A trustee has the duty to exercise reasonable care, skill, and caution in investing and managing trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." *Norwest Bank Minn. N., N.A. v. Beckler*, 663 N.W.2d 571, 580 (Minn. App. 2003) (quotation omitted). "A trustee may not exercise its discretion in a manner that defeats the settlor's intent or the purposes of the trust." *Id.* But "[so] long as the trustees act in good faith, from proper motives, and within the bounds of reasonable judgment, the court will not interfere with their decisions." *Id.* at 580-81 (quotation omitted) (alteration in original). In discussing these concepts in the context of a corporation, the supreme court has stated that "[t]he essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain." *Westgor v. Grimm*, 318 N.W.2d 56, 59 (Minn. 1982) (quoting *Pepper v. Litton*, 308 U.S. 295, 306, 60 S. Ct. 238, 245 (1939)).

Richard and appraiser Ann Heimbach, among other witnesses, testified that Heimbach appraised the shopping center in 2014 to determine its value as of the date of Shirley's death. Heimbach was familiar with the shopping center, having appraised it previously, and was recommended to Richard as the most highly respected appraiser in the area.

Heimbach testified that she used the income approach to appraisal, based on the expected income to an investor purchasing the mall, and that it is the most reliable method of appraising this type of property. Heimbach testified that, using that approach, she determined that the value of the shopping center at the time of Shirley's death in September 2014 was $2.4 million. This value was lower than those determined by Heimbach in her 2012 and 2013 appraisals. Heimbach explained the difference as being attributable to her using the actual rental rates for the theater and liquor store spaces in the 2014 appraisal as opposed to using the market-rental rates she used in 2012 and 2013. Heimbach also testified that the rental rates she used were based on Premiere Theaters and a liquor store in the mall having negotiated lower rental rates than those listed in their leases, and were based on an agreement reached during Eugene's life that the theater did not have to pay approximately $16,000 in annual property taxes.

Appellant's expert witness, Gary Battuello, agreed that the income approach is the appropriate method to appraise the shopping center. Battuello testified that the shopping center's value at the time of Shirley's death was $2,777,777. He noted that, in reaching that value, he added back the $25,000 of deductions in property taxes and CAM fees that the theater had not been paying.

Finally, David Holappa, a real estate broker, prepared and signed an affidavit, received without objection, based on his review of the 2014 appraisal and Richard's offer to purchase the shopping center. In his affidavit, Holappa stated that he saw nothing objectionable in Heimbach's 2014 appraisal and opined that the purchase price paid by Richard was reasonable, complied with "standard practice," and was "typical" for the market.

Richard testified that, in proposing a purchase to his siblings for approval under the terms of the trust, he started with Heimbach's appraisal value of $2.4 million, and made deductions and additions he thought to be reasonable, resulting in a final purchase price of $2,365,000. Before making his calculations and his offer, Richard asked Heimbach if she believed the market had changed, and Heimbach told him that she did not believe it had changed. Richard also consulted with attorneys and accountants before making any decisions about whether to purchase the shopping mall. According to Richard, no transactions were ever entered into without input from an attorney and a vote by his siblings.

The district court found Richard's testimony to be credible, stating:

> His openness and lack of defensiveness during his testimony and in the submissions to the Court in which he advised his siblings of the status of the trust lead the Court to the conclusion that he acted in good faith. His regular contact with lawyers and his accountant further demonstrates that he acted in a reasonable and prudent manner.

We give due regard "to the opportunity of the trial court to judge the credibility of the witnesses," Minn. R. Civ. P. 52.01, and defer to district court credibility determinations, *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). On this record, the district court did not abuse its discretion in finding that Richard acted in good faith and with due regard for the interests of the beneficiaries in purchasing the shopping center. The district court clearly identified the reasons for its credibility determinations, and the record supports those stated reasons.

B. The record supports the district court's findings that Richard acted with due regard for the interests of the other trust beneficiaries and kept those beneficiaries reasonably informed.

Minnesota law requires a trustee to "keep the qualified beneficiaries of an irrevocable trust reasonably informed about the administration of the trust and of the material facts necessary to protect their interests." Minn. Stat. § 501C.0813(a) (2016). "Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of an irrevocable trust." *Id.* A trustee has a "duty to 'disclose to the beneficiary fully, frankly, and without reservation all facts pertaining to the trust.'" *Norwest Bank*, 663 N.W.2d at 581 (quoting *In re Enger's Will*, 225 Minn. 229, 239, 30 N.W.2d 694, 701 (1948)). We again review questions of law de novo, but review the district court's ultimate conclusions for abuse of discretion. *Sullivan*, 868 N.W.2d at 754.

Here, the record demonstrates that Richard provided regular and detailed updates to the other beneficiaries. Richard sent updates to all of them on September 19, 2014, October 7, 2014, December 18, 2014, February 11, 2015, June 18, 2015, November 29, 2015, December 12, 2015, and March 19, 2016.[4] Richard also sent updates to Shirley's grandchildren on November 26, 2014, and February 10, 2015.

[4] The March 2016 update was addressed only to the four brothers, which Richard testified was because he separately provided the update to appellant through her attorney.

Richard emailed appellant on May 25, 2015 with information on the sale of the hunting shack and future plans for the shopping center. After Richard proposed to purchase the shopping center, Richard and appellant exchanged a number of emails in December 2015, in which appellant asked more questions regarding the shopping center and other property. Richard sent appellant an email attachment identified as "Stowell Shopping Center.pdf," which Richard testified was an electronic copy of the full appraisal from 2014. Richard also attached profit-and-loss statements for G & R Development LLC in the emails. In response to appellant's request for Shirley's bank statements, Richard emailed numerous pages of attachments containing the requested information.

Record evidence supports the district court's finding that Richard acted with due regard for the interests of the other beneficiaries and was diligent in keeping those beneficiaries informed and updated about the status of the trust. We see no error in the district court's conclusion that Richard complied with his statutory duties.

III. The district court did not abuse its discretion in considering testimony related to the unpaid CAM fees and property taxes.

Finally, appellant argues that the district court erred when it considered the oral agreement between Richard and Eugene regarding the theater not having paid property taxes and CAM fees as provided in the lease. Richard testified that he and his father agreed on these taxes and fees after the lease was signed, and that the lease was never amended in writing despite the agreement. Appellant did not object to this testimony at trial, nor did she move for a new trial after the district court decided the case.

This court "may reverse, affirm or modify the judgment or order appealed from or take any other action as the interest of justice may require," and review any order affecting the appealed-from order or the merits of the judgment. Minn. R. Civ. App. P. 103.04. We also "may review any other matter as the interest of justice may require"; however, "[t]he scope of review afforded may be affected by whether proper steps have been taken to preserve issues for review on appeal, including the existence of timely and proper post-trial motions." *Id.* The supreme court has held that rule 103.04's broad language does not change the longstanding general rule "that matters such as trial procedure, evidentiary rulings and jury instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986) (citing *Heise v. J.R. Clark, Co.*, 245 Minn. 179, 191, 71 N.W.2d 818, 826 (1955)). Such a motion "provides both trial court and counsel with a unique opportunity to eliminate the need for appellate review or to more fully develop critical aspects of the record in the event appellate review is sought." *Sauter*, 389 N.W.2d at 201. As such, "in order to preserve for appellate review issues arising during the course of trial, counsel—in addition to taking the other requisite steps, including making a timely objection—must move the trial court for a new trial pursuant to Minn. R. Civ. App. P. 59.01." *Id.* at 202.

Appellant did not object at trial to the evidence of Richard's post-lease agreements with Eugene. In fact, appellant's trial counsel elicited testimony about these agreements and the theater's lease when questioning Richard on direct examination during appellant's case in chief. Appellant's position at trial was that the Heimbach appraisal was entitled to less weight than the Battuello appraisal, because Heimbach determined income lower than what was called for by the written lease. "It is well settled . . . that the trial court has the discretion to refuse to receive inadmissible evidence offered without objection." *St. Croix Eng'g Corp. v. McLay*, 304 N.W.2d 912, 914 (Minn. 1981). Because both parties elicited extrinsic evidence concerning the theater's lease through Richard's testimony, without objection, the district court did not abuse its discretion in considering that evidence.

Even if the objection to this testimony had been preserved, the district court did not err by considering it. Richard was completing a majority of the legal work for the shopping center on his own and on a volunteer basis. We suppose that best practices might suggest reducing to writing agreements such as those that he reached with his father concerning taxes and CAM fees. However, we see no abuse of discretion in the district court's admission of testimony regarding the theater's unpaid CAM fees and property taxes. Testimony concerning those agreements is relevant to the appraisals, and the district court found that there was an agreement not contained in the written lease regarding these expenses. Consideration of that agreement was relevant in analyzing the appraisals and in determining whether Richard's purchase of the shopping center was done in good faith.

In sum, the record supports the district court's findings that Richard's purchase of the shopping center complied with the terms of the trust and that Richard complied with his statutory duties as a trustee. The district court did not err in admitting at trial evidence concerning oral agreements between Richard and Eugene.

Affirmed.