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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0969**

In re: the Trust of the Arnold G. A. Schauer
and Yvonne B. Schauer Family Irrevocable Trust.

**Filed April 8, 2019
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Sibley County District Court
File No. 72-CV-16-118

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Rettmann)

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Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this trust dispute, appellant argues that the district court erred (1) by approving the trustee's mediated settlement agreement for the sale price of stock held by the trust because the trustee breached his duty of impartiality, and (2) by awarding attorney fees to

be paid by the trust to the trust beneficiary who was acting in his capacity as the purchaser of stock in the mediation. We affirm in part, reverse in part, and remand.

FACTS

At dispute in this case is the Arnold G.A. Schauer and Yvonne B. Schauer Family Irrevocable Trust. In 2010, Arnold and Yvonne Schauer created the trust in their namesake. They named their two adult children, appellant Diane Rettmann and respondent David Schauer, as the sole beneficiaries of the trust. The trust named Richard Kakeldey as trustee. By its terms, the trust obligated the trustee, upon the death of Arnold and Yvonne (the grantors), to distribute \$350,000 to their daughter, Rettmann. The remaining balance of the trust was to be divided between the two siblings, with 55% going to Rettmann and 45% going to their son, David Schauer.

The principal asset of the trust consisted of the grantors' shares in a farming company called Arnold & David Schauer Enterprises, Inc. As its name entails, the company was owned by the Schauer parents and their son, but Rettmann was not an owner of the company. The trust was closely linked to the family's farming company, as the trust granted the trustee the power to "execute and carryout the terms" of the company's Stock Transfer Agreement (STA). The STA provided that upon the death of a shareholder, the surviving shareholders must purchase all of the decedent's stock in the company. Upon the death of both grantors, respondent Schauer was the only surviving shareholder of the company.

After Yvonne passed away in 2013 and Arnold passed away in 2016, Kakeldey resigned as trustee and appointed Christopher Sandquist as successor trustee, contingent

upon court approval. Rettmann then petitioned the district court for approval of the successor trustee, but Schauer objected. The district court appointed Sandquist as acting trustee, but restricted his abilities to carry out the terms of the trust until a final resolution was reached between the beneficiaries. After the parties attended an unsuccessful court-ordered mediation, the district court ordered trustee Sandquist to administer the trust according to the grantors' wishes and removed the trustee restrictions.

In a separate action initiated by Schauer, the district court ordered Schauer and the trust to arbitrate a number of issues, including the dispute over corporate stock valuation. According to the STA, any disputes arising under the agreement were to be resolved by arbitration. The parties agreed to mediate before attending arbitration.

Schauer and trustee Sandquist mediated in January 2018. Schauer and Sandquist each hired an expert to value the company and the purchase price of the stock. Using both experts' advice, Schauer and trustee Sandquist reached a settlement agreement. They agreed that the value of the company's stock was \$1,310,827, and the sales price of the stock held by the trust was \$686,372. Their agreed-upon purchase price included a reduction for taxes and a discount for a lack of control and marketability. The agreement was made subject to approval by the district court, and trustee Sandquist petitioned the district court for approval of the sales price of stock and approval of his administrative fees as allowable expenses of the trust. He also requested that the district court decide whether the trust should pay for the claimed administrative expenses of former trustee Kakeldey, the company, and Schauer.

Rettmann objected to the agreed-upon purchase price. And in response to the trustee's petition to approve the mediated settlement agreement, Rettmann petitioned the district court to compel distribution of \$350,000 as provided in the trust. She also requested that the district court charge Schauer with any discount on the purchase price of shares, alleging that the trustee acted partially and that the only remedy for this breach of duty was to charge the discount to Schauer's 45% distribution. She also objected to the payment of attorney fees from the trust for Schauer or the company.

Following a motion hearing, the district court approved the mediated agreement's sale price of the stock, finding that the trustee did not breach his duty of impartiality. It also approved payment of trustee Sandquist's request for fees in the amount of \$30,143.28, reserved former trustee Kakeldey's request for fees, denied attorney fees requested by the company, and approved in part Schauer's request for attorney fees, awarding him a total of \$188,566.46 in fees. In a supplemental order, the district court awarded former trustee Kakeldey's expenses in the amount of \$6,380.

This appeal follows.

D E C I S I O N

I. Duty of impartiality

Rettmann argues that the trustee breached his duty of impartiality by agreeing to a purchase price of the stock held in the trust. We review a district court's determination of whether a trustee breached his fiduciary duties for an abuse of discretion. *In re Trusteeship Created by City of Sheridan*, 593 N.W.2d 702, 708 (Minn. App. 1999). We apply a clear-error review to a district court's findings of fact. *In re Pamela Andreas Stisser Grantor*

Trust, 818 N.W.2d 495, 507 (Minn. 2012). A finding of fact is clearly erroneous “only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). We will not disturb a district court’s finding of fact if there is reasonable evidence in the record to support it. *Id.*

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) (2018). “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 (2018).

The precise meaning of the trustee’s duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time.

Norwest Bank Minn. N., N.A. v. Beckler, 663 N.W.2d 571, 581 (Minn. App. 2003) (quotation omitted).

Rettmann argues that the trustee breached his duty of impartiality in agreeing to the purchase price for stock held by the trust. She therefore contends that the district court erred by accepting the trustee’s petition to approve the mediated settlement agreement between the trust and the company on several grounds.

Tax Reduction

Rettmann first argues that the trustee breached his duty of impartiality by agreeing to a 40% reduction in the value of the stock for tax purposes.

We generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Although Rettmann made general objections to the purchase price as set forth in the mediated agreement, she did not specifically challenge the tax reduction. Accordingly, the district court did not consider whether the tax reduction constituted a breach of duty. For these reasons, whether the tax reduction constituted a breach of the trustee's duty of impartiality is not properly before us. And even if we were to consider the merits of Rettmann's argument, we would find no reason to reverse the district court's acceptance of the purchase price or decision to not grant an evidentiary hearing on the issue.

In determining the value of the company, the trustee relied on two valuation experts. Both experts recommended using a liquidation value approach to determine the net value of the company. The trustee submitted Rettmann's objection to the liquidation value approach to the experts. Both experts rejected her objection and recommended use of this approach based on the company's type and primary assets consisting of farmland, vehicles, and equipment. Because "a willing buyer or seller of an equity interest would look to the company's underlying assets to establish the fair market value," the experts recommended using the liquidation value approach. Both experts indicated this approach includes accounting for a 40% reduction for the combined federal and state income tax rate upon sale.

The trustee used both expert opinions to settle on the value of the company. “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.” *United States v. O’Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994). Here, the trustee was well within his discretion to determine the value of the company and relied upon two expert opinions to establish the valuation approach. In order to fulfill his duties as trustee, he used the valuation of the company to agree to a sales price for the stock held in the trust. We would not, even on the merits of Rettmann’s argument, grant the relief requested based on the tax reduction. This leads us to her second objection to the trustee’s valuation.

Lack-of-marketability-and-control discount

Second, Rettmann argues that the district court erred by finding that the trustee did not breach his duty of impartiality by agreeing to a 25% discount for lack of control and marketability in a closely held corporation in the stock purchase price. Again, we review findings of fact for clear error. *In re Stisser*, 818 N.W.2d at 507.

In reaching its decision that the trustee did not breach his duty of impartiality, the district court made detailed findings regarding the nature of the trustee’s powers and his efforts in reaching a settlement on the sale of stock. First, the district court found that the trustee had the power to sell the stock. The trust grants the trustee the power to sell assets and was required, upon the death of the grantors, to distribute the remaining balance of the trust to Rettmann and Schauer. The district court also noted the trustee’s power to sell stock as codified in Minn. Stat. § 501C.0816 (7)(iii) (2018).

Second, the district court approved the mediated price for the shares because “[t]he compromises made by the Trustee were made in good faith and in line with his assessment of the risks posed to the Trust.” The district court found that the trustee agreed to the sales price by relying on both expert opinions hired by the trust and Schauer and the input of both Rettmann and Schauer as beneficiaries. It appears that both experts were instructed to evaluate the company based on a fair market value not including a discount for lack of marketability and control. Schauer’s expert opined that if they were to include this discount, the discount should be 34%. Instead, the parties agreed to a 25% discount for lack of marketability and control, which takes into account the actual value of stock depending on the ownership interest in the stock (control) and the ability to sell the stock for cash (marketability). The district court concluded that “all matters related to a discount for the common stock for marketability and lack of control were considered at the mediation.”

The district court then addressed Rettmann’s contention that the trustee granted Schauer a significant benefit at her expense by reducing the sales price of the stock. In response, the district court indicated that the mediation for the sales price involved only the remaining shareholders of the company—the trust and Schauer. It found that the trustee did not agree to a discount or benefit for Schauer as beneficiary, but for Schauer as shareholder of a company and the buyer of stock held by the trust.

We have previously addressed valuation methods which use discounts for lack of control and marketability in a closely held corporation. In *In re Estate of King*, we affirmed a district court’s approval of a 45% discount for the sale of stock based on a lack of control

and marketability. 668 N.W.2d 6, 8, 10 (Minn. App. 2003). In that case, upon King's death, the shares of a closely held corporation were to be sold to one of her nephews. *Id.* at 8. King's personal representatives used the fair market value of the shares and applied a 45% discount to the shares to account for a lack of control and marketability. *Id.* The district court approved the sales price, thereby approving the method used in determining the value which used a discount for lack of control and marketability. *Id.* at 9. On review, we held that in order to reverse the district court, the appellant had to show that the fair market value method was unreasonable. *Id.* at 10. We reasoned that "it is not the province of this court to determine which method of valuation is the *best*," but to "determine whether the district court's findings regarding valuation and distribution are clearly erroneous." *Id.* Because the appellant failed to show that the method used was unreasonable, and the district court determined that both the method used and the method suggested by the appellant were reasonable, we concluded that the district court did not abuse its discretion by approving the method used by the trustees. *Id.* at 10–11.

Similarly here, Rettmann does not provide any reasoning why the liquidation value approach used by the trustee was unreasonable. She contends that we should reverse the district court for approving the discount used in the approach, but does not identify a clear error that warrants reversal. "This court will not substitute its discretion for the discretion of the trustee save when it is necessary to prevent an abuse of discretion such as where the trustee is given discretion in distributing income and corpus." *Id.* at 9. And a trustee must act within the bounds of reasonable judgment. *O'Shaughnessy*, 517 N.W.2d at 577. Because Rettmann failed to provide any reason to conclude that the valuation method,

which included a discount for lack of marketability and control, was unreasonable, we affirm the district court's approval of the mediated stock sales price.

Because we conclude that the trustee did not breach his duty of impartiality, we need not address Rettmann's argument that the district court erred by failing to remedy the alleged breach.

II. Attorney fees

Rettmann argues that the district court abused its discretion by granting Schauer attorney fees in the amount of \$188,566.46 to be paid by the trust. An award of attorney fees from a trust will not be reversed absent an abuse of discretion. *In re Great N. Iron Ore Props.*, 311 N.W.2d 488, 492 (Minn. 1981).

Minnesota courts have long recognized that a beneficiary or party to the trust may be allowed attorney fees and expenses from a trust. *Id.* The oft-cited rule was established in *In re Atwood's Trust*:

In the sound and cautiously exercised discretion of the court, and not as a matter of right, attorneys' 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 in order to resolve the meaning and legal effect of ambiguous language used by the settlor in the trust instrument, if an adjudication thereof is essential to a proper administration of the trust, and if, without unnecessary expense or delay, the litigation is conducted in good faith for the primary benefit of the trust as a whole.

35 N.W.2d 736, 740 (Minn. 1949).

The Minnesota Legislature recently adopted a section of the Uniform Trust Code on the topic of attorney fees. See Minn. Stat. § 501C.1004 (2018); *Lund as Trustee of*

Revocable Trust of Kim A. Lund v. Lund, ___N.W.2d ___, ___, 2019 WL 178461, at *8 (Minn. App. Jan. 14, 2019), *review denied* (Minn. Mar. 27, 2019). Section 501C.1004 provides, “In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party from the trust that is the subject of the judicial proceeding.” Minn. Stat. § 501C.0106 (2018) provides that the common law supplements the Minnesota Trust Code “except to the extent modified by [the code] or another law of this state.” And this court has specifically recognized that the common law supplements the trust code in relation to attorney fees. *Lund*, 2019 WL 178461, at *8–9.

Here, the district court awarded the majority of Schauer’s attorney fees. In doing so, it reasoned that justice and equity entitled Schauer to the award of attorney fees as a *beneficiary* of the trust in working to settle trust disputes. But Schauer was not acting in the role of beneficiary in contesting the value of the stock held by the trust; he was acting in his role as a shareholder of the family’s farming company. And as the shareholder purchasing the stock, Schauer’s interests were precisely contrary to the interests of the trust. Schauer’s attorney fees incurred in contesting the value of the stock, therefore, cannot be based solely upon his role as a beneficiary of the trust. The award of these attorney fees to Schauer solely on the basis of his status as a beneficiary of trust was error as a matter of law.

Appellant also argues that in awarding attorney fees to Schauer, the district court also made a number of other factual and legal errors. We agree. First, the district court failed to make any findings regarding how it determined the amount of fees awarded to

Schauer's attorneys. Both of his attorneys submitted invoices to the district court outlining their fees in representing Schauer. Attorney Scott Nokes submitted an invoice indicating an amount for \$91,563.75 in fees. After the motion hearing to discuss the issue of fees, Nokes submitted a second invoice with a number of entries crossed out by hand. He indicated that "upon further consideration of the caselaw . . . as well as the comments and observations of the Court," he eliminated certain entries characterized as fees relating to a criminal case and a harassment restraining order. After eliminating these entries, Nokes reduced his request to the amount of \$88,669.75. Of that, the district court granted \$85,010.28 to be paid from the trust. Schauer's second attorney, Steve Ward, submitted four invoices to the district court, totaling what appears to be \$112,106 in attorney fees. The district court awarded Schauer \$103,556.18 for attorney fees owed to Ward. In doing so, the district court stated that it "spent a significant amount of time going through each invoice" and "determined what fees . . . have related to issues of the Trust and representation of Mr. Schauer as a beneficiary to the Trust."

While the district court indicated it spent time going through each invoice, it did not provide any guidance in its order or memorandum outlining how it arrived at each amount. We therefore have no indication of why or how the district court reduced attorney Nokes' bills by \$3,659.47 or attorney Ward's bills by \$8,549.82. This precludes us from assessing, upon review, the reasonableness of the fees awarded.

Furthermore, the strikingly dissimilar award of fees, in comparison to the trustee's fees, undermines the district court's reasoning in granting Schauer's requests for attorney fees. From our review of the record, it is unclear why the trustee only incurred fees in the

amount of \$30,143.28, while Schauer’s attorneys incurred \$188,566.46 in fees. In the district court’s memorandum, it explained that neither party objected to the payment of trustee Sandquist’s fees from the trust. And based on Minn. Stat. § 501C.1004, the district court concluded that justice and equity required that Schauer’s fees also be paid by the trust, “so far as they relate to the same issues that Trustee Sandquist had to work through.”

In *Lund*, this court clarified the different standards that apply in awarding attorney fees in light of the recent statutory adoptions to the Minnesota Trust Code.¹ *Lund*, 2019 WL 178461, at *8–9. In *Lund*, we held that Minn. Stat. § 501C.1004 did not apply to the trustee fees, but that Minn. Stat. § 501C.0709 (2018) did apply, as supplemented by common law. *Id.* at *8–9. On the other hand, Minn. Stat. § 501C.1004, the justice-and-equity rule, applies to the award of beneficiary and third-party attorney fees, as supplemented by the common law. *See id.* at *8–9. While beneficiary attorney fees are subject to a justice-and-equity analysis, trustees are *entitled* to fees when “the fees are reasonable and incurred in good faith.” *Id.* at *9.

Applying these principles to this case, we conclude that trustee Sandquist is entitled to fees under Minn. Stat. § 501C.0709, while beneficiaries of the trust are entitled to attorney fees under Minn. Stat. § 501C.1004. It appears that district court’s award of attorney fees to Schauer was based primarily upon the fact that the trustee was awarded attorney fees for the same dispute without objection. But if this were the only criteria for granting attorney fees to beneficiaries, such interpretation would render Minn. Stat.

¹ This opinion was not published at the time of the district court’s order.

§ 501C.1004 superfluous. Instead, Minn. Stat. § 501C.1004 requires that when district courts assess whether a beneficiary should be awarded attorney fees, it *may* award attorney fees as justice and equity require.

And, as this court has instructed, this section is supplemented by the common law. *Lund*, 2019 WL 178461, at *8–9. The longstanding rule from *Atwood* is still required in assessing whether beneficiary attorney fees should be awarded. *See In re Atwood*, 35 N.W.2d at 740. Here, the district court did not discuss or rule on whether (1) the litigation was “necessary in order to resolve the meaning and legal effect of ambiguous language used by the settlor in the trust instrument,” (2) the adjudication “is essential to a proper administration of the trust,” and (3) “without unnecessary expense or delay, the litigation is conducted in good faith for the primary benefit of the trust as a whole.” *Id.* Because the district court failed to discuss or rule on whether attorney fees should be awarded under *Atwood*, we are unable to review whether the attorney-fee award on behalf of Schauer was appropriate on appeal. *See Thiele*, 425 N.W.2d at 582 (holding that appellate courts cannot review matters not considered by the district court).

As requested by Rettmann, and based on the district court’s lack of findings and errors of law, we reverse the district court’s award of Schauer’s attorney fees and remand for further proceedings in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.