IN THE COURT OF APPEALS OF IOWA

No. 0-085 / 09-0617
Filed April 21, 2010

PATRICIA A. SCHADE,
Plaintiff-Appellee,

vs.

JACK B. GETHMANN,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, William J. Pattinson, Judge.

Jack Gethmann appeals from a district court order distributing trust assets and terminating the trust. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Louis R. Hockenberg of Sullivan & Ward, P.C., West Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

I. Facts and Procedural History.

This probate proceeding comes to us for the second time. In 1992 Kenneth Gethmann, a successful Marshalltown businessman, died. Among his assets were Inns of Iowa, Ltd., which owned motels; Gethmann Construction Co., a construction company; and Gethmann Investment Co. (GIC), a holding company for real estate investments. Shortly before his death, Kenneth formed the Kenneth Gethmann Trust and executed a will. Kenneth's will provided that upon his death, the residue of his estate would pass to the Trust. The Trust assets, apart from a marital income trust for the benefit of Kenneth's wife Clyda during her lifetime, would be divided between Kenneth's two children, Patricia Schade and Jack Gethmann.

Patricia had been active in the motel company for many years, and Jack had been involved in the construction company. Consistent with that history, the Kenneth Gethmann Trust Agreement provided in part:

> ARTICLE VI
> DISTRIBUTION OF RESIDUE
>
> Upon my death, the residue of this Trust shall be administered as follows:
>
> A. My Trustee shall divide the trust into two equal shares, one share for each of my children, in the following manner:
>
> 1. The share of my daughter, Patricia Ann Schade shall include all of the capital stock, securities, interest or claims owned by me in the Iowa corporation known as Inns of Iowa, Ltd. . . . up to one-half of my residue es[t]ate, whichever is less. . . .
>
> 2. The share of my son, Jack B. Gethmann, shall include all of the capital stock, securities, interest or claims owned by me in the Iowa corporations of Gethmann Construction Co., Inc., up to one-half of my residue estate, whichever is less.
>
> 3. Any obligations on which I am personally liable which were incurred or for which a lien exists on any of the property specifically

> referred to in the preceding two paragraphs shall be assumed by the respective beneficiaries . . . .
> 4. The value of the shares of my children shall be determined on the basis of the net equity received by each, that i[s], subtracting all obligations assumed or outstanding by each from the value of the property specifically included in each share. My trustee shall make such apportionment between my two children based on fair market value. If there is a disagreement between my trustee and beneficiaries, I direct that the acceptance of values finally determined for Iowa inheritance tax purposes be used, or in the event those fixed for federal estate tax purposes are higher, the values determined for federal estate tax purposes shall be used.

Both Patricia and Jack executed this Trust Agreement. The Trust further provided that Patricia and Jack would become co-trustees after Kenneth died. The parties do not dispute that Kenneth's overall plan was for Patricia to inherit Inns of Iowa, for Jack to inherit Gethmann Construction, and for shares in GIC to be used to equalize the distribution between the two children. Before his death, Kenneth had gifted some shares of GIC to Patricia and Jack, Jack receiving slightly more shares than Patricia.

In November 1992, Kenneth passed away. In 1994 a probate court order was entered transferring the stock of Inns of Iowa to Patricia and the stock of Gethmann Construction Co. to Jack. Pursuant to the same order, a partial distribution of 41,788 additional shares of GIC stock was made to Jack. Patricia received no shares in GIC at that time. In 1995 certain other entities previously formed by Kenneth Gethmann were merged into GIC.

Probate of Kenneth's estate was delayed by several factors, including disagreements with the IRS over the estate taxes due, the estate's desire to pay those taxes according to a long-term installment plan, and the implementation of the marital trust. Clyda, Kenneth's wife and Patricia and Jack's stepmother,

passed away in 2000, and the marital trust was terminated. Meanwhile, relations between Patricia and Jack deteriorated. In 2001 Patricia asked the probate court for an accounting, complaining that Jack had denied her access to information regarding the Trust and GIC, and had been running those entities on his own. This ultimately resulted in a 2004 ruling that Jack had breached his fiduciary duty as co-trustee of the Trust by causing GIC to pay excessive management fees to himself and to make other improper payments. The district court ordered Jack to repay $299,229.11 to GIC. Upon our review, we affirmed. *Schade v. Gethmann*, No. 5-744 (Iowa Ct. App. Nov. 23, 2005).

In its 2004 ruling, the district court noted that between the years 1993 and 2001, the vast majority of the shares in GIC had been transferred from the Trust to Jack, although it was unclear how this had happened and whether it was proper. The court ultimately declined to rule on this issue, and so did we. As we noted in our prior opinion:

> Patricia asserts that Jack obtained a majority shareholder interest in GIC in the years following Kenneth's death, in violation of the terms and intent of the Trust. Jack contends that he acquired his interest in GIC through a court order or other proper means, consistent with the intent of the Trust to equalize their respective interests. The parties presented this issue at trial and in the rule 1.904 motion to enlarge, but the district court determined that it could not rule on the issue of proportionate shareholder interest in this cause of action, due to an incomplete record and the pending resolution of both Kenneth and Clyda's estates. As these issues were not ruled upon by the district court in this action, we may not consider them on appeal. [Footnote and citation omitted.]

Despite the terms of the 2004 court order, Jack did not actually pay back $299,229.11, but instead upon counsel's advice signed a promissory note, which

stated that payment (with interest) would be made at such time as the court resolved the final distribution of the Trust assets.

In 2007 and 2008, Patricia and Jack returned to court. They requested that the court terminate the Trust, distribute its assets, and resolve certain other disputes. The court conducted another trial and, on February 23, 2009, issued a comprehensive ruling that explained its reasoning clearly on each point.

As the court acknowledged, the "pivotal issue" in the case was whether, in equalizing each party's distribution, the Trust assets (Inns of Iowa, Gethmann Construction Co., and GIC) should be valued as of Kenneth's death in 1992 or based on their present value. If Kenneth's date of death were used as the baseline, Jack would receive essentially all the estate's shares of GIC, and would not need to compensate Patricia. If the present day were used as the baseline, Jack would need to compensate Patricia substantially if he were going to retain his controlling interest in GIC.

In considerable detail, the district court explained why it believed present-day values should be used. Based on present value, the court determined Kenneth owed Patricia $1,343,215 to compensate her for the difference between the respective present values of Inns of Iowa, on the one hand, and Gethmann Construction Co. and GIC, on the other. The court also ruled that Jack had caused another $179,555 to be improperly distributed to himself, in addition to the sums covered by the 2004 ruling. Thus, the district court entered a $1,552,770 judgment in favor of Patricia and against Jack. The court also assessed $75,272.81 in attorney fees and expenses against Jack. Jack appeals.

II. Analysis.

Review of matters tried in probate is ordinarily de novo. Iowa Code § 633.33 (2009).[1] The parties agreed at the outset that this matter was being tried in equity. Accordingly, we give weight to the trial court's factual findings, particularly with regard to the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

A. Date for Determining Market Value.

No one disputes that Kenneth's estate should be divided into "two equal shares" for Patricia and Jack, as set forth in the Trust. The critical question is whether those shares should be valued as of the date of Kenneth's death in 1992, or as of the date of distribution nearly two decades later. As the district court observed:

> The Trust's assets' value have increased substantially in the last 16 years, especially that of Gethmann Construction Company. As a result, the valuation standard used to distribute the Trust residue, fair market values or . . . 1992 estate tax value, will result in a significant shift of assets from one party's side of the ledger to that of the other.
>
> If the accounting is conducted using the federal estate tax values assigned to these assets in 1992, Mr. Gethmann will essentially lick the platter clean.

In other words, if date-of-death values are used, Patricia will receive only the motel company and Jack will receive both Gethmann Construction Co. and substantially all of GIC. In fact, according to Jack, Patricia will have to pay Jack $30,014. However, if present-day values are used, because the motel company

[1] No substantive difference exists between the relevant current code sections and those in force at the time the action arose. Therefore, all references are to the 2009 Iowa Code unless otherwise indicated. *IBP, Inc. v. Burress*, ___ N.W.2d ___, ___ n.1 (Iowa 2010).

has grown more slowly in value than the construction company since 1992, Jack will have to pay Patricia $1,343,215 to buy out her interest in GIC.[2]

Jack argues that it is fair for him to receive the benefit of the more rapid appreciation in value of Gethmann Construction Co. and GIC because he has been running those companies. As Patricia testified on cross-examination:

> Q. Mrs. Schade, since 1992 at your father's death, have you operated Inns of Iowa as if it were your own company? A. Yes, I have.
>
> Q. And since 1992 after your father's death, has Jack operated Gethmann Construction Company as his? A. Yes, he has.
>
> Q. Why? A. Because those are the two companies that our father wished us to have.
>
> Q. And so any enhancement in those companies have been at the benefit or the efforts of say Inns of Iowa would be at your—the benefit of your efforts, is that fair? A. That's fair.
>
> Q. And any enhancement in Gethmann Construction Company since 1992 would be as a result of Jack's efforts. Would that be fair? A. Yes.
>
> Q. Now I believe that you are taking the position in this trial that you have had nothing to do with Gethmann Investment Company since 1992? A. That's correct.
>
> Q. So would it be fair then to say that the benefits associated with the enhancement of Gethmann Investment Company, those efforts have been Jack Gethmann in enhancing that company? Would that be fair? A. It wouldn't be fair to say that I shouldn't have been involved in that along with making some of those decisions with Gethmann Investments.
>
> Q. I understand that that's your position. What I want to do is have you answer my question. A. He's the one involved in it, yes.
>
> Q. Now has the value increased through the years? A. Yes, it has.
>
> Q. And same with the construction company? A. Yes.
>
> Q. And same with the investment company? A. Yes.

[2] Jack testified that Gethmann Construction Co. was struggling at the time of his father's death because it had taken large losses on some bonds it had guaranteed for a contractor in California. The estate tax return, signed by both Jack and Patricia, valued Kenneth's holding of Gethmann Construction at $688,969.42 and the Trust's holding of Inns of Iowa at $1,838,397.

Jack also argues that the 2004 district court order implicitly supported a date-of-death valuation. He relies on the following language:

> Kenneth further anticipated that the shares of stock in Gethmann Investments would be used to facilitate an equal division of the trust assets. Because the values of Gethmann Construction and Inns of Iowa would, in all likelihood, not be exactly equal *at the time of his death*, Kenneth probably contemplated that one of his children, in his or her capacity as a trustee, would own more shares of stock in Gethmann Investments than the other child.

(Emphasis added.) Moreover, Jack notes that he received a court-ordered partial distribution of 41,788 shares of GIC in 1994, while Patricia received nothing, and she voiced no objection at the time.

Regardless, we agree with the district court that the starting-point for analysis should be the language of the Trust itself. The language of the Trust is the most persuasive and reliable indicator of the settlor's intent. *In re Trust of Killian*, 459 N.W.2d 497, 501 (Iowa 1990). The general rules of construction apply when interpreting trusts. We resort to technical rules or canons of construction only if the language of a trust is ambiguous or if the settlor's intent is for any reason uncertain. Where we find the terms of a trust unambiguous, we are precluded from interpreting those terms. *Barron v. Snapp*, 468 N.W.2d 841, 843 (Iowa Ct. App. 1991).

Here the Trust provided in paragraph VI.A.4:

> The value of the shares of my children shall be determined on the basis of the net equity received by each, that i[s], subtracting all obligations assumed or outstanding by each from the value of the property specifically included in each share. My trustee shall make such apportionment between my two children based on fair market value. If there is a disagreement between my trustee and beneficiaries, I direct that the acceptance of values finally determined for Iowa inheritance tax purposes be used, or in the

> event those fixed for federal estate tax purposes are higher, the values determined for federal estate tax purposes shall be used.

Jack's argument is straightforward. This case involves a "disagreement" between Jack in his capacity as trustee and Patricia in her status as beneficiary, or alternatively between Patricia as trustee and Jack as beneficiary.[3] Accordingly, "the values determined for federal estate tax purposes [i.e., as of Kenneth's date of death] shall be used."

At trial, Patricia (under leading questioning from her attorney) maintained that the last sentence of paragraph VI.A.4 did not apply because this was a disagreement "between beneficiaries," i.e., Patricia and Jack, not between a trustee and a beneficiary. The problem with her position, though, is that Jack was *also* a trustee. The dispute concerns apportionment of assets, a responsibility assigned to the trustee(s) under the terms of Trust Agreement. Hence, it was not just a disagreement between beneficiaries; it was a disagreement between a trustee and a beneficiary. (Indeed, Patricia named Jack as a defendant in this lawsuit both individually and in his capacity as trustee.)

Moreover, the sentence about "disagreement between my trustee and beneficiaries" appears directly after the sentence requiring the trustee to make "apportionment between my two children based on fair market value." Thus, if the latter sentence has nothing to do with the former sentence, it is very odd that they are nevertheless right next to each other within the same paragraph of the

[3] Notably, a separate article of the Trust provides that "[n]ouns, pronouns, and terms as used herein, shall include the . . . singular, or plural thereof whichever is appropriate to the context." The Trust further provided that Kenneth was the "Initial Trustee" but that upon his death, Patricia and Jack would each become "Successor Trustees."

Trust document. Furthermore, if one reads the latter sentence by itself, the reference to "disagreement" is incomplete. What kind of disagreement? To understand the nature of the disagreement being referred to, i.e., concerning apportionment of assets, one must read this sentence in tandem with its immediate predecessor.

Notably, in her post-trial briefing, Patricia did not make a textual argument based on the language of the Trust. Instead, she basically urged that it would be "totally inequitable to value the assets as of their 1992 values." In her post-trial reply memorandum, she added, "To clarify part of the relief sought by the Plaintiff, she is seeking a modification of one of the administrative provisions of the Trust Agreement, that being the date and method of valuing assets." In short, in the proceedings below, Patricia sought *revision*, not implementation, of the Trust language. *See* Iowa Code § 633A.2204.

The district court, however, arrived at a construction of the Trust that neither party had advanced. Specifically, it drew a distinction between "children" (as used in the first and second sentences of paragraph VI.A.4) and "beneficiaries" (as used in the third sentence of paragraph VI.A.4). As the court wrote:

> The term "beneficiary" is not specifically defined in the Trust Instrument but it is clear from the context of Article VI that said term primarily applies to Ms. Schade's and Mr. Gethmann's lineal descendants even though Mr. Gethmann and Ms. Schade are technically beneficiaries of the Trust.

Thus, the district court concluded that the trustee versus beneficiary language "is to be employed only if the survivor of Mr. Gethmann and Ms. Schade, in his/her

capacity as Trustee, becomes embroiled in a dispute with the other's lineal descendants."

After reviewing the language of the Trust and the attendant circumstances, we cannot accept the district court's construction that limits the term "beneficiaries" to lineal descendants of Patricia and Jack, excluding Patricia and Jack themselves. In the first place, Patricia and Jack clearly *are* beneficiaries of the trust. By the normal, everyday meaning of the term, they should fall within its coverage. *See In re Trust Known as Spencer Memorial Fund*, 641 N.W.2d 771, 775 (Iowa 2002) (stating trust language is to be accorded "its usual and ordinary meaning"). Additionally, as we have already noted, the prior sentence of paragraph VI.A.4 specifically requires an "apportionment between [the] two children based on fair market value." The following sentence discusses a valuation date to be used when there is a disagreement between a trustee and a beneficiary. This juxtaposition would be difficult to explain if the valuation date and the apportionment between the children were not connected, which they would be if "beneficiaries" is given its normal meaning. *See In re Estate of Keenan*, 519 N.W.2d 373, 378 (Iowa 1994) ("[T]he words used in a will are ordinarily to be interpreted in the context of that instrument.").

Furthermore, in the same part of the trust (VI.A), it is made clear that the term "beneficiaries" includes the two children. Thus, just above paragraph VI.A.4, paragraph VI.A.3 of the Trust provides:

> Any obligations on which I am personally liable which were incurred or for which a lien exists on any of the property specifically referred to in the preceding two paragraphs shall be assumed by the respective beneficiaries.

The aforementioned "preceding two paragraphs" (i.e., VI.A.1 and VI.A.2) refer to Patricia and Jack by name and, hence, there is no question that they are "beneficiaries."

In its ruling, the district court did not mention paragraph VI.A.3. Rather, it referred to another portion of the Trust instrument—namely, paragraph VI.C. This paragraph covers the contingency "[i]f any share or any portion of a share becomes distributable to a beneficiary who has not attained the age of forty-five (45) years." The court pointed out that both Patricia and Jack were over forty-five when the Trust was executed. However, this language merely indicates the potential "beneficiaries" *include* lineal descendants of Patricia and Jack. It does not mean that Patricia and Jack are not *also* beneficiaries, and it does not override the clear indication in paragraph VI.A.3 that they are.

Paragraph VI.B, which immediately precedes paragraph VI.C, makes it plain why paragraph VI.C is worded as it is. Paragraph VI.B provides, "In the event either of my children predeceases me, his or her share shall be distributed per stirpes to his or her descendants . . . , limited only by the provisions of paragraph C of this article." Thus, if Patricia or Jack predeceased Kenneth, her or his lineal descendants would succeed as the "beneficiaries" to Patricia's or Jack's share of the Trust. In short, the district court's textual exegesis, in our view, establishes only that the potential "beneficiaries" included more than Patricia and Jack, not that Patricia and Jack are excluded. Significantly, where the Trust instrument intended to refer only to lineal descendants of Patricia and

Jack, as in paragraph VI.B, the term "descendants" rather than "beneficiaries" was used.

Moreover, the district court's interpretation leads to illogical results. Why should a date-of-death valuation be used if Patricia or Jack had predeceased Kenneth but a later valuation date be used otherwise? Having two different dates of valuation seems purely arbitrary. In a footnote, the district court hypothesized that an earlier valuation date for lineal descendants could be "akin to an *in terrorem* clause, i.e., a threat to a beneficiary who might be so bold as to endanger family harmony." In other words, if a lineal descendant contested his or her distribution, the trustee could "threaten" him or her with using a date-of-death valuation. But there are several problems with this reasoning. For one thing, a date-of-death valuation might be of benefit to the lineal descendant. The odds are 50-50 that it would be. Hence, this might not be a threat at all. There is an additional flaw in the *in terrorem* rationale. The typical *in terrorem* clause disinherits an heir who contests a will. Such a clause has some "Sword of Damocles" logic behind it: The threat of getting nothing deters a will contest. However, a clause that specifies how an instrument is to be interpreted cannot also be an *in terrorem* clause. That is because the trustee is simply going to follow the clause anyway. Additionally, it is difficult to understand why Kenneth would have wanted an *in terrorem* clause against lineal descendants of Patricia and Jack but not against Patricia and Jack themselves. For all these reasons, the district court's interpretation of the Trust cannot be sustained.

The district court also reasoned that it would be fairer to use a current-day rather than a date-of-death valuation. However, "fairness," as often is the case, works as a double-edged sword. Patricia maintains that it is unfair for Jack to end up with more assets today. Jack, on the other hand, argues that the parties have been running their separate businesses since 1992, and it would be unfair for Patricia to claim half of what he has built up through his own efforts since then. Even under a date-of-death valuation, Patricia receives assets worth millions of dollars today.[4]

In addition, there is a practical reason why Kenneth could have proposed, and Patricia and Jack by signing the Trust could have agreed, to use a date-of-death valuation date. Due to the size of Kenneth's estate, it was clear that the parties were going to have to file an estate tax return, which would require all the assets of the estate to be valued. Thus, by using the date of death as the relevant valuation date for distribution purposes, the parties were able to piggyback on valuations that would have already been performed, saving the need for separate appraisals.

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[4] The district court commented that Kenneth wanted to treat his children equally and that "on three separate occasions in the three years immediately preceding his death, Kenneth made gifts to [Patricia and Jack] in exactly equal amounts." However, a desire to treat the children equally can be just as consistent with a date-of-death valuation as with a date-of-distribution valuation. The issue is *when* the equal division is to be made. Moreover, the district court's statement about gifts in equal amounts is incomplete. While Kenneth did make two smaller *inter vivos* gifts of GIC shares to Patricia and Jack in equal amounts, his largest gift of GIC shares prior to his death actually provided Jack with more shares than Patricia. As an equalizer, Patricia received Inns of Iowa stock. In any event, none of this is inconsistent with the notion that after Kenneth's death, Jack would receive the majority or even all the remaining GIC shares in order to equalize the relative values of Inns of Iowa and Gethmann Construction Co. Also, as we have already pointed out, a court-approved distribution of additional GIC shares was made to Jack in 1994 with no objection from Patricia.

Lastly, in her application filed with the district court, Patricia alleged (conceded might be a more accurate term) as follows:

> Kenneth's intent was to have the assets *valued at their fair market value as of the date of his death* with expectation that the assets would be distributed immediately following his death.

(Emphasis added.) One might argue that Kenneth's "expectation" was not fulfilled, although in effect there was a distribution of the assets shortly after death when Patricia took over Inns of Iowa and Jack assumed control of Gethmann Construction and GIC. However, unless we have authority to modify the Trust (an issue that we address immediately below), we are not relieved from the duty to carry out Kenneth's "intent" as stated in the document and in Patricia's application—"to have the assets valued at their fair market value as of the date of his death." Patricia herself signed off on the Trust Agreement, and concedes that she is and was a "sophisticated businesswoman."

We reiterate that the district court's fact findings, especially its credibility findings, are entitled to deference. However, in this case no credibility finding entered into its interpretation of paragraph VI.A.4. The settlor had passed away long ago, and the settlor's attorney was not called by either party as a witness at trial.[5] The district court's interpretation of the trust was primarily based on the language itself, in combination with certain background facts that are not in dispute. We respectfully believe the district court erred and accordingly hold that, consistent with the language of paragraph VI.A.4, a date-of-death valuation must be used.

[5] The district court observed that it would have been "extremely helpful" if the settlor's attorney had been called as a witness at trial. For whatever reason, neither party called him.

B. Trust Modification?

Since we hold that the Trust required valuation of Patricia's and Jack's shares as of the date of Kenneth's death, we now turn to Patricia's argument that the district court should modify the Trust. Patricia invokes Iowa Code section 633A.2204, which provides:

> On petition by a trustee or beneficiary, the court may modify the administrative provisions of the trust, if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.

The critical feature of section 633A.2204, however, is that it only allows the court to modify "administrative provisions" of the trust. As Professor Begleiter points out, section 633A.2204 does not allow the court to modify "dispositive provisions," that is, to take what the trust gave to one beneficiary and give to another. Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 Drake L. Rev. 165, 201-02 (2001). This is in contrast to the Uniform Trust Code, which allows modification of "the administrative *or dispositive* terms" of the trust if, because of circumstances not anticipated by the settlor, modification will further the purposes of the trust. Unif. Trust Code § 412(a) (2000) (emphasis added); Begleiter, 49 Drake L. Rev. at 202 n.204. It also contrasts with the Restatement (Third) of Trusts which permits court-ordered modification of "an administrative or distributive provision" based on unanticipated circumstances in order to further the purposes of the trust. Restatement (Third) of Trusts § 66(1), at 492 (2003); Begleiter, 49 Drake L. Rev. at 202 n.204.

Patricia is seeking a modification of a "dispositive" provision, not an "administrative" one. If she prevails, she would receive approximately $1.5 million more and Jack would receive approximately $1.5 million less. *See* Martin D. Begleiter, *Administrative and Dispositive Powers in Trust and Tax Law; Toward a Realistic Approach*, 36 Fla. L. Rev. 957, 959 (1984) (explaining that a dispositive power "directly affects the substantive provisions of a trust, primarily those provisions identifying the beneficiaries and setting forth their interests"). Accordingly, Iowa trust law does not authorize Patricia's desired modification.

C. Remaining Issues.

Jack also challenges the district court's award of damages for self-dealing with the assets of GIC. Jack argues that portions of the award were improper under the doctrines of claim and/or issue preclusion, since the 2004 ruling also dealt with these matters (albeit only through a date in 2003). However, Jack suggests that the self-dealing issues would become moot if we rule in his favor regarding a date-of-death valuation for distribution purposes. In that event, it would be irrelevant whether he has to repay GIC, because he would own GIC. So, we need to confront the mootness question first.

Based on the record before us, we cannot say with certainty that the self-dealing issues will be mooted if Jack prevails on the valuation issue. *See Maghee v. State*, 773 N.W.2d 228, 233 (Iowa 2009) (stating an issue is not moot unless it has "become academic or nonexistent and the court's opinion would be of no force or effect in the underlying controversy"). Patricia has at all relevant times owned at least some shares in GIC. It is not apparent to us that she would

relinquish those shares if she loses on the valuation issue. So long as Patricia has some ownership interest in GIC, it seems to us that she would benefit from the restoration of sums inappropriately withdrawn from GIC. Patricia's attorney himself agreed with this line of reasoning at oral argument.

Furthermore, this litigation has taken a considerable amount of time. We are reluctant to leave undecided an aspect of the dispute that has been fully briefed by the parties, unless we are absolutely certain that the matter will not have to be re-visited in the future. Lacking that degree of certainty, we turn to the self-dealing ruling of the district court.

a. Self-Dealing

The district court found that Jack should reimburse GIC for paying himself excessive management fees and improper administrative fees. Jack contends these matters are precluded by the 2004 ruling.

Issue preclusion means "simply that when an issue . . . has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *City of Johnston v. Christenson*, 718 N.W.2d 290, 297 (Iowa 2006) (citations omitted). In order for the prior determination to have preclusive effect in subsequent litigation, the party asserting issue preclusion must establish:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

George v. D.W. Zinser Co., 762 N.W.2d 865, 868 (Iowa 2009). Claim preclusion, by contrast, forecloses a party from raising even matters that were not decided in

a prior case between the same parties, so long as they could have been fully and fairly adjudicated in the prior case. *Braunschweig v. Fahrenkrog*, 773 N.W.2d 888, 893 (Iowa 2009).

Management fees. The first trial took place in late May 2003. In August 2004, the district court issued its ruling finding a reasonable annual management fee to be $42,000 and ordering Jack to repay $213,000, representing the difference between the $633,000 Jack had received in aggregate from 1993 to 2002 and the $420,000 ($42,000 x 10) to which he was entitled. The district court's ruling was limited in time to payments made prior to May 2003. In a supplemental order, the court directed Jack to provide Patricia with ongoing information on relevant disbursements from GIC after May 1, 2003.

Following the May 2003 trial, but prior to the district court's August 2004 ruling, Jack caused GIC to pay additional management fees to himself. These payments, which occurred in June 2003 and June 2004, amounted to $60,000 apiece. Then, in June 2005, Jack paid himself a $20,000 management fee, and in June 2006, a further $40,000 management fee.

In its decision that we are now reviewing, the district court summed up all management fees paid from 2003 through 2006, and concluded that Jack should repay GIC $12,000. The court reasoned that Jack was entitled to $168,000 ($42,000 x 4) and had received $180,000 ($60,000 + $60,000 + $40,000 + $20,000). We find no error. The district court's ruling did not violate principles of issue or claim preclusion. If anything, it benefited Jack because the district court allowed him to carry over excess management fees into the following years and

offset them against amounts he received in those years that fell below the permitted maximum.[6]

Administrative fees. Over the years, Jack has caused GIC to pay Gethmann Construction administrative fees. By May 2003, they had reached the level of $3000 per month. In the prior proceeding, Patricia did not ask that those fees should be refunded but argued they should count against the maximum allowable compensation from GIC to Jack. The district court, in its August 2004 ruling, did not mention those fees or discuss how they should be handled. As noted, it did order some portion of the management fees paid by GIC to Jack to be refunded.

As part of its award in this case, the district court ordered Jack to repay $204,000, representing monthly administrative fees paid by GIC to Gethmann Construction from May 2003 through 2009. Jack argues that principles of issue preclusion should have prevented Patricia from re-litigating the propriety of those fees. The district court found that issue and claim preclusion did not apply because the fees did not commence until May 2003, i.e., after the first trial. The district court was in error on this factual point. The fees began before then. Nonetheless, we do not believe either issue preclusion or claim preclusion applies. Issue preclusion does not apply because the propriety of the pre-May 2003 administrative fees was not "determined" in the prior action. *See City of Johnston*, 718 N.W.2d at 297. Patricia did not actually ask that those administrative fees be refunded, so they were not directly at issue. The district court, in its previous ruling on the management fees, seemed to ignore the

[6] The original 2004 ruling followed the same approach.

administrative fees altogether. This set of facts is insufficient to implicate the doctrine of issue preclusion.[7] Also, claim preclusion does not apply because the only administrative fees for which recovery was sought in the present action were those that relate to May 2003 or later, and which could not have been litigated in the first action.

Alternatively, Jack claims the administrative fees were allowable to compensate Gethmann Construction for accounting services, use of equipment, and other services. However, the district court made a direct credibility determination. It found the testimony of Orville Brekke, Gethmann Construction Co.'s treasurer and employee for forty-three years, to be more convincing than Jack's testimony. Orville Brekke testified that the $3000 monthly payment from GIC "represent[ed] a portion of Jack Gethmann's salary." The district court's credibility determination is entitled to deference, and therefore we uphold the $204,000 award for administrative fees.

b. Estate taxes

Jack also challenges the district court determination that Patricia was entitled to a credit of $89,772.48 for her share of estate taxes and Jack was not. The record reveals that Jack and Patricia each wrote their own personal checks to the Kenneth Gethmann Estate to cover half the estate taxes. Each paid

[7] We acknowledge that "even when an opinion is silent on a particular issue, issue preclusion is applicable if resolution of that issue was necessary to the judgment." *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 900 F.2d 360, 365 (D.C. Cir. 1990) (citing *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir 1989)). However, the district court did not need to consider the administrative fees from GIC to Gethmann Construction, and apparently did not consider them, in ordering that management fees averaging above $42,000 per year from GIC to Jack personally were excessive and had to be repaid. Silence, in this case, does not mean that the issue was necessarily decided.

$31,000 on August 31, 1998, $29,500 on August 30, 1999, and $29,272.48 on August 30, 2000. However, in the month following each of his payments, Jack wrote checks from GIC to himself to cover his share. These payments included: three checks totaling $15,127.05 in September 1998; three checks totaling $34,162.20 in September 1999; and two checks totaling $34,375.00 in September 2000. The district court was entitled to draw the reasonable inference that the September payments from GIC to Jack were reimbursement for the estate taxes Jack had paid the previous month.

This inference was further buttressed by Jack's testimony:

> Q. I'm asking you every time you made a payment to the corporation for taxes, you received a check back from the corporation at or about that same time? A. That appears to be, yes.
>
> Q. In two cases the checks that you received back almost match up dollar for dollar with the checks you paid out? A. Yes, sir.

On appeal, Jack now claims that the reimbursements from GIC were treated in the prior litigation as part of his management fees and, accordingly, he is now being charged twice for the same GIC withdrawals. This argument is without merit. The 2004 ruling found that Jack paid himself management fees of $100,000 in 1998, $125,000 in 1999, and $85,000 in 2000. These management fee payments were separate from and in addition to the September 1998, 1999, and 2000 estate tax reimbursements. Accordingly, the district court correctly found that Jack should repay GIC $83,664.25 ($15,127.05 + $34,162.20 + $34,375.00) for the estate tax reimbursements he received.

c. Debenture

Jack also challenges the district court's treatment of $200,000 in GIC debentures. We agree with the district court that both the evidence and the parties' arguments on this subject are confusing. We also agree with the district court's characterization of those debentures. According to the trial record, the debentures are in effect bonds issued by GIC to the benefit of Kenneth Gethmann that reflect monies advanced to GIC back when it was formed. Thus, they are a liability of GIC and an asset of the estate.

d. Attorney fees

Jack argues that the district court erred in awarding attorney fees in favor of Patricia in the amount of $75,272.81. The district court awarded Patricia attorney fees under Iowa Code section 633A.4507, which 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, to be paid by another party or from the trust that is the subject of the controversy.

In light of our decision that Jack should prevail on the overriding issue in this case, i.e., valuation, we believe an award of attorneys' fees to Patricia is not justified. Also, as the district court noted, "[B]oth parties are responsible in varying degrees for the mess that evolved as a result of their intractability." Accordingly, the award of attorneys' fees is reversed.

III. Conclusion.

In this case, the district court conducted a very thorough review of a complex set of facts. Our disagreement with that court is essentially limited to one issue. However, it is an important issue. On the question of when the

assets are to be valued, we believe paragraph VI.A.4 requires a date-of-death valuation to be used. Accordingly, we affirm in part, reverse in part, and remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.