

IN THE COURT OF APPEALS OF IOWA

No. 3-948 / 13-0542
Filed December 18, 2013

**SHERRY A. DUVAL, JODI R. FRANKLIN,
and JOEL A. FRANKLIN,**
Plaintiffs-Appellees,

vs.

**JAY FOX, As Trustee of the Residuary
Trusts of Kenneth L. Albertson and of
Vera A. Albertson,**
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Annette J. Scieszinski, Judge.

Jay Fox appeals the district court's ruling removing him as the trustee of the residuary trusts of Kenneth and Vera Albertson, having found he engaged in self-dealing. **AFFIRMED AND REMANDED WITH INSTRUCTIONS.**

Garold F. Heslinga of Heslinga, Dixon, Moore & Hite, Oskaloosa, for appellant.

S.P. DeVolder of The DeVolder Law Firm, Norwalk, for appellees.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Sherry Duval and her children, Jodi and Joel Franklin, are beneficiaries of two testamentary residual trusts established pursuant to the last will and testament of Sherry's parents, Kenny and Veva Albertson. The Albertsons' wills named as trustee of both trusts Jay Fox, who was a cousin, friend, and neighbor of the Albertsons. Following Veva's death in 1989, Fox became trustee of the trusts, and he served in that capacity for many years.

In 2012, the beneficiaries filed an action against Fox as the trustee, asserting he had breached his trust and his fiduciary duties owed to them and to the trusts. Fox answered, denying their claims, and the matter ultimately proceeded to a trial before the bench in January 2013.

In March 2013, the district court entered its ruling in favor of the beneficiaries, removing Fox as trustee. The court found the beneficiaries proved Fox "committed a breach of trust that compe[lled] court intervention in the administration of the Albertson Trust to preserve the purpose of the trust, assure the trustee's compliance with fiduciary duty, and protect the interests of the beneficiaries." The court determined Fox, in entering into an oral lease of trust farmland with his son at an amount lower than market rents, engaged in self-dealing resulting in damages to the trust in the amount of \$13,441, based upon its calculation of lost rents. The court granted the beneficiaries' requests for the assessment of attorney fees and litigation costs, holding Fox personally responsible for reimbursing the trust.

Fox appeals, challenging the district court's rulings. He asserts the district court: (1) abused its discretion in removing him as trustee; (2) abused its

discretion in assessing damages; (3) abused its discretion in finding self-dealing on the part of the trustee; (4) abused its discretion in assessing the plaintiffs' attorney fees and costs to the trustee; and (5) had no authority to void the farm lease with the trustee's son for the year 2013.

Our review is governed by the following principles. Because “[p]roceedings concerning the internal affairs of a trust, including proceedings to compel the trustee to account to the beneficiaries are tried in equity,” our review is de novo. See *In re Trust No. T-1 of Trimble*, 826 N.W.2d 474, 482 (Iowa 2013). However, our review of Fox’s challenge of the attorney-fee award is for an abuse of discretion, which we will only find if the court’s ruling was based upon grounds that were unreasonable or untenable, i.e., either not supported by substantial evidence or based upon an erroneous application of the law. See *id.*; *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

Although we review the case anew, we give weight to the district court’s factual findings, though we are not bound by them. *Trimble*, 826 N.W.2d at 482. Nevertheless, because we recognize it is that court that listens to and observes both the parties and witnesses firsthand, we generally defer to the district court’s credibility findings. See *In re Marriage of Gensley*, 777 N.W.2d 705, 713 (Iowa Ct. App. 2009) (citing *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984)); see also Iowa R. App. P. 6.904(3)(g).¹ And, “[t]here is good reason for us to pay very close

¹ “Credibility” in this context, we believe, goes beyond mere truthfulness; it encompasses a witness’s motive, candor, bias, and prejudice.

attention to the trial court's assessment of the credibility of witnesses." *Vrban*, 359 N.W.2d at 423. The court deciding the case

is greatly helped in making a wise decision about the parties by listening to them and watching them in person. In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

Id. (internal quotation marks and citations omitted); see also *State v. Teager*, 269 N.W. 348, 351 (Iowa 1936) (noting the factfinder "had the advantage of being confronted with the witnesses, with an opportunity to observe their demeanor and candor, or the lack of it, and were in a much better position to judge and pass upon the weight and credibility of the testimony," unlike the reviewing appellate court "with nothing but the cold, naked, printed testimony before [it]"). A witness's facial expressions, vocal intonation, eye movement, gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the transcript. See, e.g., Diane M. Hartmus & James P. Levine, *Videotaped Trial Transcripts for Juror Deliberations*, 82 *Judicature* 84, 85 (1998) ("Whereas the court reporter's affectless recitation of witnesses' words eliminates the revealing physical side to testimony, the videotape captures revealing bodily reactions and vocal intonations, which can provide clues about veracity. Seeing whether people sweat, fidget, wave their hands, tap their feet, or avoid their questioners' eyes, and hearing whether their voices are halting or forceful, provides a source of data that has a bearing on determining truthfulness."). Hidden attitudes, feelings, and opinions may be detected from this "nonverbal leakage." See Thomas Sannito & Peter J. McGovern, *Courtroom Psychology for Trial Lawyers* 1 (1985). Thus, the trial judge is in the best position to assess a

witness's interest in the trial, their motive, candor, bias, and prejudice. See *Teager*, 269 N.W. at 351.

After a thorough review and consideration of the record, we ultimately find the district court's conclusions of law are correct and fully supported by the facts. Further, we find no abuse of discretion on the part of the district court in its ruling. We therefore affirm the district court's ruling as to Fox's claims pursuant to Iowa Court Rule 21.26(1)(d).

The beneficiaries request an award of appellate attorney fees, citing Iowa Code section 633A.4507 (2011), 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." Our supreme court recently explained that, in interpreting what justice and equity require under section 633A.4507, we consider the following general criteria in whether the party is entitled to attorney fees:

- (a) reasonableness of the parties' claims, contentions, or defenses;
- (b) unnecessarily prolonging litigation;
- (c) relative ability to bear the financial burden;
- (d) result obtained by the litigation and prevailing party concepts; and
- (e) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation.

Trimble, 826 N.W.2d at 491.

In considering these factors, we conclude the beneficiaries are entitled to have Fox pay their reasonable appellate attorney fees. See *id.* Here, the beneficiaries prevailed on all issues challenged by Fox, including the district court's finding Fox breached his duty to the trust by engaging in self-dealing

resulting in damages to the trust. We remand this issue to the district court to make findings and conclusions regarding the appropriate amount of appellate attorney fees to be paid in this case. *See id.* Costs are assessed to Fox.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.