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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1134**

In the Matter of the
M. Arnold Lyons Family Trust
Created under Article 4 of the
Last Will and Testament of
M. Arnold Lyons,
dated October 9, 1985.

**Filed May 12, 2009
Affirmed
Klaphake, Judge**

Hennepin County District Court
File No. 27-TR-CV-04-126

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Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Harten, Judge.*

UNPUBLISHED OPINION

KLAPHAKE, Judge

In this appeal from an order establishing an attorney's lien in an underlying trust dispute action, appellant Dove, Fretland & Van Valkenburg, PLLP, challenges the district

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

court's calculation of attorney fees against respondents. Appellant argues that the district court erred by (1) excluding court-awarded fees from "the amount recovered" under the contingent fee agreement and (2) declining to include any costs of collection.

Because the ambiguity of the fee agreement should be construed against appellant to exclude an award of attorney fees from "the amount recovered," and because the district court did not abuse its discretion in declining to include costs of collection, we affirm.

FACTS

This trust dispute originated in September 2004 upon the petition of respondents, Lisa Lyons and U. S. Bank, N.A., as co-trustees of the M. Arnold Lyons Family Trust, the M. Arnold Lyons Marital Trust and the Vera Lyons Revocable Trust, for instructions concerning the attempted exercise by Vera Lyons of powers of appointment granted to her under the family and marital trusts. The dispute surrounded the claims of Barbara Hobbs, a beneficiary of the revocable trust and purported beneficiary of the family trust, and Andrew and William Buirge (the Buirges), beneficiaries of the family trust. A February 7, 2005 district court order directed the reformation of Vera Lyons' will and her revocable trust. The Buirges entered into a legal services agreement (the agreement) on August 3, 2005, with appellant Dove, Fretland & Van Valkenburg, PLLP, in which appellant agreed to appeal the February 7, 2005 order on behalf of the Buirges in exchange for payment of "one-third of any amount recovered by settlement or the appeal" plus expenses. The agreement further provided that if any fees or expenses were not paid, appellant would be reimbursed for "time spent and expenses incurred in

collecting the unpaid amounts, at the same rate, and for the same expenses as are described in” the agreement.

This court’s July 18, 2006 opinion reversing the district court’s order reforming the will and revocable trust resulted in the distribution of one-third of the assets of the family trust (\$254,383.42) to the Buirges equally. The parties petitioned for further review, which was denied by the Minnesota Supreme Court on September 19, 2006. On January 3, 2007, appellant, on behalf of the Buirges, petitioned the district court for orders allowing attorney fees. On March 16, 2007, the district court issued its order allowing attorney fees in the amount of \$82,500 and disbursements in the amount of \$2,609.89. The court directed the co-trustees to pay 73% of such fees and disbursements from the family trust (\$62,130.22) and 27% of such fees from the revocable trust. Although the court acknowledged in its findings the existence of the contingent fee provided by the agreement, it did not award attorney fees accordingly, but based its award on the affidavit submitted by appellant setting forth the description, date, and charges for the services appellant provided, computed at appellant’s usual hourly billing rate. The court concluded that the total charges of \$82,500 reflecting 275 hours at \$300 per hour were fair and reasonable. The contingent fee would have been \$84,794.47 (one-third of the award of \$254,383.42).

On August 2, 2007, respondents paid appellant the court-awarded fees and disbursements of \$85,109.89 from the trusts. Respondents then distributed to each of the Buirges their one-third interest in the remaining balance of the family trust. On August 13, 2007, appellant requested payment of \$27,184.58 from the Buirges for additional

attorney fees owed under the agreement. Appellant arrived at this figure by adding together one-third of the Buirges' distribution from the family trust and one-third of the attorney fees awarded from the family and revocable trusts and subtracting from this amount the attorney fees and disbursements it had already received.¹

On October 16, 2007, appellant petitioned the district court for an attorney's lien against respondents in the amount of \$36,246.11. Appellant arrived at this amount by adding to the unpaid fees of \$27,184.58, one-third of this amount, or \$9,061.53. Neither of the Buirges has appeared in the lien proceeding. The district court granted an attorney's lien in the amount of \$2,294.47 on the Buirges' interest in the family trust, ordering respondents to pay the lien to the extent it had not been satisfied. Appellant requests this court affirm and modify the district court's order by increasing the amount of the attorney's lien. Respondents assert by notice of review that appellant waived its claim for contingent-based fees under the agreement by obtaining a court award of hourly-based fees.

D E C I S I O N

This court reviews the application of the attorney-lien statute de novo, as a question of law. *Thomas A. Foster & Assocs. v. Paulson*, 699 N.W.2d 1, 4 (Minn. App. 2005). "Although the reasonable value of attorney fees is a question of fact, . . . when considering whether the district court employed the proper method to calculate the amount of an attorney lien, we undertake a de novo review . . ." *Id.* (citation omitted).

¹ $(\$254,383.42 \times 1/3) + (\$82,500.00 \times 1/3) - (\$82,500.00 + \$2,609.89) = \$27,184.58.$

When there is an agreement between an attorney and a client that sets the attorney's compensation, the amount of the attorney's lien for legal services must be determined by reference to that agreement. *Id.* at 6.

This court reviews de novo whether a district court properly interprets an agreement when calculating the amount due under its terms. *See Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) (stating that de novo standard of review applies to interpretation of an unambiguous contract); *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 417-18 (Minn. App. 2008). A contract is ambiguous if its language is reasonably susceptible to more than one interpretation. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Whether a contract is ambiguous is a question of law which this court will review de novo. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). Any ambiguities in a contract should be construed against its drafter, in the absence of a clear showing that the parties intended a contrary meaning. *Id.* This is particularly appropriate when interpreting a contingent fee agreement. *See Cardenas v. Ramsey County*, 322 N.W.2d 191, 193-94 (Minn. 1982) (recognizing the principle of construing ambiguous contingent fee agreements against their drafters, relying on an attorney's sophistication and fiduciary status as the reason to favor an interpretation that fulfills the client's expectations).

The district court set the amount of appellant's lien at the greater of one-third of the amount of the recovery *exclusive* of the awarded fees, or the court-awarded fees. Because the total fees due under the fee agreement as calculated by the court were greater than the court-awarded fees, the court set the lien at that amount plus appellant's

expenses less the amounts appellant had already received.² The rationale for this calculation was based on dicta contained in a Massachusetts Supreme Court decision discussing how court-awarded attorney fees should be allocated when a contingent fee agreement is either ambiguous or silent on the matter. *Cambridge Trust Co. v. Hanify & King Prof'l Corp.*, 721 N.E.2d 1, 7 (Mass. 1999). The district court applied the Massachusetts rule because it believed there was no Minnesota law on this issue. However, we do not believe it is necessary to rely on this rule and so decline to apply it to the present case.

This court has ruled on the narrow issue of whether to include court-awarded fees when computing a contingent fee in *Untiedt v. Grand Labs., Inc.*, 552 N.W.2d 571 (Minn. App. 1996), *review denied* (Oct 15, 1996). In that case, Charles Untiedt executed an agreement with his attorney that provided that “[i]n the event of a cash settlement or jury verdict, I agree to pay said attorneys from any money and or [sic] property paid, received, or collected by action, compromise, or otherwise, 40 percent of any recovery for attorney fees for handling my case to settlement or suit including appeal.” *Id.* at 572. Untiedt and his attorney disagreed on how to divide the proceeds of the litigation, which included a \$1,038,775 jury verdict and \$366,584.24 in costs and attorney fees. Specifically, the parties disagreed as to whether statutory attorney fees were part of the “recovery” under the retainer agreement. Because the term “recovery” was capable of multiple constructions, one inclusive of statutory attorney fees and one exclusive of those

² $((\$254,383.42 \times 1/3) + \$2,609.89) - \$85,109.89 = \$2,294.47$

fees, the court found the agreement was ambiguous and construed it in favor of Untiedt, interpreting “recovery” not to include an award of statutory attorney fees. *Id.* at 574-75.

The *Untiedt* court stated that although “an attorney may bargain for a percentage of both damages and fees, provided the overall compensation is reasonable . . . the attorney must clearly provide for the intended division, perhaps by defining “recovery” to include an award of fees.” *Id.* at 575. The court noted that “the burden of identifying and clarifying ambiguities” should be placed on the attorney, “whose experience places him or her in a better position to discharge the task at the least cost.” *Id.*, n.1. The court also noted that this is also “consistent with the attorney’s fiduciary status, which requires him or her to exercise great caution in the adverse process of selecting the terms that will govern a contingent fee arrangement.” *Id.*

The question presented here is almost identical to that presented in *Untiedt*. Here, the language at issue is: “one-third of any amount recovered”; the language at issue in *Untiedt* was: “40 percent of any recovery.” The question in both cases is whether “recovered” or “recovery” includes statutory or court-awarded attorney fees. In *Untiedt*, the fees were awarded under Minn. Stat. § 8.31, subs. 1, 3a (1994), allowing consumer fraud plaintiffs to “recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees.” *Id.* at 575. Here, the fees were awarded pursuant to a court order granting the clients’ petition based on Minnesota law entitling beneficiaries to an award of costs and attorney fees from a trust where substantial benefit is conferred on the trust through the litigation. *In re Trust Known as Great Northern Iron Ore Props.*, 311 N.W.2d 488, 492 (Minn. 1981); *see also* Minn.

Stat. § 524.3-720 (2008) (allowing attorney fees and expenses to be paid from an estate when it is determined that such services for any interested person contributed to the benefit of the estate).

Because the language of the fee agreement is reasonably susceptible to more than one interpretation, it is ambiguous. *See Untiedt*, 552 N.W.2d at 574-75 (finding agreement ambiguous because the term “recovery” was capable of multiple constructions). Because the fee agreement is ambiguous, the ambiguity should be construed against the drafting attorney. *See id.* at 575 (holding “recovery” did not include an award of statutory attorney fees). Appellant has failed to distinguish the facts of the present case from the facts in *Untiedt*.

The amount of an attorney’s lien for legal services must be determined by reference to the agreement between the attorney and client, if one exists. *Paulson*, 699 N.W.2d at 6. Because there was a legal services agreement in place here, it will control. There is no authority in Minnesota to support the district court’s determination to set the lien at the higher of the contingent fee under the agreement or the court-awarded fees. However, since the court established the amount of the lien at the amount due appellant under the agreement, its determination is affirmed on grounds consistent with this opinion.

Appellant also claims the district court erred in excluding its costs of collection from the amount of the lien. A district court has broad discretion to deny attorney fees and costs of collection; its decision will not be overturned absent an abuse of such discretion. *TIG Ins. Co. v. Anderson*, 663 N.W.2d 1, 7 (Minn. App. 2003), *review denied*

(Minn. May 20, 2003). Appellant argues that collection costs due under the fee agreement equal one-third of its unpaid fees. The fee agreement provided that appellant would be reimbursed for “time spent and expenses incurred in collecting [unpaid fees or expenses], at the same rate, and for the same expenses as are described in” the agreement. However, the agreement does not specify a rate for time spent, and thus is ambiguous. It is not clear that collection costs were to be calculated on a percentage basis, as were the contingent fees under the agreement. Because the fee agreement is ambiguous, the ambiguity should be construed against the drafting attorney. *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 295 (Minn. App. 1995). Under these circumstances, the district court did not abuse its broad discretion to deny these costs. *TIG*, 663 N.W.2d at 7.

Respondents argue by notice of review that appellant intentionally waived its right to claim attorney fees pursuant to the contingent fee agreement because it affirmatively sought and obtained an award of attorney fees based on its hourly rate applied to the time it spent on the trust matter on behalf of the Buirges. A request of statutory fees does not preclude an attorney’s right to recover contingent fees based on a fee agreement. *See Untiedt*, 552 N.W.2d at 575 (allowing an attorney to bargain for a percentage of both damages and fees “by defining ‘recovery’ to include an award of fees”). Appellant did not waive its rights to contingent fees by petitioning the court for an award of fees, since appellant has a right to bargain for a percentage of those fees as a part of the recovery subject to its contingent fee. This right would be meaningless if the act of obtaining the

fees constituted a waiver of one's bargain for a percentage of those fees. Accordingly, we reject respondent's claim of waiver by appellant.

Affirmed.