

IN THE COURT OF APPEALS OF IOWA

No. 0-910 / 10-0816
Filed February 23, 2011

**HARRIET A. SCHNEIDER, JOYCE M.
RABAS, and DWIGHT E. CORNWELL,**
Plaintiffs-Appellants/Cross-Appellees,

vs.

**DONALD BROWN, Individually and
as Trustee of the Donald Brown
and Ruth Alene Trust,**
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Bremer County, Christopher C. Foy, Judge.

Residual beneficiaries of a trust appeal a district court decree related to the administration of that trust; the defendant trustor/trustee cross appeals, contending that as surviving trustor, he should have the power to amend the terms of the trust related to all of the trust property. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Arthur A. Neu of Neu, Minnich, Comito & Neu, P.C., Carroll, for appellants/cross-appellees.

Sara A. McClintock and C. Kevin McCrindle of Law Offices of C. Kevin McCrindle, Waterloo, for appellee/cross-appellant.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

VAITHESWARAN, P.J.

A husband and wife signed a trust agreement to govern the disposition of their property. When the wife died, her children from a former marriage challenged the husband's authority to amend the trust agreement as well as his disposition of trust assets. The district court's resolution of this dispute is the subject of this appeal.

I. Background Facts and Proceedings

Ruth Alene Brown ("Alene") and Donald Brown married in 1983. Each of them had three children at the time of the marriage. Twenty years into their marriage, the couple executed an inter vivos trust agreement, naming themselves as co-trustees and their six children as alternate trustees and remainder beneficiaries. The couple owned a condominium, which they deeded to the trust.

A year after executing the trust agreement, Alene and Donald signed an amendment to the trust providing that, upon the death of the surviving spouse, the condominium would pass to Donald's three children. This amendment is not at issue on appeal.

Alene died in 2008. On her death, her investments, annuities, and life insurance proceeds were transferred to the trust.

Donald, as trustee, initially kept separate checking accounts for trust and personal assets but eventually consolidated the accounts. He did not provide an accounting of trust assets to the remainder beneficiaries. He also twice amended the trust—first, to remove Alene's children as alternate co-trustees and, second, to provide for a complete, rather than incremental, payout of the residual

trust assets upon his death. He paid for his wife's funeral expenses from trust assets and withdrew money to cover his attorney fees. Finally, he sold the condominium in the trust and bought another condominium. Donald did not transfer any of his assets into the trust.

Alene's children¹ sued Donald, seeking an order 1) directing him not to amend the trust, 2) compelling him to transfer his assets into the trust or seeking a constructive trust on his assets, and 3) directing him to withdraw only interest and income during his life. Following trial, her children also sought to have Donald removed as trustee on the ground that he failed to provide them with annual accountings.

The district court concluded that Donald retained the power to revoke or modify the terms of the trust with respect to his assets. The court declined to order a transfer of Donald's assets into the trust, declined to impose a constructive trust over his assets, and summarily denied the request to limit withdrawals to interest and income. The court found no authority to remove Donald as trustee for failure to provide an annual accounting but, nonetheless, ordered Donald to provide the residual beneficiaries with future accountings.

All parties appealed. Our review of the issues raised in this appeal is de novo. Iowa R. App. P. 6.907.

II. Donald's Authority to Amend or Revoke Trust

The plaintiffs assert that the terms of the trust became irrevocable upon Alene's death, as to Donald's assets as well as Alene's. If accepted, their

¹ During the pendency of this action, Alene's daughter, Katherine L. Cornwell passed away and her husband, Dwight E. Cornwell, was substituted as a party.

argument would result in the invalidation of the trust amendments made by Donald after Alene's death.

The district court rejected the plaintiffs' argument, concluding Donald "retains the power to revoke or modify the terms of the Brown Trust, at least with respect to any assets he has contributed." The court relied on Iowa Code section 633A.3102(2) (2007), which provides:

Except as otherwise provided by the terms of the trust, if a trust is created or funded by more than one settlor, each settlor may revoke or modify the trust as to the portion of the trust contributed by that settlor.

On appeal, the plaintiffs cite out-of-state case law in support of their argument. We find it unnecessary to address this case law because, like the district court, we agree that section 633A.3102(2) is controlling.

That provision begins with the phrase "[e]xcept as otherwise provided by the terms of the trust." Iowa Code § 633A.3102(2). The terms of the trust do not otherwise provide.² Nothing in the agreement precludes a surviving trustee from amending or revoking the trust agreement. In fact, the trust agreement expressly permits the trustors³ to amend or revoke the agreement.

It is true that the pertinent trust provision refers to "trustors" in the plural. But, in our view, the tense alone does not mandate joint action absent express trust language requiring joint action or prohibiting individual action. As there is no such language, we conclude section 633A.3102(2) authorized Donald to amend or revoke the trust as to his portion.

² See Restatement (Third) of Trusts § 63 cmt. e, at 446 (2003) (noting settlor may reserve a power "to revoke the trust as to all or any part" of the trust property).

³ Donald was defined as a trustor and trustee.

This conclusion is supported by the Restatement (Third) of Trusts, which provides:

If a revocable trust has more than one settlor, unless the terms of the trust provide otherwise, each settlor ordinarily (but see exceptions below) may revoke or amend the trust with regard to that portion of the trust property attributable to the settlor's contribution.

Restatement (Third) of Trusts § 63 cmt. k, at 448 (2003). According to the comments, this rule

may also help in reaching appropriate solutions where the terms of a multi-settlor trust make vague reference to the existence of powers of revocation while the settlors are both alive.

Id. cmt. k, at 461. The “appropriate solution” here is to allow Donald to amend or revoke the trust agreement with respect to his assets.

We turn to Donald's argument on cross-appeal that “[t]he trust agreement allows Donald acting as trustor to amend or revoke the trust agreement simply by filing a written instrument with the trustees without regard to whether those amendments affect the assets contributed by Alene.” The trust agreement does not confer such broad powers on the surviving spouse nor does section 633A.3102(2) support this reading. Accordingly, we reject this argument.

III. Donald's Obligations Regarding Assets

A. Transfer of Assets into Trust

The plaintiffs next contend the district court should have required Donald to transfer his assets into the trust. The trust agreement does not require such a transfer and, as the district court noted, Alene herself did not transfer all of her assets into the trust during her lifetime. Additionally, our affirmance of the district court's conclusion that Donald could modify the trust as to the assets he

contributed necessarily leads to a conclusion that Donald was not required to transfer his assets into the trust.

B. Imposition of Constructive Trust

The plaintiffs urge this court to create a constructive trust over Donald's assets. Relying on section 633A.3102(2), the court denied the request. For the reasons stated above, we agree with this conclusion.

C. Withdrawal of Interest and Income from the Trust

The plaintiffs also contend Donald should only have been allowed to withdraw interest and income from the trust during his lifetime. This request is contrary to a trust provision that states, "In addition to the net income, the trustees shall pay to the trustors such sums from the principal that the trustors requests [sic] in writing." Based on this provision, we reject the plaintiffs' contention.

IV. Breach of Fiduciary Duty

The plaintiffs contend Donald breached his fiduciary duty to the remainder beneficiaries and, accordingly, should have been replaced with an independent trustee. They point to 1) his failure to provide annual accountings, 2) his transfer of assets and payment of certain bills, and 3) his acknowledged commingling of trust assets.

On the first issue, the district court concluded Donald was not obligated to provide accountings because the plaintiffs were not "qualified beneficiaries entitled to an accounting under Iowa Code section 633A.4213." We need not decide whether the district court was correct on this legal point because we

believe the trust agreement answers the question of whether accountings were required. It provides in pertinent part:

The trustee shall, at least annually, make an accounting to all beneficiaries, and the approval by a beneficiary, or his or her parent, legal guardian, or conservator, shall release and relieve the trustee from any further responsibility or liability with respect to that beneficiary, and his or her heirs and assigns, for its actions during the period covered by the accounting.

The term “beneficiary” is not defined in the trust agreement, but as defined in the Iowa Trust Code, it “includes a person who has any present or future interest in the trust, vested or contingent, and also includes the owner of an interest by assignment or other transfer.” Iowa Code § 633A.1102(2). Because the plaintiffs are specifically named as remainder beneficiaries under the trust agreement, we conclude they should have received an accounting. There is no dispute that Donald did not furnish annual accountings.

We turn to Donald’s disposition of assets and payment of bills. The plaintiffs allege Donald paid for Alene’s funeral twice—with one of the payments coming from the trust assets. The record reflects otherwise. Donald testified he initially paid for the funeral expenses with a check from Alene’s checking account. He later withdrew the same amount from the trust in an apparent effort to reimburse himself. We are not convinced Donald breached any fiduciary duties owing to Alene’s children in paying this bill.

The plaintiffs also challenge Donald’s withdrawal of \$3316.92 in trust assets to pay for attorney fees. As noted, the trust agreement did not prohibit this type of withdrawal. Additionally, a trustee is authorized to hire attorneys to

assist with trust performance. *Id.* § 633A.4402(26). Accordingly, we discern nothing inappropriate in Donald's use of trust assets to pay for these fees.

The most significant complaint relates to Donald's disposition of the condominium in the trust. The plaintiffs note that Donald sold that condominium. They question whether all the sale proceeds were returned to the trust.

The record reflects Donald withdrew money from his personal account, bought a new condominium, and put the new condominium in his children's names while he continued to reside in it. He later sold the old condominium that was in the trust and deposited the proceeds into his personal account. While the paper trail for this set of transactions is mostly absent, Alene's children presented scant evidence that the transactions were designed to or did deprive them of a portion of their mother's assets. Alene agreed during her lifetime that the condominium in the trust would go to Donald's children. In the end, a condominium of approximately the same value,⁴ albeit not the one in the trust, was transferred to his children.

This brings us to the key question, whether Donald's failure to provide accountings and his use of trust and personal assets interchangeably⁵ warranted his removal as trustee. A court may remove a trustee:

- a. If the trustee has committed a material breach of the trust.
- b. If the trustee is unfit to administer the trust.
- c. If hostility or lack of cooperation among co-trustees impairs the administration of the trust.

⁴ The plaintiffs contend that the sum of these transactions resulted in a net deficit to the trust account. The testimony of Donald's financial advisor does not support this contention.

⁵ See Iowa Code § 633A.4210(1) (stating that a trustee shall "[k]eep the trust property separate from other property of the trustee unless the trust provides otherwise").

- d. If the trustee's investment performance is consistently and substantially substandard.
- e. If the trustee's compensation is excessive under the circumstances.
- f. If the trustee merges with another institution or the location or place of administration of the trust changes.
- g. For other good cause shown.

Id. § 633A.4107(2).

Donald did not pilfer the trust account. As his financial advisor testified, “[t]he only withdrawals that have been taken out of the trust have been the one for final expenses, which is a little over \$6000 [and] then the other one for \$3000 something for attorney’s fees.” Nonetheless, he lacked an understanding of his obligations as trustee and concededly failed to comply with administrative and record-keeping requirements. These omissions created an appearance that he was compromising his duty to “administer the trust solely in the interest of the beneficiaries.” *Id.* § 633A.4202. For that reason, we conclude Donald was unfit to administer the trust and should have been removed as trustee.

V. Conclusion

We affirm all aspects of the district court’s opinion except that portion which declined to remove Donald as trustee. That portion is reversed and remanded for the appointment of a new trustee.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.