

IN THE COURT OF APPEALS OF IOWA

No. 2-182 / 11-1388
Filed April 25, 2012

**IN THE MATTER OF THE
TRUSTEESHIP OF MARY
F. LOTZ, Deceased.**

**SHARON JORDAN, DAWN
GIOVANNONI, and AKIKO
JORDAN,**
Appellants.

Appeal from the Iowa District Court for Madison County, Terry Rickers,
Judge.

Objectors appeal from the probate court's decision overruling their
objections to the trustees' report. **REVERSED AND REMANDED.**

Matthew D. Gardner of Sullivan & Ward, P.C., West Des Moines, for
appellants.

Adam Doll and Anne L. Clark of Hopkins & Huebner, P.C., Adel, for
appellees.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

In December 2010, the trustees of the Trusteeship of Mary F. Lotz filed a report with the probate court and sought a declaratory ruling as to how to proceed upon the termination of the testamentary trust. The trustees recommended the creation of a charitable foundation with funds from the sale of farmland owned by the trust and accumulated 2009 and 2010 income from the trust. Objectors appeal from the court's decision overruling their objections to the report on the grounds that Akiko Jordan's objection was not filed timely, that Sharon Jordan and Dawn Giovannoni have no standing to object to the 2009 income disbursement proposal, and that the proposal for a charitable foundation was sufficiently specific. For the reasons that follow, we reverse and remand for further proceedings.

I. Background Facts and Proceedings.

Mary F. Lotz was a resident of Winterset, Iowa. She executed her last will and testament on June 19, 1953. Mary died in 1958. Her will contained provisions for the establishment of a testamentary trust using certain assets of her estate. Pursuant to Item One of her will, the trustee was to maintain specified farmland "in its most productive state," and the "net income arising" from that farmland was to be paid to Mary's grandchildren, Charles Martin Jordan and Phyllis Mart, "during their lifetimes, share and share alike, and upon the death of either of them, to the survivor during his or her lifetime."

Following Mary's death in 1958, the income beneficiaries of the trust, Charles and Phyllis, shared the income from 160 acres of "high quality Madison

County farmland.” Phyllis died several years ago and the remaining income beneficiary, Charles, died on February 9, 2010.

The last paragraph of Item One of Mary’s will addresses the disposition of the trust corpus following the deaths of the income beneficiaries:

If at the time of the death of both of said grandchildren, Charles Martin Jordan and Phyllis Mart, my daughter Mary Agnes Gates Decker shall be deceased, then it is my will and I so direct, that the real estate described in this clause, Item One, be devised, given and bequeathed as directed in Item Five hereinafter stated, for the purposes therein stated.

Mary Lotz’s daughter and Charles’ mother, Mary Agnes Gates Decker, died before Charles.

Item Five of Mary’s will provides:

Upon the termination of the trusts created in Items One and Two hereof, which is to say, upon the death of my grandchildren, . . . I give, devise and bequeath all real estate and funds remaining in the hands of my trustee or trustees as a fund for the erection and maintenance of an old people’s home in the City of Winterset, Iowa.

Conditions of the bequest included the creation of a non-profit “organization, foundation or society,”

[t]he stated purpose of such corporation shall be the erection and maintenance of a home in the City of Winterset, devoted to the care and residence of aged persons, without regard to their religious beliefs or station in life, said home to be maintained without pecuniary profit, the charges to be made to those housed therein to be based upon the businesslike determination of the costs of maintenance and upkeep thereof.

On February 24, 2010, the trustees filed an annual report to the court covering calendar year 2009. A check in the amount of \$40,364.00 was issued to Charles and was held by trustee James E. Van Werden pending approval of the annual report.

On December 8, 2010, the probate court approved the 2009 annual report, which included “all receipts and disbursements for the period covering January 1, 2009 through December 31, 2009.”

The check to Charles was not sent, however; rather, on December 29, 2010, the trustees sought a declaratory ruling in the probate court. The trustees asserted Charles, last income beneficiary, had died; the check issued and held by James Van Werden was for “accrued income”; and the “undersigned ask[] the court for interpretation of the Trust as to whether or not and how much of the accrued income should be paid to Charles Martin Jordan’s estate.” The report set forth the trustees’ proposal for disposition of the trust corpus farmland, as well as the remaining funds held in the trustees’ possession. The trustees requested approval from the court to disburse the 2009 trust income, and any income accumulated since Charles’s death, to the Mary F. Lotz Charitable Foundation, rather than to Charles’s heirs.

The matter was set for hearing on April 21, 2011. Objections were to be filed by March 24, 2011. Notice was personally served upon Charles’s widow, Akiko Jordan in Stockton, California, on February 23, 2011. Notice by publication was made for three consecutive weeks, the last publication appearing on February 23, 2011.

On March 24, 2011, Sharon Jordan and Dawn Giovannoni filed an objection to the December 29, 2010 report to the court, asserting “the accrued but undistributed income up to the date of death of the last surviving life tenant (February 9, 2010) should be paid to the estate of Charles Martin Jordan” and not pursuant to “Item 5” of the Lotz trust as requested by the trustees. They

further objected to the trustees' proposed remainder beneficiary. In their prayer for relief, Jordan and Giovannoni "as natural heirs of the Trustor" asked

that the Court construe the Trust established under the Last Will and Testament of Mary F. Lotz for the distribution of the accrued income to the estate of the life tenant and not to the remainder; further that the Proposed Charity be revised to reflect all of the terms of the Trust, or in the alternative, that the assets remain in Trust until a determination on the feasibility for accomplishing the purposes of the Trust can be made; and for such other relief as may be appropriate to adjudge and declare the rights of the parties.

At the hearing, trustee Donald Bolton testified that a check for the 2009 trust income had been issued and a tax return was filed showing a distribution of 2009 income. But upon learning of Charles' death and despite the court's order approving the disbursement, the trustees decided not to pay the 2009 income to Charles' estate "[b]ecause we hadn't received the necessary papers clearing the income to be paid to the beneficiaries."

On May 6, 2011, Akiko Jordan filed a late objection to the December 29, 2010 report "formally repeat[ing] and incorporat[ing] the objection of Sharon Jordan and Dawn Giovannoni." She asked for the distribution of the accrued income to the estate of the life tenant, Charles, and not to the remainder proposed foundation.

On August 1, 2011, the court dismissed the objectors' claim regarding entitlement and distribution of the 2009 trust income, writing:

In setting the hearing and the deadline for objections, the Trustees complied with the process outlined in Iowa Code § 633.40. There is nothing in the record that indicates that either Sharon or Dawn have any current vested interest in any distribution that may be directed to their mother, the surviving spouse of Charles. If there is a will or estate proceeding filed in the State of California, there was no mention of it during the hearing in this matter.

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Assuming, for the sake of argument, that there is no personal representative or other fiduciary appointed to act on behalf of the late Charles, Akiko seems to be the only appropriate person to assert any claim to trust distributions payable to her late husband. She has failed to file a timely objection. Consequently, the Court must deny her claim to the 2009 Trust net income. The 2009 Trust income, along with the trust corpus and any other accumulated income shall be distributed per Item Five of Mary's Testamentary Trust.

To the extent the Trustees should amend their fiduciary income tax returns to reflect this conclusion, it is hereby authorized by the Court.

The court then concluded the trustees were appropriately attempting to carry out Mary's testamentary intent in creating a charitable foundation.

As noted above, Mary's intent is of paramount importance in resolving this dispute. Mary's intent is clear in the language itself which states that "an organization, foundation or society shall be duly formed" within ten years of Charles' death. The primary charitable purpose of the proposed entity is "the erection and maintenance of a home in the city of Winterset, devoted to the care and residence of age[d] persons, without regard to their religious beliefs or station in life, said home to be maintained without pecuniary profit."

Other than the noted typographical error, the purpose and contents of the proposed organizational document appears to satisfactorily fulfill Mary's testamentary intent. The Court does not believe that it is necessary to scrutinize whether the charitable entity creates a facility that is called a "care facility" or a "hospice" or "senior housing." It is not material whether the facility houses two, or twenty, or two hundred residents. As long as it provides a home, whether permanent or temporary, for elderly people in the vicinity of Winterset, it should satisfy Mary's ultimate and generous goal.

The court thus concluded that the trustees "should be authorized to move forward with the creation of the Mary F. Lotz Charitable Foundation." The court ordered costs "associated with the litigation of the objections" assessed against the objectors.

On August 11, 2011, the objectors filed a motion to amend or enlarge findings, arguing in part that Iowa Code section 637.303 (2011) directs the distribution of the accrued but undistributed income to the estate of the life beneficiary. Because a trustee is obligated to administer a trust according to the Iowa trust code, and the court has an independent duty to review and apply the law, they argued distribution of the 2009 trust income contrary to the statutory provision was in error. The objectors also noted that the guardian ad litem appointed by the court to represent nonresident parties failed to conduct any investigation in discharge of his duties. They further complained that the court erred in ordering them to pay the costs of the action.

On August 12, the court overruled the motion and affirmed its earlier ruling in its entirety.

On appeal, Sharon Jordan, Dawn Giovannoni, and Akiko Jordan argue (1) the estate of the life tenant of the trust is entitled to receipt of the 2009 income and (2) the proposed charitable foundation fails to adhere to the trustor's requirements for distribution and administration of the remainder share.

II. Scope and Standard of Review.

This case comes to us from a ruling in probate court. A hearing on objections to a fiduciary's report is an equitable proceeding. Iowa Code § 633.33. A declaratory judgment to construe a will is also an equitable proceeding. See *In re Will of Uichtorff*, 693 N.W.2d 790, 793 (Iowa 2005). Our review is thus de novo. Iowa R. App. P. 6.907; *In re Estate of Gist*, 763 N.W.2d 561, 563 (Iowa 2009); *In re Barkema Trust*, 690 N.W.2d 50, 53 (Iowa 2004).

III. Discussion.

A. *2009 trust income.* The trustees do not directly address the merits of the objectors' contention—that statutory authority directs payment of the 2009 trust income to the income beneficiary's estate. They argued below, and the district court agreed, that Sharon Jordan and Dawn Giovannoni have no standing to object to the December 29, 2010 report, and that Akiko Jordan failed to timely object.

We find these arguments unavailing as the trustees themselves raised the issue of the proper recipient of the 2009 trust income. In the December 29, 2010 report to the court, the “undersigned [trustees] asks the court for interpretation of the Trust as to whether or not and how much of the accrued income should be paid to Charles Martin Jordan's estate.”

Iowa Code chapter 633A, the Iowa trust code, is applicable to all trusts within its scope “regardless of whether the trust was created before, on, or after July 1, 2000, except as otherwise stated in this trust code.” Iowa Code § 633A.1106(1). Pursuant to section 633A.4201, a trustee must administer the trust in accordance with the terms of the trust and the trust code. And section 633A.4705 states, “Chapter 637 [the Uniform Principal and Income Act] shall apply to trusts subject to this chapter.”

Under Item One of the Lotz trust, the trustee was to keep the farmland in “productive use; and to pay the net income arising therefrom to . . . Charles Martin Jordan . . . during [his] lifetime.” By the express terms of the trust then, Charles survived all of 2009 and was entitled to the 2009 trust income. See Iowa Code §§ 637.102(5) (“‘Income beneficiary’ means a person to whom a trust's net

income is or may be payable.”); (7) (“Mandatory income interest’ means an income beneficiary’s right to receive net income that the terms of the trust require the fiduciary to distribute.”); (8) (defining “net income”); and 637.301(4) (“An income interest ends on the day before an income beneficiary dies or another terminating event occurs.”).

As the income beneficiary of the Lotz trust, Charles was entitled to the 2009 net trust income. In fact, the 2009 annual report had been submitted and approved, which included disbursement of the 2009 net income to Charles. The check had been issued. Statutorily, this income was payable to Charles’ estate:

When a mandatory income interest ends [under section 637.301(4)—“the day before an income beneficiary dies,”], the trustee shall pay to a mandatory income beneficiary who survives that date, *or the estate of a deceased mandatory income beneficiary whose death causes the interest to end*, the beneficiary’s share of the undistributed income that is not disposed of pursuant to the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked may be added to principal.

Id. § 637.303(2) (emphasis added).

This is consistent with the common law, see *In re Estate of Luke*, 184 N.W.2d 42, 47 (Iowa 1971), and the Restatement (Second) of Trusts, *Disposition of Income on Death of Life Beneficiary* §235A, at 570–71 (1959).

The issue was properly before the probate court upon the trustees’ request for direction as to “whether or not and how much of the accrued income

should be paid to Charles Martin Jordan's estate." No appearance was made on behalf of Charles' estate. But a guardian ad litem was appointed¹ here

to represent . . . any incompetent person and persons who may be under any disability interested in this estate and to represent any nonresident or unrepresented persons interested in this estate whose names are unknown, if any such there may be

The guardian ad litem filed an answer demanding protection of the rights and interests of those he was appointed to represent.

We conclude the district court erred in ruling no interested person raised a proper objection to the trustees' proposed distribution of the 2009 net income. See Iowa Code § 633A.1102(10) (defining "interested person" as "a trustee, an acting successor trustee, a beneficiary who may receive income or principal currently from the trust, or would receive principal of the trust if the trust were terminated at the time relevant to the determination, and a fiduciary representing an interested person"); *Baker v. City of Iowa City*, 750 N.W.2d 93, 98 (Iowa 2008) (noting standing means that a party must have "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of the controversy" (citations omitted)). We reverse this ruling and remand for further orders to effectuate the payment of the 2009 trust income.

B. Trust corpus. The Lotz testamentary trust terminated upon the death of Charles, the remaining life beneficiary. Lotz's will provides that upon the death

¹ We note the guardian ad litem was not appointed until March 31, 2011, *after* the date allowed by the court to file objections. Any deadline for filing objections set prior to appointment cannot stand as to the guardian ad litem. See Iowa Code § 633.40(4) (providing "the notice may direct each interested party to file the party's objections thereto in writing, if any, on or before a date certain, to be set out in the notice and to be *not less than twenty days after the day the notice is served upon the party*" (emphasis added)); see *In re Lemke's Estate*, 216 N.W.2d 186, 189–90 (Iowa 1974) (stating "due process requirements depend[] upon the facts and circumstances in each case" and concluding notice was not reasonable).

of the named beneficiaries, “I give, devise and bequeath all real estate and funds remaining in the hands of my trustee or trustees as a fund for the erection and maintenance of an old people’s home in the City of Winterset, Iowa.” In order to accomplish this charitable purpose, the trustees were directed to form a non-profit corporation and to hold the real estate “[u]ntil such time as such organization, foundation or society shall be established.” However, “[i]f in the judgment of said trustees said real estate should be sold during such period,” they were authorized to do so.

If such organization, foundation or society shall not be established as herein directed within ten years after the termination of the trusts created in Items One and Two . . . , then it is my will . . . all funds and real estate remaining in the hands of my trustees at that time be paid over to my natural heirs at law

Sharon Jordan and Dawn Giovannoni, as Lotz’s natural heirs, objected to the trustees’ proposal for the creation of the Lotz Charitable Foundation, arguing the purpose stated in the proposal was not sufficiently narrow in light of the trustor’s wishes, and asking that the court maintain the status quo for ten years to determine whether the testator’s specific purpose could be satisfied by that date.

The intent of the testator governs our interpretation of a bequest. *In re Trust Known as Spencer Mem’l Fund*, 641 N.W.2d 771, 774–75 (Iowa 2002). “The meaning accorded to the language used is to be its usual and ordinary meaning.” *Id.* We must apply these rules in deciding whether the trustees’ proposal follows Mary Lotz’s wishes.

Item Five of Mary Lotz’s will provides in pertinent part:

The *stated purposes* of such [non-profit] corporation shall be the erection and maintenance of a home in the City of Winterset, devoted to the care and residence of aged persons, without regard

to their religious beliefs or station in life, said home to be maintained without pecuniary benefit, the charges to be made to those housed therein to be based upon the businesslike determination of the costs of maintenance and upkeep thereof.

(Emphasis added.)

Article II(A)(2) of the proposed Mary F. Lotz Charitable Foundation provides:

The trustees shall make distributions of net income and principle of the Foundation, in the name of the Foundation, *for one or more charitable purposes*, including the making of distributions to one or more charitable organizations, at such times and in such amounts or proportions as the trustees, established in Article III of this instrument, shall direct; and

The primary charitable purpose of this Foundation shall be the erection and maintenance of a home in the city of Winterset, devoted to the care and residence of age[sic] persons, without regard to their religious beliefs or station in life, said home to be maintained without pecuniary profit, the charges to be made to those housed therein and based upon the business like determination of the cost of maintenance and upkeep thereof.

(Emphasis added.)

The objectors contend the language establishing the proposed foundation does not adhere to the trustor's intent. The district court concluded,

[t]he primary charitable purpose of the proposed entity is "the erection and maintenance of a home in the city of Winterset, devoted to the care and residence of age[d] persons, without regard to their religious beliefs or station in life, said home to be maintained without pecuniary profit."

. . . The Court does not believe that it is necessary to scrutinize whether the charitable entity creates a facility that is called a "care facility" or a "hospice" or "senior housing." It is not material whether the facility houses two, or twenty, or two hundred residents. As long as it provides a home, whether permanent or temporary, for elderly people in the vicinity of Winterset, it should satisfy Mary's ultimate and generous goal.

We do not disagree with these statements. The language used by the trustees with respect to the “primary charitable purpose” follows the language of Lotz’s will.

We do, however, find that the first paragraph of Article II(A)(2), which allows distributions “for one or more charitable purposes” is overly broad as it could be used to authorize the expenditure of trust funds for other than the testator’s intended primary purpose. See *Spencer Mem’l Fund*, 641 N.W.2d at 775.

We reverse the court’s ruling as to the 2009 trust income and remand for further proceedings in that regard. We remand with directions that the foundation documents be amended so as to limit the distribution of charitable trust funds for the charitable purpose described by the trustor Mary Lotz.

REVERSED AND REMANDED.