IN THE COURT OF APPEALS OF IOWA

No. 6-664 / 05-1067
Filed November 30, 2006

IN THE MATTER OF THE HAROLD J. ALLEN TRUST NUMBER THREE FOR THE BENEFIT OF KATHLEEN ELIZABETH ALLEN, CHARLES C. ALLEN, AND BRUCE H. ALLEN, Trustees,
Petitioners-Appellees/Cross-Appellants,

vs.

KATHLEEN BROOK, f/k/a KATHLEEN ELIZABETH ALLEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Palo Alto County, Don E. Courtney, Judge.

A trustee of the Harold Allen Trust Number Three appeals following a district court ruling that she could not change the trust situs to Canada. **AFFIRMED.**

Joseph A. Cacciatore, Todd R. Buchanan, and Kristi A. Traynor of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellant.

Robert M. Hogg, Patrick M. Roby, and Anna Rybicki of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellees.

Heard by Huitink, P.J., and Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.

In 1965, while a resident of California, Harold Allen created three separate trusts for the benefit of his three children, Charles, Bruce, and Kathleen. Each trust was funded at the time of his death in 1974 with an undivided one-third interest in five farms located in north central Iowa. An additional farm and an interest in a Colorado strip mall were subsequently acquired and are collectively owned by all three trusts. All three of Harold's children have acted as trustees of all three trusts since 1965 pursuant to the trust instrument; however, Charles and Bruce have conducted most of the administration.

After her marriage, Kathleen became a resident of Canada. Because she has historically incurred larger tax liability due to her Canadian residency and ownership of United States investments, Kathleen's trust has not benefited her as much as her brothers. In addition, Kathleen suffers from various health problems and has a daughter with special medical needs. Due to Kathleen's desire to reduce her tax liability and increase her cash flow, she began discussing with Bruce and Charles ways in which her trust might be reorganized to better assist her.

Pursuant to those discussions, plans were developed regarding a reorganization that would produce more liquidity for the benefit of Kathleen's trust. The trustees initially discussed selling one of the farms, but Bruce and Charles both believed this would be contrary to their father's wishes. They then discussed having Bruce and Charles resign as trustees of Kathleen's trust and allowing the successor trustees to sell the trust assets. Kathleen suggested naming her two children, also Canadian residents, to become trustees.

However, Bruce and Charles were opposed to this, believing that her children could not carry out their duties independently. Kathleen persisted with her efforts to transfer the situs of her trust to Canada.

Ultimately the relationship between the three siblings deteriorated and Bruce and Charles eventually filed a declaratory judgment action. They asked the court to determine whether the trustees could be compelled to divide the real estate interests in the three trusts into three separate shares which would require the sale of the trust assets, thus terminating the trust. They also asked the court to determine whether they were entitled to trustee fees for their efforts at managing the trusts. Kathleen later filed motions to (1) remove Bruce and Charles as trustees of her trust (2) authorize the sale of her United States real estate and (3) have a final accounting and a liquidation of the trust assets.

Following a trial, the court ruled that (1) Kathleen did not have the right to transfer the situs of her trust to Canada nor to liquidate its assets because Harold did not intend the trust assets to be partitioned, (2) Bruce and Charles were entitled to reasonable trustees' fees, (3) Kathleen should formally present her request for distribution of the trust principal to the trustees, (4) Kathleen's trust should pay the costs of the attempted reorganization, and (5) attorney fees and costs should be shared equally among the three trusts. Kathleen appeals.

Scope of Review.

We review this equity matter de novo. *In re Estate of Gearhart*, 584 N.W.2d 327, 329 (Iowa 1998). Under a de novo standard of review, we are not bound by the trial court's conclusions of law or findings of fact, although we do

give weight to factual findings, particularly when they involve the credibility of witnesses. *Id* at 329.

Trust Situs.

Kathleen seeks to "establish her right to transfer the trust situs to Canada." The district court held, and Bruce and Charles urge on appeal, that the settlor's intent would be frustrated if the situs of Kathleen's trust was moved to Canada. Because the trust agreement provides that the trust shall be interpreted pursuant to the laws of the State of California, we look to the laws of that state. The situs of a trust means "the place of performance of the trustee's active duties [and it is] determined from various factors, particularly the donor's intent and the place of administration." 90 C.J.S. *Trusts* 221, at 349-50 (2002). "In the construction of a trust agreement the intention of the trustor as expressed in the trust instrument must control." *Mummert v. Security-First Nat'l Bank of Los Angeles*, 183 Cal. App. 2d 195, 199 (1960).

Kathleen's trust states:

> Although this trust shall be interpreted pursuant to the laws of the State of California, the situs of the trust shall be that determined by Kathleen during her life, and thereafter, shall be that from time to time mutually agreed upon by the trustees.

We acknowledge that a superficial reading of this trust provision may seemingly provide Kathleen the authority to transfer the trust situs. However, when considering the whole context of the trust instrument, we agree with the district court's conclusion.

As Bruce and Charles note on appeal, the trust instrument "does not allow Kathleen to change the situs of the trust in a way that would require management

contrary to the purpose of the trust." Kathleen's proposal would break up the trusts and the farms. A transfer of the trust situs to Canada would necessarily have adverse effects on Bruce's and Charles's trusts. Such a transfer would require either a partition of the real estate or a liquidation of the trusts' assets. Harold acquired five farms during hard economic times, maintained them throughout his life, and preserved them in trusts granted to his three children. Furthermore, Harold, who was himself an experienced trusts and estates attorney, provided for the ability of Kathleen to receive part of the principal of the trust if her income from the trust was otherwise insufficient to support her. Allowing her the ability to liquidate the entire trust for her healthcare would be contrary to this provision. Also, if the trust situs was transferred to Canada, Charles and Bruce, for all intents and purposes, would have to be removed as trustees. This is clearly contrary to Harold's express intent as indicated by his naming all three children as trustees in each of their three trusts. Finally, the settlor's requirement that the trust be interpreted by California law could be thwarted if the trust situs were moved to Canada since full faith and credit would have no application. *See* 50 C.J.S. *Judgments* §1033, at 635 (1997).

Partition.

Elizabeth objects to the district court's ruling which ostensibly denies any right of partition of trust assets in the future. We do not read the ruling so narrowly. Because the court was faced with express trust provisions which were irreconcilable (named trustees vis-à-vis situs), the court considered the settlor's intent. We do not read the district court's decision to restrict a partition of trust assets to the extent contemplated in the trust instrument.

Costs of the Attempted Reorganization.

As noted, the district court ordered that Kathleen's trust be liable for all of the costs incurred in the attempt to restructure the trusts to Kathleen's benefit. On appeal, Kathleen maintains the costs should be divided equally among the three trusts because Charles and Bruce have "unclean hands." In particular, Kathleen urges that they abused their power by terminating her reorganization efforts when she refused to go along with the proposal regarding the Colorado strip mall.

The doctrine of unclean hands considers whether the party seeking relief has engaged in inequitable conduct that has harmed the party against whom he seeks relief. *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 184 (Iowa 1987). We reject Kathleen's attempt to invoke this doctrine and therefore affirm the court's allocation of costs to her trust. First, all of the reorganization efforts were undertaken with an eye toward accommodating Kathleen's financial situation and her trust. Second, no particular benefit would have accrued to the other two trusts by this reorganization. Equity is served by requiring Kathleen's trust to pay the expenses of the attempted reorganization.

Attorney Fees and Costs of the Action.

The district court ordered that the attorney fees and costs of the action should be divided equally among the trusts. In their cross-appeal, Bruce and Charles ask this court to reverse and grant them attorney fees and costs. They claim they instigated this action merely to "defend the proper management" of Kathleen's trust. Iowa Code section 633.198 (2005) gives courts the discretion to award such fees and costs. We agree with the district court that because the

expense of the litigation was "incurred to protect all three trusts" the fees and costs should be borne equally.

AFFIRMED.