

IN THE COURT OF APPEALS OF IOWA

No. 8-577 / 07-2006
Filed August 27, 2008

**IN THE MATTER OF THE FAMILY TRUST
OF KEITH WINDUS**

DELORES WINDUS,
Trustee-Appellant,

vs.

**SANDRA MCDONALD, DEBORAH PARIZEK
and BRETT WARSON,**
Beneficiaries-Appellees.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Delores Windus appeals from the district court ruling following a contested hearing on her reports as trustee of the Windus family trust. **REVERSED AND REMANDED.**

Thomas D. Hobart and Andrew J. Hosmanek of Meardon, Sueppel & Downer P.L.C., Iowa City, for appellant.

Sandra McDonald, Coralville, pro se.

Deborah Parizek, West Liberty, pro se.

Brett Warson, West Liberty, pro se.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

The appellant, Dolores Windus, is the trustee and primary beneficiary of a family trust established by her husband, Keith Windus, in his will. During Dolores's life, she is to receive the net income of the trust. In addition, the will provides that "my trustee shall pay to my spouse such sums from the principle as my trustee deems advisable for my spouse's health, education, support and maintenance."

The appellees, Sandra McDonald, Deborah Parizek, and Brett Warson, are three of Keith and Delores's daughters. At the time of Delores's death, each will receive an equal share of the trust. In June 2004, the appellees filed a petition alleging Delores had breached her fiduciary duty as trustee, and that they had an interest in a limited partnership Keith had formed decades earlier. The trial court found Delores had engaged in fraudulent conduct as trustee and ordered 110 acres placed in the trust, but denied the appellees' claim regarding the partnership interest. This court affirmed in *McDonald v. Windus*, No. 05-1276 (Iowa Ct. App. Jan. 18, 2007).

As trustee, Delores filed an "Inventory and First Report" covering the period of July 1, 2005, through June 30, 2006, and a "Second Report of Trustee" covering the period of July 1, 2006, through June 30, 2007. The appellees filed objections to the first report, alleging certain expenditures were "inappropriate and constitute[d] breaches of fiduciary duty by Delores Windus." These expenditures were disbursements to Delores of \$2700, \$46,504 to pay the attorney fees incurred in the prior litigation, \$55,664 to pay credit card debt

related to Artist's Colony, and \$6,122 to pay credit card debt related to Bridal Chalet. They also asked the court to remove Delores as trustee.

Following a hearing, the district court on November 2, 2007, entered its "Ruling on Hearing on Inventory and First Report and Second Report." The ruling states in pertinent part:

Delores has a fiduciary duty as trustee of the trust to protect the interests of her remaindermen children. In other words, it was her husband's intent that they should inherit all of the property he placed in trust for their ultimate benefit. Until she is able to demonstrate to the Court she cannot maintain her standard of living through current and projected income and her own assets, invasion of the principal of the remainder trust for her own benefit may not be authorized. In other words, the \$55,664 in personal credit card charges and the \$6,122 personal obligation for the Bridal Chalet business may not be paid for by the Keith Windus Trust principal.

Although Delores is entitled to maintain her standard of living under the terms of her deceased husband's will, she may not do so by taking property her husband intended to be inherited ultimately by their children unless absolutely necessary. Delores may not justify the invasion of trust principal by living beyond her means through excessive credit card charges. If these or even a significant amount of these credit card charges existed at the time of Keith's demise, the Court expects he would have addressed how he wanted those credit card charges to be paid, especially if he wanted Delores to be able to invade trust principal to pay them. Delores will have over \$50,000 per year net income to live on. That amount of money should enable her to pay off both interest and some principal on the credit card, Bridal Chalet, and any other debt she has incurred or incurs each year.

...

Wherefore, Delores may be reimbursed by invasion of trust principal \$23,500 only.

The court entered no ruling on the request to remove Delores as trustee.

Delores appeals. Because this case was tried in equity, see Iowa Code § 633.33

(2005), our review is de novo. Iowa R. App. P. 6.4.

We first determine the type of trust at issue. Because the principal of the trust could only be invaded if necessary for Delores's support and maintenance, the trust established was a support trust. *In re Barkema Trust*, 690 N.W.2d 50, 53 (Iowa 2004). There are two types of support trusts: (1) pure support trusts, and (2) discretionary support trusts. *Id.* at 54.

A settlor creates a pure support trust if a trustee is directed to pay or apply trust income or principal for the benefit of a named person, but only to the extent necessary to support him, and only when the disbursements will accomplish support. In contrast, a settlor creates a discretionary support trust if the stated purpose of the trust is to furnish the beneficiary with support, and the trustee is directed to pay to the beneficiary whatever amount of trust income or principal the trustee deems necessary for his support.

Id. Here, the trust allows for invasion of the principal for Delores's "health, education, support, and maintenance" as "my trustee deems advisable." As such, a discretionary trust was formed. *Id.* ("By using the words 'to the extent said trustees deem necessary,' it gave the trustees some discretion as to whether to invade the corpus.").

The appellees have an interest in the trust, which they are entitled to guard against. *Cox v. Cox*, 357 N.W.2d 304, 306 (Iowa 1984) ("Even contingent remaindermen are entitled to guard against damage to their interest."). The question is whether Delores abused her discretion by making the expenditures complained of. *Cf. Strojek ex rel. Mills v. Hardin County Bd. of Supervisors*, 602 N.W.2d 566, 570 (Iowa Ct. App. 1999) ("If a trustee abuses her discretion and violates her fiduciary duties, the beneficiary, through judicial action, may compel disbursements from the trust for minimal support."). To resolve this issue, we must turn to the intent of the testator. "The purpose of a trust governs its

administration and enforcement. The purpose is determined by examining the language of the trust instrument and the surrounding circumstances.” *Hanson v. Minette*, 461 N.W.2d 592, 594 (Iowa 1990) (citations omitted). The trust here allows the principal to be used for Delores’s “support and maintenance.” We note, contrary to the trial court’s finding, the credit card debt was incurred in 1998, prior to Keith’s death. The money was borrowed to try and salvage two businesses, Artist Colony and Bridal Chalet. If Delores had paid the credit card and attorney fee debts from her own funds in 2005 she would not have adequate funds to cover her basic living expenses.

Because the disbursement of sums from the principal of the trust was necessary for her support and maintenance, we conclude Delores did not abuse her discretion. We reverse the district court’s finding Delores may only be reimbursed by invasion of the trust principal for \$23,500 and remand for approval of the first report.

REVERSED AND REMANDED.