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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE TRUST AND UNDER THE WILL OF L.J. SPENCER, Deceased,	)	Filed August 27, 1986
	)	305
DALE AND LYLE SPENCER,	)	6-258 / 85-1686
Appellants.	)	

Appeal from the Iowa District Court for Greene County (8588) - Carl D. Baker, Judge.

Appellants challenge the trial court's order appointing corporate trust to the estate of L. J. Spencer. **AFFIRMED.**

William D. Kurth of Kurth & Bunger, Carroll, Iowa, for appellants Dale Spencer and Lyle Spencer and for Donna Spencer.

Scott D. Hillstrom of Hillstrom & Bale, Minneapolis, Minnesota, and Robert L. Horak of Horak Law Offices, Jefferson, Iowa, for appellee Harold Spencer.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J. 306

On December 28, 1972, L. J. Spencer died, survived by his four children (Harold, Donna, Lyle and Dale), thirteen grandchildren, and one great-grandchild. L.J.'s will is a long, minutely detailed and inartfully-crafted instrument. By the provisions of this will, a trust was created which included as its principle asset 800 acres of farm land located in Greene and Humboldt counties. This land involved contributions from both L.J. and his deceased wife, Fern. L.J. wished to control the living from the grave, this is evidenced by the language in the instrument that the trust should last as long as "legally possible" and by the minute details which listed specific instructions regarding the most mundane aspect of running the farm. The power of L.J. to appoint a trustee as to Fern's property was previously decided in In re Estate of Spencer, 232 N.W.2d 491 (Iowa 1975).

Initially Harold Spencer was appointed executor and given authority to act as the trustee. After the 1975 court decision the four children agreed in December, 1975, to appoint the Home State Bank of Jefferson as trustee. Two years later the three brothers made a joint application to appoint themselves as co-trustees which the court approved on January 9, 1978. Seven years later, as a result of the brothers' inability to work together, the court appointed the Brenton State Bank of Jefferson to act as interim trustee. The three brothers agreed to never reapply to become trustees again. The bank declined the position of permanent trustee because of "the continuing animosity of the beneficiaries which has now been directed at the bank." In an order entered September 13, 1985, the court gave the parties ten days to propose a successor trustee.

Appellants offered three individuals to act as trustee since they are opposed to the appointment of a corporate trustee. In the appellants' brief, filed by Dale and Lyle, they cite two provisions of the will and codicil to support this

proposition. They assert that the Last Will and Testament of L.J. Spencer, paragraph 6 at ITEM X, limits the pool of potential successor fiduciaries to individual farmers, as follows:

> Should there be a complete failure of the named Fiduciary officers to act, or to be able to act, then and in that event, the Court is to name as successor, an experienced qualified farmer, age approximately 45 to 60 years of age, who shall be possessed of all the powers given to the original fiduciary.

Additionally, they maintain ITEM II, paragraph 2 of the second codicil to the Will prohibits the appointment of a corporate trustee. This provision provides: "Under no circumstances or conditions shall the Court ever turn over the management of my farms to any incorporated Farm Management Company."

Appellee Harold Spencer supported the appointment of the corporate trustee based on the belief that such an appointment would be necessary because only would such a trustee have the strength, both structurally and financially, to manage the trust. The trial court appointed First American State Bank of Fort Dodge, Iowa, to act as the permanent trustee. Appellee asserts that the trial court was well within its discretion to appoint the bank since: it is in the best interest of all the beneficiaries; it will reduce the strife amongst the family members; and nothing in the will precludes the appointment. We agree.

In deciding the scope of review we find that actions for the removal of a fiduciary are triable as actions in equity. Iowa Code § 633.33 (1983); Estate of Lovell, 344 N.W.2d 576, 577 (Iowa Ct. App. 1983). Also a proceeding which required the Iowa Supreme Court to interpret a testamentary instrument was triable in equity and reviewable de novo. Estate of Kruse, 250 N.W.2d 432, 433 (Iowa 1977); In re Estate of Miguet, 185 N.W.2d 508, 513 (Iowa 1971).

We must first examine the full text of the will/trust that concerns our review. ITEM X of the Will of L.J. Spencer provides:

ITEM X. 308

I name as Executor of this Will my son, Harold Lee Spencer, who shall act as Trustee or Guardian, as the case may be for the purpose of carrying out the terms and conditions of my Last Will and Testament, and he shall be empowered as such to handle all money coming into the estate, trust or guardianship as the case may be, and he shall be fully empowered to rent the 640 acre tract in Greene County, the 160 acre tract in Humboldt County and in general he shall be fully authorized to do all things required or needed to carry out this Will according to its spirit and the terms thereof, and in accordance with the laws of the State of Iowa.

If for the reason my son, Harold Lee Spencer, is unable to act, then in that event I name as successor my son, Dale Elden Spencer, as successor, and if for any reason he is unable to act, I name as successor my son, Lyle Darwin Spencer, and if for any reason he is unable to act, I name as successor Verl Subbert.

I name my sons as the first Executors under this Will because I have great faith and confidence in their ability and their desire to carry out the terms of this Will faithfully and in accordance with its spirit. It is this spirit that I suggest in the management and control of the estate, that the Executor acting shall have the right to consult with his brothers, or brother, as the case may be, who shall serve in the function of aids for the purpose of counsel and advice. This is not to limit the power of the acting Executor, but is suggested in the spirit that the combined judgment of all could in many cases be advantageous to the estate.

Executors, trustees, guardians and attorneys employed by the fiduciary shall be entitled to fair and reasonable compensation for services actually performed, and to reimbursement for actual out of pocket expense incurred in the carrying out of this Will.

For the guidance of my Executors, I direct that such fees are not to be based upon any percentage basis (because the State law allows excessive fees based upon the percentage basis) and I expect and direct that the Executor shall make an advance arrangement for legal service and the fee to be paid, and shall receive such compensation himself as shall be realistic, fair, conservative and judicious and shall bear a fair relation to compensation for work actually performed. In other words, it shall be the duty of the fiduciary to see to it that the assets of the estate are truly and properly preserved and protected and that fees not be paid upon any speculative

> or percentage basis, but rather upon a compensatory basis. It is my judgment that the attorney should receive $1200.00 to $1500.00 plus out of pocket expenses, and the Executor should receive $500.00 per year plus expenses. In any event, I direct the Executor to make the best deal he can for the estate.
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> When a fiduciary officer is named herein, for any purpose, such as Executor, Trustee or Guardian, it is my Will that any person named to any capacity shall fully perform all of the functions required of fiduciary officers by whatever name designated, to carry out the terms of this Will. Each named fiduciary officer shall have all of the powers, qualifications and rights of the original fiduciary and be subject to the same qualifications as hereinafter specified as to the original fiduciary. Should there be a complete failure of the named fiduciary officers to act, or to be able to act, then and in that event, the Court is to name as successor, an experienced qualified farmer, age approximately 45 to 60 years of age, who shall be possessed of all the powers given to the original fiduciary.

Regarding the paramount intention of his estate, L.J. provided in ITEM I as follows:

> ITEM I
>
> It is my intention by the provisions hereinafter appearing in this Will, to provide for the Administration of my estate in accordance with my wishes, and especially to preserve my estate for the use and benefit of my children and their legal descendants and to provide for the legal means of carrying out my intentions. It is the paramount intention on my part to keep all my real estate intact for so long a period of time as possible, and if, for any reason, this Will should ever have to be construed by any Court, this paramount intention of mine is expressly stated in the outset of this Will for the guidance of the Court.

In this instrument there can be no doubt that L.J. used the terms executor, fiduciary officer, and trustee interchangeably. We recognize a clear distinction between the duties of a trustee and an executor. The primary distinction is that the duties of an executor, as contrasted with those of a trustee, are limited to the winding up of an estate and are temporary. Estate of Wiese, 257 N.W.2d

1, 4 (Iowa 1977). Here we are concerned solely with those laws and cases concerning the appointment of a trustee.

As a general rule all courts search for the dominant purpose of a testamentary trust and attempt to fulfill it. In re McDonough, 252 Iowa 870, 881, 109 N.W.2d 29, 35 (1961). A testamentary trust must be construed "in favor of the general or primary intent" derived from the instrument taken as a whole. In re Estate of Barnes, 256 Iowa 1043, 1054, 128 N.W.2d 188, 194 (1964).

Under the laws of Iowa the court is authorized to appoint successor fiduciaries, this authority is set forth in Iowa Code section 633.66 as follows:

> When any fiduciary fails to qualify, dies, is removed by the court, or resigns, and such resignation is accepted by the court, the court may, and if the fiduciary were the sole or last surviving fiduciary, and the administration has not been completed, the court shall appoint another fiduciary in the former's place.

In its determination of a successor fiduciary the court must be fully appraised of the duties required of the fiduciary and is not bound to recognize the nomination of the fiduciary in decedents will. In re Estate of Mackey, 197 N.W.2d 622, 624 (Iowa 1972), and In re Estate of VanVleck's, 123 Iowa 84, 92, 98 N.W. 557, 558 (1904) (both involving the nomination of an executor). Another factor to consider in the determination of successor trustee are the wishes of the beneficiaries, but the court is not bound to follow such wishes. In re Estate of Jones, 236 Iowa 563, 567, 19N.W.2d 611, 612 (1945).

The most rationale guidelines, and the ones followed by this court, are set forth in Restatement (Second) of Trusts, section 108 (1959), which provides:

> If a trust is created and there is no trustee or if the trustee, or one of several trustees, ceases for any reason to be trustee, a new trustee can be appointed
>
> (a) by a proper court; or
>
> (b) by the person, if any, who by the terms of the trust is authorized to appoint a trustee.

"The court in exercising its discretion in appointing a new trustee will have regard to (1) the intention of the settlor; (2) the interests and wishes of the various beneficiaries; and (3) the promotion of the proper administration of the trust." Restatement (Second) of Trusts § 180, comment (d) (1959) (these standards fully adopted in Iowa, In re Estate of Jones, 236 Iowa at 567, 19 N.W.2d at 612)). We found further support for these criteria in 90 C.J.S. Trusts § 217(e) (1955), which provides in pertinent part:

> The appointment of a fit and proper person is a matter largely within the discretion of the court. It is not, however, an arbitrary discretion, but is subject to well known and clearly defined rules. In the selection of a trustee the court should consider all factors bearing on the matter, such as the intention of the settlor, the interest of the estate and beneficiaries, and the rights of the parties. [footnotes omitted]

Estate of Hodyen v. Sproul, 221 Iowa 1104, 1108-09, 267 N.W. 692, 695 (1936) (more recently cited in In re Jackson's Will, 291 S.W.2d 2A. 226 (Mo. Ct. App. 1956)).

There is no question but that L.J.'s controlling intent was to keep this real estate intact for as long a period as possible. Appellants contend that L.J.'s instructions regarding the appointment of a successor trustee control. Regarding the limitation found in the second codicil, forbidding the court from turning over L.J.'s farms to an incorporated farm management company, we conclude that the First American State Bank of Ft. Dodge does not fall within this prohibition. However, we find ITEM X provides the criteria that L.J. wanted the court to use in selecting a fiduciary. The trial court did not abuse its discretion in not following these criteria. In interpreting the settlor's intent, we must view the record as a whole. In re Barnes Estate, 256 Iowa at 1049, 128 N.W.2d at 191. As mentioned, the continued existence of the farms was L.J.'s major concern. The trial court considered the appointment of a corporate trustee

necessary for the survival of the trust. Clearly the intentions of L.J. were manifested more perfectly by maintaining this paramount intention above the request that certain criteria be considered in choosing a fiduciary.

There is a split among the beneficiaries. On one hand appellants (Dale and Lyle) contend that the elements set forth in ITEM X should be followed. On the other hand appellee (Harold) concurs with the court and asserts that the trust can only continue to exist if controlled by a corporate trustee. The desires of the beneficiaries are but one factor to consider. The trial court, in its discretion, determined the only way to insure the continued existence of the trust was through the appointment of a corporate trustee.

The final element which the court was required to consider was the proper administration of the trust. As pointed out in appellee's brief, the qualifications of the bank have never been questioned. The trial court concluded only a corporate trustee could avoid the influence and manipulation of the beneficiaries, and provide continuity in the management of the trust. This conclusion not only provides for the proper administration of the trust, but it also serves the dual purpose of effectuating settlor's intention regarding the continuing existence of the trust.

After weighing the factors, as provided in Restatement (Second) Trusts § 180, comment (d) (1959), we conclude the trial court was well within its discretion in appointing First American State Bank as trustee.

Finally, appellants contend that we should address the issue of whether ITEM II of the second codicil limits the term of a court-appointed fiduciary to a ten-year period. We conclude this issue is prematurely presented and do not address it.

AFFIRMED.