FILED
MAR 29 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JUDITH MARLENE MANTZ and CLINTON HOMER MANTZ

Upon the Petition of	)	
JUDITH MARLENE MANTZ,	)	Filed March 29, 1979
Appellee,	)	
And Concerning	)	448
CLINTON HOMER MANTZ,	)	2-60632
Appellant.	)	

Appeal from Boone District Court - R. K. Richardson, Judge.

Appeal from declaratory judgment construing a child support trust established in a marriage dissolution decree between the parties. Affirmed.

Jerry L. Jones, of Ames, for appellant.

L. W. Courter, of Doran, Doran and Courter, of Boone, for appellee.

Submitted to Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Clinton Mantz appeals from the ruling of the trial court in a declaratory judgment action for construction of a child support trust established in a marriage dissolution decree between the parties.

The decree of dissolution between the parties was entered December 16, 1974, and in a supplemental decree of February 6, 1975, the court made provision for child custody, child support, and division of property. As part of the property division, Clinton was to pay Judith $50,000. Of this sum, $30,000 was to be paid within 15 days and the remaining $20,000 in annual installments of $5000.

On June 17, 1975, the parties presented to the court a proposed modification to the prior supplemental decree whereby, in lieu of the $20,000 to be paid Judith in installments, Clinton would establish a higher-education trust for the two minor children of the parties with a corpus of $20,000. This proposed modification of the decree was approved by the trial court and the proposed trust was confirmed by court order. Pertinent provisions of the written trust agreement included the following:

* * *

> 3. Powers and duties of Trustees. Trustees hereunder shall have the following rights, duties, powers, privileges, immunities and exemptions: (a) Investment power. The trustees shall have all of the powers granted under [Sic] Trustees under the laws of Iowa. The Trustees may retain any investment or property originally received by it hereunder, and in addition to powers of investment authorized under the Iowa statutes, the Trustees are authorized to invest or reinvest any part or all of the trust principal, and any income not required for the objects and purposes of the trust, in such investments as a reasonable prudent person might make of his own funds, considering the safety of principal and a reasonable return for the investment thereof, not for speculation, but as the permanent disposition of their funds, and to retain any such investment.
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> 5. Beneficiaries. This trust is created for the use and benefit of Grantor's two children, namely Kalene Mantz, born January 20, 1967, and Karla Mantz, born July 31, 1970.
>
> 6. Purpose of Trust. The purpose for which this Trust is created is to provide a fund out of which shall be paid at times and in amounts to be determined in the sole discretion of the Trustee, some or all of the costs of the higher education (as hereinafter defined) of some or all of the Grantor's two children named hereinabove.

7. Distribution of Income. The net income earned by said Trust shall be paid in monthly installments to Judith Marlene Mantz.

8. Distribution of Principal. the principal of the Trust Estate shall be distributed solely for the purpose of defraying some or all of the costs of the higher education of Grantor's children. The amounts of, and the time and manner of making, such distributions and the child or children of the Grantor for whose benefit such distributions are made, shall be determined in the sole uncontrolled and absolute discretion of the Trustees.

* * *

11. Termination of Trust. This Trust shall terminate when the Trust Estate has been totally distributed under paragraph 8 above, provided that the Trustees may terminate this Trust at any time if, in their considered judgment, there is no reasonable probability that any of the Grantor's children will thereafter pursue any form of higher education, the costs of which might otherwise be paid in whole or in part out of the Trust Estate. If this Trust has not been theretofore terminated under the foregoing provisions of this paragraph it shall in any event terminate July 31, 1991.

Upon termination, any remaining assets in the trust were to be divided equally between the two children of the parties.

On March 2, 1976, the decree was again modified by joint request of the parties, approved by the trial court,so as to add to paragraph 7 of the higher-education trust the following additional provisions:

> That said net income shall be taxable to Judith Marlene Mantz. That as long as custody of Karla Mantz and Kalene Mantz remains with Judith Marlene Mantz, an itemized accounting will will not be required. Judith Marlene Mantz will provide to the Corporate Trustee a signed statement at the end of every calendar year that the trust income has been expended for the general use and benefit of Karla Mantz and Kalene Mantz. That said statement would not be challenged unless specific good cause can be shown.[1]

I. In the present declaratory judgment proceeding, Clinton asks for a decree construing the trust in such a manner as to confirm the right of the corporate trustee to limit expenditures from trust income to such amounts as it determined, in its sole discretion, to be necessary for the use of the two children. The trial court construed

[1] In its written ruling and declaratory judgment the trial court makes reference to an earlier modification to paragraph 7, sometime prior to the one approved by the court on March 2, 1976. The record is otherwise silent as to any such prior modification, which apparently never received court approval. We therefore give it no consideration in deciding this appeal.

the instrument as providing for payment of all the net income of the trust to Judith. The matter being in equity we review the record de novo. Rule 4, Rules of Appellate Procedure. With slight amplification we affirm the trial court.

II. Clinton bases his proposed construction of the trust upon the provision of paragraph 3(a) that "any income not required for the objects and purposes of the trust" may be invested along with the principal. He urges that this provision clearly anticipates the retention of some of the income. Whatever implications this language might have standing alone, it cannot override the explicit directive of paragraph 7 of the trust that the net income be paid to Judith in monthly installments. Where there are both general and specific provisions in a written instrument involving the same subject matter the specific provision must be deemed controlling. Mopper v. Circle Key Life Ins. Co., 172 N.W.2d 118, 126 (Iowa 1969); Small v. Ogden, 259 Iowa 1126, 1131, 147 N.W.2d 18, 21 (1966); Schlosser v. Van Dusseldorp, 251 Iowa 521, 526, 101 N.W.2d 715, 718 (1960).

We thus conclude that the trial court correctly adjudicated and declared Judith's right to monthly payments of all of said net income. In addition, we hold by way of amplification of said declaratory judgment that all of said net income must be expended by Judith for "the general use and benefit" of Karla and Kalene. Such requirement shall continue throughout the duration of the trust. While both Karla and Kalene are in Judith's custody she need not account for said expenditures other than by providing the corporate trustee with the annual statement described in paragraph 7, as amended.[2] If and when Judith ceases to have custody of both girls she shall nonetheless continue in the same manner to receive the net income of the trust, shall continue to expend it for the general use and benefit of both girls, and, in addition, shall be required to account for such expenditures to the corporate trustee. If the corporate trustee is not satisfied with such accounting any differences shall be resolved by the district court on notice to all interested parties.

[2] Said statement may be challenged by the corporate trustee only for "specific good cause." Any such challenge must be determined by the district court on notice to all interested parties.

III. We further hold that Clinton has failed to establish grounds for Judith's removal as a co-trustee and that the trial court correctly refused to grant such request.

IV. The subject litigation being ancillary to and not a part of the original marriage dissolution proceeding, we deem an allowance of attorney fees on appeal to be inappropriate. See In re Marriage of Havener, 249 N.W.2d 670, 671 (Iowa 1976); Dworak v. Dworak, 195 N.W.2d 740, 743 (Iowa 1972). We therefore deny Judith's request that such fees be assessed against Clinton.

As herein amplified the judgment and decree of the trial court is affirmed.