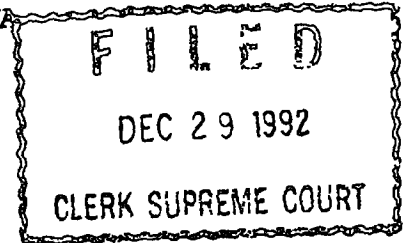


IN THE COURT OF APPEALS OF IOWA

No. 2-534 / 92-188

IN THE MATTER OF THE ERNEST L. MILLER TRUST
DATED AUGUST 31, 1946



SHRINER'S HOSPITAL FOR CRIPPLED CHILDREN;
YOUNG MEN'S CHRISTIAN ASSOCIATION OF CLINTON, IOWA;
YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF CLINTON, IOWA;
MISSISSIPPI VALLEY GIRL SCOUT COUNCIL, INC.; and
JEANNE SANDERS and ARLISLE GRAY,

Appellants.

Appeal from the Iowa District Court for Clinton County,
Margaret S. Briles, Judge.

This case concerns an interlocutory appeal from a
partial summary judgment interpreting the provisions of the
Ernest Miller Trust. **AFFIRMED.**

Edward N. Wehr of Wehr, Berger, Lane & Stevens,
Davenport, for appellant Shriner's Hospital.

Michael M. Judge of Petersen, Petersen & Eddy, Clinton,
for appellants YMCA and YWCA.

Henry G. Neuman of Betty, Neuman & McMahon, Davenport,
for appellant Girl Scouts.

Dorothy A. O'Brien of Noyes, O'Brien, Gosma & Brooke,
Davenport, for appellants Sanders and Gray.

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellees Carol Runquist, Ernest L. Miller, Edison W. Miller, Marie Rockrohr, Margaret Shumake, and Roy Earl Miller.

Steven E. Mayer of Mayer, Mayer, Lonergan & Rolfes, Clinton, for appellees Mt. St. Clare College and Clinton Women's Club Foundation.

William C. Davidson of Lane & Waterman, Davenport, for appellee Clinton Community College.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ. Schlegel, J., takes no part.

SACKETT, J.

The issue in this interlocutory appeal is the extent of the powers given by a settlor of a trust under a power of appointment. We affirm the decision of the trial court granting a partial summary judgment and construing the extent of these powers.

Appellants, Shriner's Hospital for Crippled Children, Young Men's Christian Association of Clinton, Iowa, Young Women's Christian Association of Clinton, Iowa, Mississippi Valley Girl Scout Council, Inc., and Jeanne Sanders and Arlisle Gray, are charities and persons named in a trust instrument made by Ernest L. Miller dated August 31, 1946. Appellants were also designated as beneficiaries under the power of appointment given in the instrument to Margaret B. Miller-Kolarik. Appellees, Ernest L. Miller Trust, Carol Machael, Paul E. Pfeffer, and Chris E. Fenimore for Clinton National Bank, Trustees, Mt. St. Clare College, Clinton Community College, Clinton Women's Club Foundation, Boys' and Girls' Clubs of America, Visiting Nursing Association, Estate of Margaret Kolarik, Carol Runquist, Ernest L. Miller, Edison W. Miller, Marie Rockrohr, Margaret Shumake, Elsa Brule, Roy Earl Miller, Ernest Randall Miller, III, and the State of Iowa, are persons and charities not specifically named in the trust instrument and designated as beneficiaries under the power of appointment given in the instrument to Margaret B. Miller-Kolarik.

The trustees of the trust filed an application for a declaratory judgment to have the court give them direction in administering and distributing the trust assets and income. Ultimately, issues were submitted to the trial court by way of motions for summary judgment. The trial court ruled on the motions and appeals were taken. There are no objections to the procedure of deciding the matter on motion for summary judgment; rather, the objections on appeal are to the ruling made by the trial court on the motion for summary judgment.

Ernest L. Miller was an attorney who practiced law with his niece Margaret B. Miller-Kolarik. Ernest was married to Elsie L. Miller. Ernest and Elsie had no children. On August 31, 1946, Ernest executed the trust instrument in question. Ernest was the settlor of the trust and his wife Elsie and his niece Margaret were named co-trustees. The trust was to terminate and the corpus in the trust was to be distributed when the last of the two co-trustees died. Ernest died in 1952, Elsie died in 1972, and Margaret died in 1991.

The trust agreement, which was divided in twenty paragraphs, first commenced with an assignment of assets to the trust and then provided directions for management of the trust and collection of income. The trust agreement further provided the income from the trust should be paid to Ernest during his lifetime. The instrument provided on Ernest's

death that certain stock should be assigned to Glenn Cousins, if he were living, and certain other payments were to be made to Ernest's wife Elsie; Margaret was to receive \$50 a week, and Ernest's dog Trinal was to be maintained. The instrument then directed that surplus income be paid in differing shares to a number of persons if they be living and to designated charities. The persons who, if living, were to receive income from the trust included Ernest's wife Elsie, Ernest's niece Margaret, Arlisle M. Gray, Ernest R. Miller, Roy Barrett Miller, Jeanne M. Sanders, the children of Eugene M. Ryder and Glenn T. Cousins. It further provided for a sum to be paid for the support, maintenance or education of such person or persons as the trustee or trustees, in her or their absolute discretion, may from time to time select. The income was also to go to the Clinton Community Federation or similar organizations serving the same purposes, The Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America; Father Flanagan's Boys' Home, Inc., Young Men's Christian Association of Clinton, Young Women's Christian Association of Clinton; Clinton Council of Boy Scouts of America; the Clinton Council of Girl Scouts, the Clinton Humane Society of Clinton and Near East Foundation. When Elsie no longer was living or qualified to take income, income was to be paid to the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America for the use of the Shriner's

Hospitals for Crippled Children, Father Flanagan's Boys' Home, Inc., and the Visiting Nursing Association of Clinton.

The trust agreement contained the following directions for ultimate disposition of the trust:

Paragraph 20. . . . the trust or trusts herein established shall terminate, and the trustee or trustees shall thereupon pay, transfer, distribute or assign the corpus of said trusts together with the accumulated income if any for such purpose or purposes or to such person or persons as my niece, Margaret M. Kolarik, shall by instrument in writing or by her will provide; provided, however, that no distribution of any of my estate shall be made to any person not named herein. "Person" as herein used shall not be construed to mean any charitable organization not mentioned herein or any child of any of my nieces or nephews not mentioned by name herein.

Margaret exercised a power of appointment in 1965 and named two charities as beneficiaries of fifty percent of the trust. Five of those charities named in the power of appointment were not named in the trust instrument, namely Mount St. Clare College of Clinton, Clinton Community College, Associate Benevolent Society of Clinton, Iowa, Boys' Clubs of America and Clinton Women's Club Foundation.

Fifteen nieces and nephews or great-nieces and great-nephews were named to share in the other fifty percent.

The trial court in ruling on the motion for summary judgment basically affirmed Margaret's actions in exercising the power of appointment. The trial court found:

In construing the trust instrument, all the parties agree that the decision must be made based

entirely upon the document itself. The Court does not find the question difficult to answer. The operative language begins as follows: ". . . provided, however, that no distribution of any of my estate shall be made to any person not named herein." There is no dispute in this case over the meaning of the section just quoted. Everyone agrees that, if nothing else appeared, this clause provided that it is required that the distribution of the estate be made to the persons named in the trust. Immediately thereafter, however, the trustor defines the term "person" as used in the preceding clause. The only reason for imposing a definition of the term "person" is to make some qualification in regard to the clause which provided that the distribution of the estate to be made by the power of appointment must be made to persons named therein. This next sentence provides that the term "person" as used in the restriction upon the exercise of the power of appointment, does not include any charitable organization not named nor any children of nieces and nephews not named. The Court interprets this as meaning that the restrictions imposed upon the word "persons" in the first sentence does not include unnamed charitable organizations nor unnamed children of any nieces or nephews. In interpreting the definition provided by the trustor of the term "person," the Court believes that the concluding phrase, "or any child of any of my nieces or nephews not mentioned by name herein," should be interpreted by providing that the qualifying phrase, "not mentioned by name herein," qualifies any child of any of my nieces or nephews. It does not qualify just nieces or nephews as used in that phrase. In conclusion then, it is the construction of Paragraph 20 that Margaret Kolarik could name any child of any niece or nephew, whether or not the child or the niece or nephew were mentioned or named in the trust, and in that respect, her exercise of power of appointment with respect to the individuals named is proper under the trust, if Paragraph 20 gave her the power to appoint her adopted children.

The question is whether the language of Paragraph 20 does more than limit the class of eligible beneficiaries. Appellants contend any charities not mentioned in the original instrument are excluded from taking. Appellees

contend Paragraph 20 limits the class of eligible beneficiaries to charitable organizations and persons mentioned in the will plus any other charitable organizations and any child of any of Ernest's nieces or nephews not mentioned in the original trust instrument. That is, that "person" as herein used shall not be construed to mean any charitable organization not mentioned herein or any child of any of my nieces or nephews not mentioned by name herein," provided an exception to the provision that "no distribution of any of my estate shall be made to any person not named herein."

The general rules of construction apply to trusts. In re Work Family Trust, 260 Iowa 898, 901, 151 N.W.2d 490, 492 (Iowa 1967). In construing the trust agreement we look to find Ernest's intent. To do so we look at all the language in the trust agreement and the circumstances that existed when it was executed. See In re Trust of Killian, 459 N.W.2d 497, 499 (Iowa 1990); First Nat'l Bank of Dubuque v. Mackey, 338 N.W.2d 361, 363 (Iowa 1983); In re Estate of Noe, 195 N.W.2d 361, 364 (Iowa 1972); In re Estate of Kraft, 186 N.W.2d 628, 631 (Iowa 1971).

The focal question is whether the definition of person is an exception to the limitation or an attempt to restate what the earlier clauses provide. We agree in total with the trial court's findings on this issue and affirm.

In reaching our decision, we have also noted it is clear from the trust instrument that Ernest gave Margaret broad discretion. Paragraph 12 provided that Margaret had the power of appointment to direct the income from the trust should she die. It provided, "Upon the death of Margaret M. Kolarik, the net income from said trust fund to which she would have been entitled under the provisions of Par. 10 hereof, if living, shall be paid to such person or persons, for such purpose or purposes, and in such manner as she will . . . appoint" The co-trustees in Paragraph 10 were given power to give ten percent of the income for support, maintenance or education of such person or persons as the trustee or trustees, in her or their absolute discretion, may from time to time select. This was similar to power given in Paragraph 13 giving the trustee the power to give money for education, support or maintenance to such boys and girls as "in the judgment of the trustee are deserving;" and providing the trustee could make educational loans and providing "giving to the trustee the absolute power to select the persons to be educated and the institutions of learning in which they are to receive such education, as fully and completely as I could do if living." Additionally, Margaret was given broad power to allocate principal and income, make investments and generally carry on the business of the trust.

This all evidences an intent of the settlor to give Margaret very broad powers, and is consistent with the trial court's interpretation of Paragraph 20.

An issue was raised in one appellant's brief on the issue of Margaret's exercising the power in favor of her adopted children. The trial court determined this was a matter on which evidence was disputed or has not been established and the trial court did not make a determination as to that matter in its ruling. This is an interlocutory appeal. We address those issues ruled on by the trial court. These issues must first be developed at the trial court level.

We affirm the trial court.

AFFIRMED.