FILED
JAN 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-622 / 93-552

**IN THE MATTER OF THE ESTATE OF DOROTHY RAGAN, Deceased,**

**JON V. TIFFANY, BRIAN F. TIFFANY, VAUGHAN R. TIFFANY, and GORDON D. TIFFANY,**

Appellants.

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Appeal from the Iowa District Court for Greene County, Gary L. McMinimee, Judge.

The appellants challenge a ruling of the district court refusing to appoint one of the appellants and his father as trustees of a trust. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Marlyn S. Jensen, Osceola, for appellants.

John C. Powell and Susan S. Logsdon of Shirley, Smith, Shirley & Powell, Perry, for appellee trust beneficiary Donna Tiffany.

Richard T. Jordan of Jordan, Mahoney & Jordan, Boone, as executor for the estate of Dorothy Ragan.

Heard by Hayden, P.J., and Sackett J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

**SACKETT, J.**

John F. Tiffany and Brian F. Tiffany were appointed as trustees of a trust established for Donna Tiffany under the will of decedent Dorothy Ragan. Donna is John's wife and Brian's mother. The trial court refused to appoint John and Brian as trustees and they appeal. Four of the six children of John and Donna join this appeal contending they were not given notice of the hearing and they did not have an opportunity to be heard. We reverse and remand for further proceedings consistent with this opinion.

In a will drafted in 1975, Dorothy Ragan gave one-half of her estate to a trust for her daughter, Donna. The trust was to continue for Donna's lifetime unless the trustees determined Donna capable of handling the assets at which time the trustees could terminate the trust and deliver the assets of the trust to Donna. If the trust were in existence when Donna died, the assets remaining in the trust were to be divided among Donna's children if they were twenty-one and if Donna's children were not, the property was to remain in trust until they were. On October 11, 1991, Dorothy made a second codicil to her 1975 will changing for the second time the trustees named in her will and nominating John, Donna's husband, as trustee and if John were unable to serve, then Brian, John and Donna's son, was to serve. Dorothy died on January 21, 1992. Her will was admitted to probate and Dorothy's second daughter and Dorothy's attorney were qualified as executors of Dorothy's estate.

For Dorothy's estate to be closed it was necessary that the trustee of the trust be qualified. On June 19, 1992, John and Brian filed an application to appoint themselves co-trustees. Donna resisted their application asking a financial institution or a non-family member be appointed trustee. She requested if John and Brian were appointed they be required to post bond.

This appeal is brought by the named trustees and four of Donna's six children. Donna's children are Jon V. Tiffany, Brian F. Tiffany, Vaughan R. Tiffany, Gordon D. Tiffany, Pollyann M. Tiffany, and Jane A. Tiffany Duffy. Vaughan moved to continue the proceedings to give him adequate notice. His motion was denied. Pollyann appeared as a witness in the proceedings.

According to Donna's testimony John, her husband, and Brian both live with Donna at Route 1, Jefferson, Iowa. John also uses another Iowa address and a Wyoming address.

The district court found John and Brian unsuitable trustees either individually or together. The court also found even if they were found fit to serve, they should not because of the acrimony that existed among John, Brian, and Donna and Donna's children's interests would be in direct conflict with Donna's.

The fact there may be a conflict between Donna and the children does not disqualify the trustees named in Dorothy's will. The conflicting position is not of the proposed trustees making but was created by the provisions

+f Dorothy's will. Where the settlor of a trust knows of a potential conflict of a trustee, yet appoints him or her, the conflict will not ordinarily be a ground for removal. See Schildberg v. Schildberg, 461 N.W.2d 186, 191-92 (Iowa 1990); see also Harvey v. Leonard, 268 N.W.2d 504, 516 (Iowa 1978).

The fact John F. Tiffany may not be a resident of the state of Iowa does not preclude his being issued letters of appointment as trustee.

Iowa Code section 633.64 provides the court may appoint:

> [A] natural person who is a nonresident of this state and who is otherwise qualified under the provisions of section 633.63, provided a resident fiduciary is appointed to serve with such nonresident fiduciary; and provided further that the Court, for good cause shown, may appoint such nonresident fiduciary to serve alone without the appointment of a resident fiduciary.

The trial court found six reasons for not naming John as trustee. These included the facts that Donna's children resented her and that her alcoholism had created an antagonistic relationship with her husband. These facts obviously were known to the decedent when, short months before her death, she named John as trustee.

Dorothy had the right to name the person or persons who would administer her estate after death. The court is not bound to accept her nomination and has discretion in the matter. In re Estate of Schneider, 224 Iowa 598, 602, 277 N.W. 567, 570 (1938). But when a person is named a

fiduciary in a will it is presumed that in the judgment of the testator he or she possessed a special fitness for the discharge of the trust and the reason he or she is named is because the testator wished that he or she, not someone else, should assume the duties. Id. The person named in a will as a fiduciary should be appointed absent most persuasive reasons to the contrary. See In re Estate of Swanson, 239 Iowa 294, 301, 31 N.W.2d 385, 389 (1948). The mere wishes of the heirs or beneficiaries are not sufficient to refuse to appoint that person designated in the will. Id.

Donna has an alcohol abuse problem and Dorothy's will evidences a clear intent Donna be regulated in the disposition of her inheritance and, if she is not, it be preserved for her children. Furthermore, the named trustee is given full authority to determine whether the money would be given directly to Donna. In determining the issue, we have an obligation to look to the intention of Dorothy in directing the creation of the trust. The language of the will created the trust. See Hanson v. Minette, 461 N.W.2d 592, 594 (Iowa 1990). We look to the language of the will, the scheme of distribution, and the facts and circumstances surrounding the document's execution. First Nat'l Bank v. Mackey, 338 N.W.2d 361, 363 (Iowa 1983); see also Eldred v. Merchants Nat'l Bank, 468 N.W.2d 221, 223 (Iowa 1991).

The codicil naming the trustees was of recent origin and involved family relationships of which Dorothy was aware. It is clear Dorothy's intent was she wanted her daughter's share monitored and given to her only under special circumstances and otherwise secured. The discretion given to the trustee is substantial. John and Brian, according to Donna's own testimony, live with Donna and would be aware of Donna's condition and needs.

The children of Donna were necessary parties to any proceedings to remove the trustees named in the will. Donna argues notice on the children was not necessary because she is the beneficiary of the trust and the children only have an interest if the trust is in existence when Donna dies. The children's possible interest is totally contingent on the trustee's discretionary decision to or not to distribute the assets in the trust to Donna. Donna's children have an interest in naming the trustee as long as the trust is in existence. The matter should not have proceeded to hearing without Donna's children being notified of the hearing and having had an opportunity to be heard.

The issue of John and Brian's honesty and ability to manage and account for money are relevant to a determination of whether they should be named as trustees. John and Brian contend because of the nature of the proceeding they did not have adequate opportunity to present evidence on these issues because of the manner the

matter proceeded to hearing. We have set the order appealed from aside and are remanding and, therefore, we need not address whether the matter was properly before the district court and do not do so. John and Brian will have ample opportunity to advance evidence on rehearing as to their fitness as trustees.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**