

STATE OF MICHIGAN
COURT OF APPEALS

In re JOHN KOTSONIS IRREVOCABLE
FAMILY TRUST.

RONALD J. ZADORA, TRUSTEE,

Petitioner-Appellee,

UNPUBLISHED
November 20, 2007

v

No. 273265
Oakland Probate Court
LC No. 2006-303574-TV

DR. DINO F. KOTSONIS,

Respondent-Appellant,

and

JOHN KOTSONIS,

Amicus Curiae.

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right the probate court's order granting petitioner permission to change the beneficiary designation of a life insurance policy owned by the John Kotsonis Irrevocable Family Trust ("Trust") and removing him as a beneficiary of the Trust. We affirm.

Respondent claims that the probate court erred in granting petitioner permission to change the beneficiary of the life insurance policy from the Trust to the beneficiaries of the Trust except him. The probate court granted such permission to petitioner because it found that petitioner, in seeking its permission, acted in good faith and with proper authority.¹ We review a

¹ Although the probate court stated, at the hearing on petitioner's petition to approve trustee action, that it was granting the petition because "the father should have a right to change the [T]rust," it is well established that a court speaks through its written orders. *Rinas v Mercer*, 259 Mich App 63, 71; 672 NW2d 542 (2003). Accordingly, we review for clear error the factual findings made by the probate court in its written order granting the petition.

probate court's factual findings for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A factual finding is clearly erroneous if, although there is evidence to support the finding, we are left with a definite and firm conviction that a mistake has been made. *Id.*

To determine the powers and duties of a trustee, one must look to the trust agreement. *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983). In the present case, the John Kotsonis Irrevocable Family Trust Agreement ("Trust Agreement") granted petitioner the authority to change the beneficiary designation of the life insurance policy. Courts will not interfere with a trustee's exercise of his discretion unless the trustee has abused his discretion or has misinterpreted the trust agreement. *In re Sykes Estate*, 131 Mich App 49, 54; 345 NW2d 642 (1983); 2 Restatement Trusts, 3d, § 50(1), p 258. Respondent has failed to convince us that petitioner abused his authority or misinterpreted the Trust Agreement.

First, petitioner's request to change the beneficiary designation of the life insurance policy was not against the plain language of the Trust Agreement. The change in the beneficiary designation was a distribution. A trust distribution is defined as "[t]he cash or other property paid or credited to a trust beneficiary." Black's Law Dictionary (8th ed). The change in the beneficiary designation credited the death benefits payable under the life insurance policy to the new beneficiaries of the policy. See *Random House Webster's College Dictionary* (1991), which defines the term "credit," in part, as "a sum of money due a person." When the grantor of the Trust, John Kotsonis, dies, the death benefits payable under the life insurance policy are due the policy's beneficiaries. In addition, because the Trust, rather than respondent, was the initial designated beneficiary of the life insurance policy, respondent was not removed as a beneficiary of the Trust.

Second, although a trustee abuses his discretion when he acts from an improper motive, such as a dislike or disapproval of a beneficiary, *In re Childress Trust*, 194 Mich App 319, 324 n 2; 486 NW2d 141 (1992), there is evidence in the record to support a conclusion that petitioner was acting from a desire to preserve the Trust property. A trustee is charged by law with a duty to preserve the trust property. *In re Rosati Trust*, 177 Mich App 1, 5; 441 NW2d 30 (1989). Before petitioning the probate court for permission to change the beneficiary designation of the trust-owned life insurance policy, petitioner investigated the options of surrendering the life insurance policy or converting it to a paid-up policy. Petitioner stated that neither of those options was acceptable to him because, under either option, much of the \$1,000,000 death benefits payable under the life insurance policy, from a minimum of \$474,218 to a maximum of \$865,480, would be lost for the beneficiaries. Petitioner further stated that he sought permission to change the beneficiary designation so that the grantor would continue to pay the annual premium and so that the entire death benefits of \$1,000,000 would be maintained. Accordingly, the evidence supports the conclusion that petitioner was acting upon his duty to preserve the trust property rather than out of a dislike for respondent.

Third, the Trust Agreement did not require petitioner to treat all of the Trust beneficiaries equally. It specifically authorized petitioner to make distributions in "equal or unequal proportions" as he believed desirable for their "health, support in reasonable comfort, education, best interests, and welfare." Moreover, petitioner was not required to investigate the unknown assets of the Trust beneficiaries before making a distribution. The Trust Agreement only required petitioner to consider the known assets of the beneficiaries before he made a

distribution. See 2 Restatement Trusts, 3d, § 50, comment e, p 269-271, which indicates that the general rule, that a trustee is to consider a beneficiary's resources before making a distribution, only applies when there is no applicable provision in the trust agreement or the grantor's intent would be better served by not doing so. Because the Trust Agreement granted petitioner the specific authority to change the beneficiary designation of the life insurance policy and respondent has failed to convince us that petitioner abused his discretion or misinterpreted the Trust Agreement, we affirm the probate court's order granting petitioner permission to change the beneficiary designation of the life insurance policy. The trial court's factual findings that petitioner acted in good faith and with proper authority were not clearly erroneous. *In re Bennett Estate, supra*.

Respondent also claims that the probate court erred in removing him as a beneficiary of the Trust. A court may act in opposition to the provisions of a trust agreement when it is necessary to preserve the trust property or to protect the rights of the beneficiaries. *Evans v Grossi*, 324 Mich 297, 305; 37 NW2d 111 (1949). In addition, the equitable deviation doctrine permits a court to modify or deviate from an administrative or distributive provision of a trust agreement "if[,] because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust." 2 Restatement Trusts, 3d, § 66(1), p 492. The purpose of the equitable deviation doctrine is to give effect to what the grantor's intent would have been had the circumstances been foreseen or anticipated. *Id.* at 493.

The life insurance policy was the Trust's only significant asset. Thus, when the probate court granted petitioner permission to change the beneficiary designation of the life insurance policy, respondent was no longer entitled to receive any assets from the Trust when the grantor died. However, respondent maintained his *Crummey*² right of withdrawal. Thus, if the grantor contributed money to the Trust in order to allow petitioner to pay the annual premium, respondent could prevent petitioner from paying the annual premium by exercising his *Crummey* right of withdrawal. Accordingly, even though respondent was not a beneficiary of the life insurance policy, he, by remaining a Trust beneficiary, could thwart petitioner from maintaining the life insurance policy and its payable death benefits of \$1,000,000. Therefore, removal of respondent as a Trust beneficiary was necessary to maintain the Trust property. The grantor averred that the deterioration in his relationship with respondent was unexpected and that, had the deterioration been foreseen, he would not have named respondent as a beneficiary of the Trust. Under these circumstances, the trial court did not clearly err in finding that it was appropriate to remove respondent as a beneficiary of the Trust. *In re Bennett Estate, supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

² *Crummey v Comm'r of Internal Revenue*, 397 F2d 82 (CA 9, 1968).