

distribution. After hearing arguments on the minors' motion to reconsider, the court vacated the order authorizing the creation of irrevocable trusts and directed the guardian *ad litem* (GAL) to work with counsel to formulate an agreed order of direction to a corporate trustee in Madison County, Illinois, to hold the funds to be distributed to the minors for their benefit. On appeal, the executor contends that the circuit court erred in vacating its order granting her leave to create irrevocable trusts for the minors, and in substituting its judgment for that of the testator, as expressed in the will, by directing the GAL and counsel of record to formulate an agreed order of direction to a local corporate trustee. We reverse and remand.

¶ 3 The testator, Gilbert L. Rutman, passed away on December 16, 2008. He had been a resident of Madison County. The testator was preceded in death by his wife, Valerie Rutman, and an adult son, Andrew Rutman. He was survived by his other adult son, Michael Rutman, and two minor grandchildren, Nicole Rutman and Kaitlyn Rutman. Nicole and Kaitlyn (the minors) were the twin daughters of Andrew Rutman and his ex-wife, Felicia Hilaski. The minors resided with their mother in California. Their uncle, Michael Rutman, resided in Florida. The testator left a will dated September 3, 1992. The testator had named his wife, Valerie, as executor and his niece, Meryl B. Manin, as the first alternate executor. Michael and the minors were the remaining, living heirs named in the will.

¶ 4 In January 2009, the testator's will was admitted for probate in the circuit court of Madison County. Because Valerie had predeceased the testator, the letters of office were issued to the first alternate executor, Meryl B. Manin, as the executor of the estate (executor). The circuit court entered an order for independent administration of the estate. Subsequently, the minors filed a petition to terminate independent administration on the ground that the will did not provide for independent administration. The circuit court entered an order in which it terminated independent administration and directed the executor to file an inventory for the estate. After the time limit for filing claims against the estate had passed, the minors filed

a motion to compel the executor to distribute to each beneficiary his or her share of the estate. The executor filed a written response and asked the court to deny the motion to compel a distribution. She also filed a motion seeking leave to create two identical, irrevocable trusts and to distribute the minors' shares of the testator's estate to herself and to Michael Rutman, as cotrustees, to be administered for the benefit of the minors. The executor asserted that she had discretionary authority to create the trust under section five and section six of the will.

¶ 5 The pertinent provisions in section five and section six of the testator's will are set forth below:

SECTION FIVE

"4. I give the executor the following powers and discretions, in each case to be exercised without court order:

(d) To distribute the residue of my estate in cash or in kind or partly in each, and for this purpose the determination of the executor as to the value of any property distributed in kind shall be conclusive; and

(e) to execute and deliver any deeds, contracts, mortgages, bills of sale or other instruments necessary or desirable for the exercise of the executor's power and discretions."

SECTION SIX

"If any beneficiary of mine has not attained age twenty-one (21) at the time any property becomes distributable hereunder to him or her, the executor may distribute any part or all of such property to a parent or adult relative of the beneficiary, as trustee (or to a custodian for the beneficiary under any Uniform Transfers to Minors Act), against such person's receipt and written undertaking to deliver the property to the beneficiary at the time he or she attains such age, and in the meantime, to hold it

in trust and use it for the benefit of the beneficiary. Such receipt and written undertaking shall discharge the executor."

¶ 6 The minors filed a motion objecting to the creation of irrevocable trusts and argued that the testator had specifically provided for distribution of a minor's share to a parent or adult relative as a custodian under the Illinois Uniform Transfers to Minors Act (760 ILCS 20/1 *et seq.* (West 2008)), that the minors' natural mother was capable of acting as custodian under the Illinois Uniform Transfers to Minors Act, that the Illinois Uniform Transfers to Minors Act prescribes fiduciary duties for the protection of the minors, and that there is no allegation or any evidence to show that the distribution to their mother as custodian would be improper. The minors further argued that the executor's request was beyond the scope and authority granted to the executor in the will, contradicts the will, and did not comply with the intent of the testator as expressed in the will.

¶ 7 Following a hearing, the circuit court entered orders denying the minors' motion to compel distribution and granting the executor leave to create irrevocable trusts and to distribute the minors' shares of the estate to herself and the testator's son, Michael, as trustees, to be administered for the benefit of the minors. The court also appointed a GAL to represent the interests of the minors.

¶ 8 The minors filed a motion to reconsider the orders denying the motion to compel distribution and granting the executor leave to create irrevocable trusts. The GAL filed a report with the court. The GAL recommended that the minors' request for distribution of their shares to their mother as custodian under the Illinois Uniform Transfers to Minors Act be denied and that the minors' shares be distributed to a local financial institution as trustee. The GAL proposed an alternative recommendation if the court decided that the funds should be distributed to the executor and Michael Rutman, as cotrustees, and the recommendation was that substantial amendments be made to proposed trust document, including an

amendment providing that the trust would be created and held under the laws of Illinois rather than the laws of Florida. A hearing was held and arguments were made, but the parties did not seek to present any evidence or testimony in support of their respective positions. Following the hearing, the circuit court vacated its order granting the executor leave to create the irrevocable trusts, and it directed the GAL to work with counsel to formulate an agreed order of direction to a corporate trustee located in Madison County, Illinois, to hold the funds to be distributed to the minors. The court stated that it would issue a supplemental order in which it would provide its reasons for vacating the prior order. The supplemental order states in part:

"It is obvious to the Court (and the Court is convinced that all parties would agree), that there is a great amount of distrust between the proposed trustees of the proposed trust and the mother of the two minors, an ex-wife of a deceased son of the decedent. Both sides argue that they are in the best position to look after and protect the interests of the minors; however, given the distrust and animosity between the two sides, the Court would assert that it is in the best position to do so."

¶ 9 On appeal, the executor contends that the circuit court erred in vacating its original order granting her leave to create irrevocable trusts for the benefit of the minors; that the court erred in directing that the minors' share of the estate be distributed to a local corporate trustee; that the court essentially failed to abide by the testator's intent as expressed in the will and rewrote a provision in the will; and that the court erred in citing family distrust and animosity as grounds to deny the executor the authority and discretion granted to her by the testator to appoint adult relatives of the minors as trustees in absence of any evidence that the trusts could not be properly administered by the proposed trustees.

¶ 10 The purposes behind administering an estate are to conserve the personal assets of the estate, to pay all debts and taxes owed by the decedent and the estate, and to distribute

the residue of the estate to the heirs and legatees in accordance with the terms of the testator's will, and generally the duties of administration are performed by the executor. *In re Estate of Lis*, 365 Ill. App. 3d 1, 9, 847 N.E.2d 879, 886 (2006). It is not uncommon for adversarial relations to arise between the estate and some other party as the executor defends the wishes of the testator. *In re Estate of Kirk*, 292 Ill. App. 3d 914, 919, 686 N.E.2d 1246, 1249 (1997). Many times, the estate's adversary is a beneficiary who is contesting the will, making a claim, or filing a petition against the executor. *In re Estate of Kirk*, 292 Ill. App. 3d at 919, 686 N.E.2d at 1249. Although the executor has fiduciary obligations to the estate and the beneficiaries, the executor must also defend the wishes of the testator and act in the best interests of the estate. *In re Estate of Lis*, 365 Ill. App. 3d at 9, 847 N.E.2d at 886; *In re Estate of Kirk*, 292 Ill. App. 3d at 919, 686 N.E.2d at 1249.

¶ 11 When construing a will, the question for determination by the court "is not what the testator meant to say but rather what he meant by what he did say." *Barnhart v. Barnhart*, 415 Ill. 303, 313, 114 N.E.2d 378, 383 (1953). The primary rule of construction is that the intention of the testator as expressed in his will governs the distribution of his estate. *Barnhart*, 415 Ill. at 313, 114 N.E.2d at 383. The intentions of the testator, once ascertained, will be given full effect unless to do so would violate some settled rule of law or public policy. *Barnhart*, 415 Ill. at 313, 114 N.E.2d at 383. The court should give consideration to the whole will, and it should not read any provision in isolation, as the testator's intent cannot be determined from the language of any particular clause, phrase, or sentence. *Barnhart*, 415 Ill. at 313, 114 N.E.2d at 383. When the provisions of the will, considered as a whole, clearly indicate the testator's intent, the court should not resort to rules of construction. *Raasch v. Meier*, 171 Ill. App. 3d 226, 229, 524 N.E.2d 1206, 1208 (1988). The construction and legal effect of a will raises a question of law that is subject to *de novo* review. *In re Estate of Williams*, 366 Ill. App. 3d 746, 748, 853 N.E.2d 79, 82 (2006).

¶ 12 Similarly, when construing a trust, the court's primary concern is to determine the grantor's intent and to give effect to that intent as long as it is not contrary to public policy. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172, 582 N.E.2d 120, 123 (1991). The court applies the same rules of construction in construing a trust as it does in construing a will. *Donovan*, 145 Ill. 2d at 172-73, 582 N.E.2d at 123. Likewise, a trustee owes a fiduciary duty to the trust beneficiaries to carry out the trust according to its terms and to act with the highest degree of fidelity and good faith. *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 464, 898 N.E.2d 744, 751 (2008).

¶ 13 In this case, the will admitted for probate shows that the testator conferred considerable discretion on his executor in administering the estate. The testator expressly granted to the executor the discretion to distribute the minors' shares of the estate to a parent or adult relative, as a trustee, or alternatively, as a custodian under the Illinois Uniform Transfers to Minors Act. The executor, in her discretion, sought leave to distribute the minors' shares to herself and Michael Rutman, as cotrustees. Both are relatives of the minors. The minors did not present any witnesses or other evidence to show that the executor breached a fiduciary duty, mismanaged the estate, or violated any obligation to the heirs and legatees, and they failed to show that the creation of irrevocable trusts constituted an abuse of discretion. And while the circuit court indicated that it was obvious that there was "distrust" between the proposed cotrustees and the mother of the minors, it did not set forth the basis for its statement and there is no evidence or testimony regarding the true nature and degree of the distrust. A personal hostility between a trustee and a beneficiary is not a *per se* ground for removal of the trustee. *Laubner*, 386 Ill. App. 3d at 467, 898 N.E.2d at 754. The hostility must be shown to interfere with the beneficial administration of the trust. *Laubner*, 386 Ill. App. 3d at 467, 898 N.E.2d at 754. It is unfortunate but not unusual for ex-spouses and their respective families to harbor feelings of ill will or mistrust following

a divorce. There is some indication that a rift arose among the adult members in the respective families following the divorce of the minors' parents. But, there is no evidence that any personal hostility between the proposed trustees and the mother of the minors will interfere with the beneficial administration of the minors' trusts. There is no evidence of a conflict of interest. There is no evidence that the proposed trustees are unfit. There is no evidence that the proposed trustees would not or could not perform their duties to serve the interests of the minors with the highest degree of loyalty, fidelity, and good faith and without self-dealing.

¶ 14 In this case, the executor's request for leave to distribute the minors' shares of the estate to adult relatives, as trustees, was well within the authority and discretion granted to the executor in the will. The creation of a corporate trust is not in accord with the intent of the testator as expressed in his will. The circuit court erred in ordering that the minors' shares of the estate would be distributed to a corporate trust.

¶ 15 The limits of the trustee's powers are determined by the instrument that creates the trust. *Stuart v. Continental Illinois National Bank & Trust Co. of Chicago*, 68 Ill. 2d 502, 523, 369 N.E.2d 1262, 1271 (1977). In this case, the testator authorized the creation of trusts for the minors until they attain 21 years of age, but he did not provide specific instructions regarding specific powers of the trustees, how the trusts should be managed, and which laws should govern the administration of those trusts. The GAL and counsel for the minors raised several objections to the executor's proposed trust instruments. They argued that the proposed instruments contained provisions that were unnecessary, harmful, and inappropriate and that provisions in the proposed trust instruments negated the application of Illinois law and placed administration of the trusts under the laws of Florida. Because the court determined that the minors' shares would be held by a local corporate trustee, it did not rule on these objections. On remand, the court should take up the parties' objections and

suggested revisions to the proposed trust instruments and order any revisions necessary to give effect to the testator's intent that the minors' interests be protected.

¶ 16 Accordingly, the judgment of the circuit court of Madison County is reversed and the cause is remanded for further proceedings consistent with this decision.

¶ 17 Reversed and remanded.