2017 IL App (2d) 151283-U
No. 2-15-1283
Order filed January 10, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF RICHARD A. HINTZ, Deceased	)	Appeal from the Circuit Court of Du Page County.
	)	No. 14-P-896
(Carrie L. Hintz, Objector-Appellant, v. Nancy Mellenthin, as Executor of the Estate of Richard A. Hintz, Deceased, and as Custodian under the Illinois Uniform Transfers to Minors Act for Richard J. Hintz and Casey J. Hintz, Petitioner-Appellee).	)	Honorable Paul M. Fullerton, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in appointing decedent's executor as his children's custodian for purposes of managing the distribution of the assets in his retirement plan: because those assets passed directly to the children in accordance with the plan itself, the court had no basis for managing those assets; in any event, under the superior-rights doctrine, only the children's mother, who was presumed fit, could be their custodian.

¶ 2 Carrie L. Hintz (Hintz), the mother of the two minor sons of decedent, Richard A. Hintz, appeals, seeking review of an order designating decedent's sister and executor, Nancy Mellenthin, as the minors' "personal fiduciary" and custodian under the Illinois Uniform Transfers to Minors Act (Act) (760 ILCS 20/1 *et seq*. (West 2014)) to manage a distribution

from decedent's retirement plan. Hintz first argues that the court had no basis for involving itself in the distribution of the plan assets. She argues second that, under the superior-rights doctrine, she, as a custodial parent, was presumed to be her children's best guardian, so that, given the lack of evidence that she was unfit to protect her sons' interests, the court had no basis for giving Mellenthin control of nonprobate assets destined for the sons. We agree. We therefore reverse Mellenthin's appointment and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 At issue in this estate case is the control of the assets of a 401(k) plan in which decedent participated. A police report suggests that decedent hanged himself not long after the finalization of his divorce from Hintz. The couple had two minor sons, and the dissolution judgment gave decedent and Hintz joint custody of them. The police report states that, shortly before his suicide, decedent told his father that Hintz was threatening to involve the police in a dispute over a claim that decedent concealed assets during the divorce and a related bankruptcy proceeding.

¶ 5 Decedent's will named Mellenthin as his executor. It also named Mellenthin as trustee of a trust for the benefit of his sons; that trust was the primary beneficiary of the will. The will named Hintz as decedent's choice for the children's guardian, followed by Mellenthin.

¶ 6 Decedent did not explicitly name beneficiaries for his 401(k) plan. The plan summary documents state the following about distribution of death benefits:

> "In the event of your death, your account is distributed to your designated Beneficiary. It is important that you designate a Beneficiary so that your account is distributed according to your wishes. ***

> To designate your Beneficiary, you must complete a form available through the Fund Office or the Fund's website. You may name more than one Beneficiary and indicate the percentage of your account you want each Beneficiary to receive. ***
>
> If there is no named living Beneficiary at the time of your death, your account is distributed in this order:
>
> A. All to your spouse; if you have no living spouse, then,
>
> B. Divided equally amongst your children; if you have no living children, then,
>
> C. Divided equally amongst your parents; if you have no living parents, then,
>
> D. Divided equally amongst your brothers and sisters; if you have no living siblings, then,
>
> E. Your estate."

¶ 7 Turning to the estate proceedings, Mellenthin successfully petitioned for the admission of decedent's will to probate and for her appointment as the executor. Shortly thereafter, she successfully petitioned for appointment under the Act as custodian of the assets in the 401(k) plan. In that filing, which instituted a separate probate case later consolidated into that of decedent's estate, she asserted that, as decedent had not named any beneficiaries, his sons were the plan's distributees. She stated that the plan administrators required that she be named custodian before the plan assets could be released to her. She suggested that her being named as custodian was necessary to allow her to fulfill her role as trustee of the testamentary trust.

¶ 8 Hintz filed an appearance and challenged Mellenthin's appointment. Hintz's motion received full briefing, as did her motion to reconsider, and both motions were argued before the court. The parties accepted the premise that, at least absent a qualified domestic relations order (QDRO) modifying plan ownership, the assets of a 401(k) plan pass outside the probate estate to

the plan's death beneficiaries immediately upon the death of the plan participant. However, Mellenthin argued that, because decedent's account had no named living beneficiary when he died, no person belonged to the class "beneficiaries"—as in the petition, she classified the sons as "distributees." She asserted that the consequence of this was that the plan fell within the estate's control, making decedent's designation of Mellenthin as his preferred guardian controlling as to the choice of a custodian. The court accepted Mellenthin's argument and ruled that her appointment as custodian comported with decedent's expressed wishes in the will.

¶ 9 Hintz timely appealed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, Hintz first argues that the court had no basis for involving itself in the distribution of the plan assets. The gist of her argument is that the plan assets passed outside the probate estate immediately on decedent's death in accord with the scheme set out by the plan documents, so that the will and the trust it created were entirely irrelevant. Hintz also argues that, under the superior-rights doctrine, parents are presumed to be their children's best guardians, so that, given the lack of evidence that Hintz was unfit to protect her sons' interests, the court had no basis for giving Mellenthin control of nonprobate assets destined for the sons. We deem that Hintz has set out a *prima facie* case that the court's decision to exercise control of those assets and to apply the will to them was contrary to law. We further conclude that the superior-rights doctrine made Hintz, as a parent not demonstrated to be unfit, the mandatory choice for a custodian picked outside the framework of the will.

¶ 12 Mellenthin has not filed a response, so this court must decide this appeal under the principles of *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976). Under those principles, Hintz has made the necessary *prima facie* showing of error.

¶ 13 Hintz's primary argument rests on the claim that the court had no legal basis for exercising control over the 401(k) and so erred as a matter of law when it appointed Mellenthin. Because that is a pure issue of law, our review is *de novo*. See, *e.g.*, *Doe v. Sanchez*, 2016 IL App (2d) 150554, ¶ 21 (holding that the question on appeal could only be one of law necessarily implied that review was *de novo*).

¶ 14 We lay the groundwork of our analysis here by considering which assets are controlled by which documents and by which administrator. Decedent's will could control only his probate assets, therefore, the powers of the will's executor extend only to the probate assets. Although decedent willed "all" his property to his sister as trustee of a testamentary trust for the benefit of his sons, that "all" is limited to probate assets, that is, those assets that are transferable by will. The trustee, of course, controls only trust assets. Decedent nominated a guardian for his sons, but that nomination could not take effect, as the sons had a living mother, a person whom the common law would label a "natural guardian[] or custodian[]" (*McConnell v. McConnell*, 345 Ill. 70, 77 (1931)). See 755 ILCS 5/11-5(b) (West 2014) (the probate court must not appoint a guardian for a minor if the minor has an appropriate living parent who does not consent to the guardianship). The will did not make any gifts to anyone as a custodian under the Act. This listing shows that none of the offices mentioned in decedent's will—other than the unneeded office of guardian—should have any power over nonprobate assets.

¶ 15 The question raised in the probate court concerned the 401(k) assets' relationship to the will. For the reasons just set out, if those assets were probate assets, they would pass to Mellenthin in her capacity as trustee of the testamentary trust. However, in keeping with the nonprobate character of 401(k) plan assets, neither party argued that this occurred. See *In re*

Estate of Maddux, 93 Ill. App. 3d 435, 436 (1981) (a nonprobate asset is an asset that is transferred by an instrument other than a will).

¶ 16 In her trial court filings, Mellenthin suggested that the general rule that the plan controls *completely* applies only to a plan's *beneficiaries* and that, because decedent's sons were not *individually named beneficiaries*, they were not beneficiaries at all. She stated that, instead, the sons were distributees of some other class. She then suggested, and the court agreed, that despite the assets not passing under the will, the will came into play as a way to determine decedent's wishes. However, neither she nor the court ever made clear the mechanism linking the sons' distributee status and the will's applicability. She simply argued that naming her was consistent with decedent's intent when he named her trustee. Further, neither she nor the court ever set out the reasoning behind the conclusion that persons who are entitled to plan benefits as default recipients are not "beneficiaries."

¶ 17 We do not deem Mellenthin's arguments in the trial court to have been cogent. By contrast, Hintz's argument that we should simply follow the plan documents is consistent with the law surrounding retirement plans. If the plan assets passed according to the distribution scheme in the plan documents, they passed to decedent's sons. Moreover, those sons' minority does not preclude their ownership of the assets (see *Deatherage v. Lewis*, 131 Ill. App. 3d 685, 691 (1985) (an infant may own real property)).

¶ 18 Finally, we agree with Hintz that she was the favored custodian of her sons' assets. To be sure, courts have plenary power to act to protect the interests of minors. See *City of Chicago v. Chicago Board of Education*, 277 Ill. App. 3d 250, 260-61 (1995). However, as Hintz argues, under the superior-rights doctrine, because there was no showing that Hintz was not fit to safeguard her sons' interests, Hintz was the only custodian that the court could properly choose.

The superior-rights doctrine is a facet of the due process clause of the fourteenth amendment; it "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" (*Troxel v. Granville*, 530 U.S. 57, 66 (2000)) and thus bars government action that impairs that right without cause. The right requires a constitutional presumption that "fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68. Here, the divorce court had found Hintz fit to have custody of her sons. The probate court made no finding that Mellenthin overcame the presumption that Hintz would act in her sons' best interests. Moreover, although Mellenthin argued that Hintz was financially irresponsible and was using the probate proceedings to seek assets of decedent's that she was unable to obtain in the divorce, the record does not contain evidence to suggest that Hintz had become unfit. Certainly, decedent's desires as inferred by the court from his will are no basis for overriding Hintz's rights. Hintz was thus the only legally proper custodian, and the court erred when it decided otherwise.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we reverse the appointment of Mellenthin as the children's custodian and remand the cause.

¶ 21 Reversed and remanded.