

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Bank One Trust Company, N.A., :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-1140
 : (Prob. No. 430379-C)
 Ronald E. Scherer, Sr. et al., :
 : (REGULAR CALENDAR)
 Defendants-Appellants. :
 :

D E C I S I O N

Rendered on November 15, 2012

Zeiger, Tigges & Little LLP, Steven W. Tigges and Stuart G. Parsell, for appellee.

Chorpenning Good & Pandora Co., LPA, Elliott R. Good and Van R. Shirey, for appellants.

APPEAL from the Franklin County Court of Common Pleas,
Probate Division

TYACK, J.

{¶ 1} Defendants-appellants Ronald E. Scherer, Sr. ("Ronald Sr."), Linda S. Talbott ("Talbott"), Ronald E. Scherer, Jr. ("Ronald Jr."), Patricia Johnson, and Amie Swaddling ("appellants"), appeal from the December 1, 2011 judgment of the Franklin County Court of Common Pleas, Probate Division, accepting, approving, and settling plaintiff-appellee Bank One Trust Company, N.A.'s ("Bank One") final accounting of trusts created by Roger L. Scherer.

{¶ 2} This matter has been before this court before. On November 24, 2009, this court entered its decision in the matter of *Bank One Trust Co., N.A. v. Scherer*, 10th Dist. No. 08AP-494, 2009-Ohio-6192. In that matter, Bank One brought an action against the

trust beneficiaries for approval of a final accounting and the resignation of the trustee. This court ruled that the probate court did not err in dismissing the counterclaims of Ronald Sr. as a discovery sanction. See *id.* at ¶ 18 (discussing the many discovery disputes). Nonetheless, this court reversed the approval of the trustee's final accounting because it was error to strike the *other* beneficiaries' counterclaims and objections. Accordingly, the matter was remanded to the probate court for a new hearing on Bank One's final accounting for the trusts, the counterclaims of beneficiaries other than those of Ronald Sr., and all other matters necessary to the winding up of Bank One's trusteeship. *Id.* at ¶ 61.

{¶ 3} Some factual background is necessary before delving into the specific concerns over the final accounting. Before establishing the trusts at issue in this case, Roger L. Scherer achieved considerable success in the wholesale magazine distribution business. *Id.* at ¶ 7. In 1981, he restated an existing inter vivos trust agreement and funded it with various assets. *Id.* at ¶ 4. Upon his death in 1982, the terms of the trust agreement triggered a split of the trust into three new trusts: one primarily for Roger's son, Ronald Sr. ("RES trust"), another for Roger's daughter, Linda Scherer Talbott ("LST trust"), and a third for Roger's mother, Flora E. Scherer, and his surviving wife, Betty J. Scherer ("wife and mother trust"). *Id.*

{¶ 4} The principal trust assets conveyed to the three trusts comprised, directly or indirectly, the stock of entities engaged or affiliated with the magazine distribution business. *Id.* at ¶ 7. The assets were: (1) Northern News Company, operating in Northern Michigan; (2) Scott Krauss News Agency, later named Ohio Periodical Distributors, Inc., operating in central Ohio; (3) West Virginia Periodical Distributors, Inc., operating in West Virginia, and (4) Wholesalers Leasing Corporation, Inc., which owned the delivery vehicles essential to the business and leased them to the three distribution companies. *Id.* Other assets included real estate separately owned but used by these companies, most notably a large facility at 777 West Goodale Blvd. in Columbus, Ohio, a retail bookstore business, and an interest in several oil wells. *Id.*

{¶ 5} In correspondence accompanying the drafting of the trusts, Roger Scherer expressed the desire to give his son and daughter the opportunity to participate in the continued management of the magazine distribution businesses. *Id.* at ¶ 8. In particular,

one provision in the trust agreement stated that when the two original trust advisors resigned, positions that two of Roger's long-time colleagues in the business initially held after his death, Ronald Sr. and Linda Talbott would assume the roles of trust advisors under the agreement. *Id.* With that role, they received veto power over certain of the trustee's actions, including the advisor's ability to vote stock of any corporations in which the trusts owned an aggregate interest of more than 20 percent. *Id.*

{¶ 6} Ronald Sr. eventually assumed executive authority over the collective family businesses and served as trust advisor under the trust agreement. *Id.* at ¶ 9. This led to conflict between Bank One's understandable caution over managing undiversified trust assets overwhelmingly composed of closely-held companies that were concentrated in a single line of commerce and the family's understandable desire to carry on their father's business legacy. *Id.*

{¶ 7} In 1994, Bank One filed a declaratory judgment action asserting that Ronald Sr. and Linda Talbott prevented Bank One from properly keeping track of various family businesses. *Id.* at ¶ 10. That litigation ended in a settlement, but there continued to be conflict between Bank One and Ronald Sr. over the need for information about the assets of the trust. Then again, in 2004, Bank One brought a declaratory judgment action to compel appellants to provide the necessary information to prepare a final accounting, wind up Bank One's administration of the trust, and put in place a successor trustee. *Id.* at ¶ 15. As noted above, this court heard an appeal from that case, and remanded the matter for further consideration.

{¶ 8} The probate court conducted a hearing from July 18 through July 28, 2011. On December 1, 2011, the probate court filed its findings of fact and conclusions of law and its final judgment entry. The court entered judgment in favor of Bank One on appellants' counterclaims, accepted, approved and settled Bank One's final accounting, overruled appellants' objections to the final accounting, and determined that Bank One's actions as trustee were appropriate, confirmed, and approved.

{¶ 9} On appeal, appellants have assigned the following as errors:

1. The Probate Court committed reversible error by accepting, approving and settling Bank One Trust Company, N.A.'s Final Accounting;

2. The Probate Court committed reversible error by overruling each of the Defendants' objections to the Final Accounting;
3. The Probate Court committed reversible error by finding that all of Bank One Trust Company, N.A.'s actions as trustee and distributions and disbursements from each of the Trusts at issue in this case, were appropriate, confirmed and approved;
4. The Probate Court committed reversible error by granting judgment in favor of Bank One Trust Company N.A. and against Defendants on Defendants' counterclaims filed in the action;
5. The Probate Court abused its discretion and committed reversible error by determining that Mr. Alan S. Acker was not, despite the objective evidence of the defects contained in the Final Accounting, a credible expert witness;
6. The Probate Court abused its discretion and committed reversible error by denying Defendants' motion for the recusal of the presiding judge and the appointment of a visiting probate judge;
7. The Probate Court abused its discretion and committed reversible error by denying Defendants' motion for a jury trial on the issue of fraudulent concealment;
8. The Probate Court abused its discretion and committed reversible error by denying Defendant Ronald E. Scherer, Sr.'s motion for relief from judgment pursuant to Ohio Rule of Civil Procedure 60(B);
9. The Probate Court abused its discretion and committed reversible error by denying Defendants' motion to disqualify counsel for Bank One Trust Co., N.A.;
10. The Probate Court abused its discretion and committed reversible error by ordering Defendants to pay Bank One Trust Company, N.A.'s legal costs in the defense of Defendants' motion to disqualify counsel for Bank One Trust Company, N.A.

{¶ 10} With respect to the first four assignments of error, the applicable standard of review is whether the probate court's findings are against the manifest weight of the evidence. As we stated in our earlier decision:

When reviewing a trial court's decision on a manifest weight of the evidence basis, we are guided by the presumption that the factual findings of the trial court are correct. The rationale for this presumption is that the trial court is in the best position to evaluate the evidence by viewing witnesses and observing their demeanor, voice inflections, and gestures. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Likewise, documentary evidence is best viewed in the context of the entire scope of evidence heard at trial, and the trier of fact is in the best position to assess the global weight of all evidence heard. Thus, judgments supported by some competent, credible evidence going to all the essential elements will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

Bank One Trust Co. at ¶ 50.

{¶ 11} The probate court has exclusive jurisdiction to appoint and remove testamentary trustees, direct and control their conduct, and settle their accounts. R.C. 2101.24(A)(1)(e). The probate court has concurrent jurisdiction to hear and determine any action that involves an inter vivos trust. R.C. 2101.24(B)(1)(b). As such, credibility determinations are for the probate court as the trier of fact. A finding of error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. *See Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77 (1984). The trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Id.*

{¶ 12} With these standards in mind, we address appellants' assignments of error.

{¶ 13} In their first four assignments of error, appellants argue that the final accounting approved by the probate court was incorrect and replete with inaccuracies and inconsistencies. Appellants provided a list of 27 "nonexclusive" examples of errors. We shall address them by category.

Items 1,2, and 3—Oil Wells

{¶ 14} Appellants contend that the probate court erred when it found that Bank One had accurately accounted for all the oil well interests of the trusts, including ownership, revenue, and disposition. Appellants assert that Bank One indicated that, as of March 30, 1984, the trust owned the oil wells, but that the final accounting says that the oil wells were sold in 1983. Appellants also claim that the account is at odds with Bank One's quarterly statement for the period September 28, 1984, that reflects that the interests in the oil wells were distributed to Ronald Sr. and Talbott. Appellants also claim that Bank One only listed interests in 4 oil wells when there were actually 12 oil wells.

{¶ 15} A review of the record shows that Bank One provided a supplemental accounting and clarifying testimony concerning the oil wells. Michael Nesser, a forensic accountant the probate court found credible, testified that all the oil well interests were properly accounted for. He explained that there were originally 4 oil wells included in the trust. Then in July 1983 the remaining 9 wells were reported as received into the trust. All 13 wells were distributed to Ronald Sr. and Talbott on July 12, 1984.

Item 4—Entry for Scherer Investment Company

{¶ 16} Appellants indicate that Scherer Investment Company was dissolved on December 29, 1983, but the quarterly statement for the period ending August 30, 1991 contains an entry for Scherer Investment Company with a carrying value of \$1,821,717.

{¶ 17} This was easily explained by Bank One in that the final accounting expressly showed that Scherer Investment Company was dissolved in 1983. Internally, Bank One had used Scherer Investment Company as a "placeholder" for other assets because they could not get current information from Ronald Sr. as to which assets were owned by the trusts as a result of the dissolution.

Items 5-23—Wife and Mother Trust

{¶ 18} Appellants state that the account shows a \$500,000 cash distribution from Roger Scherer's Trust to fund the wife and mother trust on December 31, 1983, but the corresponding receipt in the wife and mother trust does not show up until May 1, 1984. At trial, it was revealed that the \$500,000 came from the redemption of a portion of the

stock of Wholesalers Leasing Corporation. The supplemental accounting clarified that the 1983 transactions included some carryover activity that occurred in early 1984 while the three trusts were being funded. This is true as to the transfer of \$41,166.85 into the wife and mother trust in late 1983 and early 1984 as well. The supplemental accounting and expert testimony by Michael Nesser resolved the alleged inconsistencies regarding this trust. Additionally, the trial court found that even if the final accounting were inaccurate or incomplete, any such deficiencies were caused by the repeated refusal of appellants to produce necessary information. This finding is amply supported by the record.

{¶ 19} Appellants claim that Bank One distributed too much money to Flora and Betty Scherer in excess of the dollar limits set forth in the trust agreement. According to the trust documents themselves, the trustee was permitted to make adjustments for inflation, and adjustments from principal to income. Moreover, Ronald Sr. and Talbott consented, approved, and contributed money to the increased distributions to the wife and mother. The evidence showed that no trust principal was distributed to the wife and mother.

{¶ 20} Appellants contend that \$14,452.28 of undistributed income should have been made available to run the trust businesses or applied for the benefit of Ronald Sr. and Talbott. However, there was no undistributed income in the trust. Even if there were, Ronald Sr.'s failure to provide information would have hindered any attempt to determine amounts needed to fund the family business.

Items 24-27—RES and LST Trusts

{¶ 21} Appellants contend there are certain irregularities with respect to the trusts for Ronald Sr. and Talbott. First they claim that over a period of many years, accumulated income was not distributed in accordance with the terms of the trust. They also claim that shares of the companies National Wholesale Drug Company and Unimag were an inappropriate concentration of trust assets. Third, appellants contend that Ronald Sr.'s wrongful taking of trust assets over a number of years shows that Bank One failed to properly oversee and protect trust assets.

{¶ 22} Appellants fail to distinguish between gross income and net income. The trust agreement sets forth that net income is to be distributed to Ronald Sr. and Talbott,

not gross income. Some years there was not enough income to pay Bank One's trust fees. Other years, income was set aside to pay Roger Scherer's estate taxes.

{¶ 23} Perhaps the most significant transaction involving the trusts took place in February 1998, when Ronald Sr. combined the family businesses with comparable regional magazine distribution businesses into a larger, and presumably more commercially viable, entity known as Unimag. *Bank One Trust Co.* at ¶ 12. When seeking Bank One's approval for the transaction, Ronald Sr. championed the Unimag transaction and promoted its importance to the continued viability of the family business. *Id.* After the close of the Unimag transaction, the RES and LST trusts each owned large quantities of Unimag stock and debentures. *Id.* Later, Ronald Sr. failed in an attempt to sell the business to a competitor. Unimag ceased operation, and its stock became worthless in 1999. *Id.* at ¶ 13.

{¶ 24} Not only did the trust advisors approve of the Unimag transaction, Ronald Sr. rejected any diversification alternatives that were recommended. Additionally, Bank One was not required to diversify when the specific wish of Roger Scherer was that his children be allowed to continue managing the family businesses. Under normal circumstances, a trustee has a duty to diversify the investments. Restatement of the Law 3d Trusts, Section 227(b) (1992). However, if a trustee determines special circumstances exist, such as a family business that has sentimental value, the trustee is not required to diversify. R.C. 5809.03(B); *Wood v. U.S. Bank, N.A.*, 160 Ohio App.3d 831, 841 2005-Ohio-2341 (1st Dist.) Such is the case here. Moreover, Ronald Sr. prevented Bank One from diversifying by refusing to turn over the securities or provide updated financial information.

{¶ 25} With respect to National Wholesale Drug Company, appellants argue that Bank One permitted an inappropriate concentration of assets in the company. This is another situation in which Ronald Sr. used trust assets to invest in a company that went bankrupt. In 1990, Ronald Sr., with Talbott's consent, purchased National Wholesale Drug Company stock with proceeds from the sale of West Virginia Periodical Distributors, Inc. They did not tell Bank One about the transaction until months later. They were uncooperative when Bank One sought to obtain the stock certificates and information

about the transaction. By 1993, National Wholesale Drug Company was defunct and its trust-owned stock worthless.

{¶ 26} It is disingenuous for Ronald Sr. to argue the trust was unduly concentrated in a company that he purchased without the knowledge of Bank One. By investing in the pharmaceutical distribution industry, he and Talbott, as trust advisors, approved the transaction at least in part to diversify the trust holdings. Under the terms of the trust agreement, approval by the trust advisors was full protection and justification for the trustee's actions or inaction.

{¶ 27} Finally, appellants argue that Ronald Sr.'s misappropriation of \$6.2 million in trust assets is proof that Bank One failed to properly oversee the trust. However, almost from the day of Roger Scherer's funeral, Ronald Sr. attempted to obtain control over the business and the trust assets. He knowingly prevented Bank One from taking action by a pattern of deceit, refusal to turn over stock certificates, and refusal to provide financial information to Bank One. The result was that Bank One was prevented from diversifying trust assets, selling trust assets, or even providing a complete accounting. Ronald Sr. knowingly hid his misappropriations from Bank One, just as he misappropriated funds that were for the benefit of his sister, his children, and his grandchildren. It was only after protracted litigation and a myriad of discovery disputes that Ronald Sr. produced documents that allowed Bank One to uncover the thefts.

{¶ 28} Appellants voluntarily ratified Ronald Sr.'s acts by wholly aligning their interests with his for the hearing on remand. Since Ronald Sr. cannot recover from Bank One for his misappropriation of trust funds, appellants may not either.

{¶ 29} The probate court's approval of the final trust accounting, and the overruling of the objections to the accounting was supported by competent, credible evidence. The first assignment of error is overruled.

{¶ 30} In their second assignment of error, appellants characterize all of their arguments under assignment of error one as a breach of fiduciary duty. The elements for such a claim include: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 36 (10th Dist.). A trust is a fiduciary relationship in which one person, i.e., the trustee, holds a property

interest, subject to an equitable obligation to keep or use that interest for the benefit of another, i.e., the beneficiary. *UAP-Columbus JV326132 v. Young*, 10th Dist. No. 11AP-926, 2012-Ohio-2471, ¶ 16. For the reasons stated in response to assignment of error one, assignment of error two is also overruled.

{¶ 31} In their third assignment of error, appellants argue that it was error for the probate court to find that Bank One's actions in administering the trust were appropriate, confirmed, and approved. Here again, appellants rely on the same arguments that were raised in connection with assignment of error one with some additional arguments. With respect to the administration of the wife and mother trust, there can be no argument that Flora and Betty Scherer needed the income for their care, support, and maintenance. The third assignment of error is overruled.

{¶ 32} In assignment of error four, appellants again claim breach of fiduciary duty, and they argue that the probate court erred in granting judgment in favor of Bank One and against appellants on their counterclaims. Appellants' counterclaim alleged a breach of fiduciary duty, breach of trust, negligence, and fraudulent concealment. Many of the same arguments that have been rejected previously are repeated in this assignment of error with some additional arguments.

{¶ 33} Appellants allege that Bank One improperly accounted for two separate sub-trusts instead of three individual trusts during most of the life of the trust. This argument is based on the testimony of Ronald Sr. and countered by expert testimony from Bank One. One cannot conclude from this that the trial court's verdict was against the manifest weight of the evidence. The same is true of appellants' other contentions, that the final accounting lacked significant details, that it failed to account for certain real property, that it lost records, failed to account for the wife and mother trust with sufficient specificity, and numerous other contentions that are either unsupported or countered by expert testimony from Bank One. It is also problematic that many of appellants' counterclaims can be laid directly on the doorstep of Ronald Sr. who not only misappropriated trust assets, but stonewalled Bank One's efforts to collect relevant financial information necessary to fulfill its duties.

{¶ 34} Accordingly, assignments of error one through four are overruled.

{¶ 35} In assignment of error five, appellants contend that the probate court erred in finding that Alan S. Acker, former judge of the Franklin County Probate Court, was not a credible expert witness.

{¶ 36} Here, appellants' expert, Alan S. Acker, admitted to having a bias in favor of appellants, in part because he had served as an attorney for appellants for many years. He admitted that he could not be a disinterested independent expert witness. At the prior hearing in 2007, the court found him to be deceptive as to the extent of his representation of Ronald Sr. The probate court also found that in the most recent hearing he was impeached with his own deposition testimony on multiple occasions. The probate court gave Acker's opinion and legal conclusions no weight.

{¶ 37} After reviewing the transcript of Mr. Acker's testimony as well as relevant portions of the record, there was competent, credible evidence to support the probate court's findings of bias, deception, and impeachment with testimony at odds with his deposition. The fifth assignment of error is overruled.

{¶ 38} With respect to assignment of error six, appellants filed a motion to recuse the then-sitting probate judge, Alan S. Acker, because Mr. Acker had served as an expert for appellants before the matter was remanded for a new hearing on the final accounting. Appellants then asked for a visiting probate judge to be appointed. However, Judge Richard S. Sheward had previously been assigned to handle all future proceedings in this action. Thus, Judge Sheward was responsible for the case until termination. Judge Sheward properly denied the motion for recusal because he already was the assigned probate judge. *See Bank One Trust Co.* at ¶ 15 ("The then-sitting probate judge having left office, the conflict no longer exists."). The sixth assignment of error is overruled.

{¶ 39} In assignment of error seven, appellants claim the probate court erred in refusing to allow a jury trial on the issue of fraudulent concealment. Appellants failed to timely demand a jury trial in 2006. Civ.R. 38(B) requires that a jury demand must be filed "not later than fourteen days after service of the last pleading directed to such issue." Additionally, Civ.R. 38(D) provides, in pertinent part, that "[t]he failure of a party to serve a demand as required by this rule * * * constitutes a waiver by him of trial by jury." The probate court ruled on August 21, 2006 that appellants had waived a jury trial. Nothing

changed in the interim to justify altering the probate court's decision. The seventh assignment of error is overruled.

{¶ 40} In assignment of error eight, appellants contend the trial court erred in not granting Ronald Sr.'s motion for relief from judgment pursuant to Civ.R. 60(B). The probate court denied Ronald Sr.'s March 23, 2011 Civ.R. 60(B) motion on August 3, 2011 as untimely. The probate court found that Ronald Sr. waited almost 3 years after the court had entered its final judgment against him, and some 16 months after this court rendered its decision, and the Supreme Court of Ohio declined to take his case, all before filing his motion for relief from judgment. The probate court also ruled that his motion sought to resurrect issues that had been decided against him in his earlier appeal.

{¶ 41} Ronald Sr. did not appeal the denial of his Civ.R. 60(B) motion in a timely manner. Moreover, his Civ.R. 60(B) motion sought to overturn issues that had been decided against him in this court in the earlier appeal. Therefore, the trial court could not entertain a Civ.R. 60(B) motion that raised the same issues he lost in his earlier appeal. The eighth assignment of error is overruled.

{¶ 42} In assignment of error nine, appellants attempted to disqualify Bank One's counsel pursuant to Prof.Cond.R. 3.7. Appellants claimed that counsel for Bank One was likely to be called as a necessary witness. The following question and answer between appellants' counsel and Victor Melchiorre, the individual who prepared the final accounting, provided the basis for the motion:

Q. When you tried to initiate the proceedings to get together enough information in order to be able to do an accounting, did anybody advise you as to specifics and what the requirements were that you had to follow in order to make that accounting an acceptable accounting under Ohio law in a probate proceeding?

A. I relied on our counsel to advise me as to the structure of the accounting."

(Tr. 527.) Counsel for appellants then asked a follow-up question:

Q. And what was it that they indicated to you that you had to follow and be in compliance with in order for it to be acceptable?

(Tr. 527.)

{¶ 43} The probate court sustained an objection to this further inquiry on the grounds of attorney-client privilege. Appellants characterized this testimony as counsel for Bank One serving an integral part of the actual substantive creation and structuring of the trust accounting documents. The probate court disagreed, and found that appellants had mischaracterized the testimony. The probate court then denied the motion and ordered appellants to pay Bank One's legal costs for defending the motion.

{¶ 44} A necessary witness under Prof.Cond.R. 3.7 is one whose testimony must be admissible and unobtainable through other trial witnesses. *Popa Land Co., Ltd v. Fragnoli*, 9th Dist. No. 08CA0062-M, 2009-Ohio-1299, ¶ 15. Giving legal advice as to requirements for a final accounting in a probate proceeding does not convert a lawyer into a necessary witness.

{¶ 45} In addition, this colloquy took place in the time period covered by the first appeal of the final accounting. Appellants could have appealed this issue in their prior appeal, but chose not to. Under one aspect of the law of the case, the doctrine gives preclusive effect to a ruling that could have been appealed, but has been abandoned by a failure to do so. *Clymer v. Clymer*, 10th Dist. No. 95APF02-239 (Sept. 26, 1995). Accordingly, the probate court's ruling on attorney-client privilege stands. The ninth assignment of error is overruled.

{¶ 46} Finally, in assignment of error ten, appellants assert that the probate court abused its discretion by awarding attorney fees in favor of Bank One in opposing appellants' motion to disqualify counsel. The record shows that Bank One filed a notice of satisfaction of judgment acknowledging that appellants had paid in full the amount of legal costs connected with the motion to disqualify counsel. The tenth assignment of error is moot.

{¶ 47} Based on the foregoing, appellants' assignments of error one through nine are overruled and assignment of error ten is moot. The judgment of the Franklin County Court of Common Pleas, Probate Division, is affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
