

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

THE HENRY FOCKE, SR. FAMILY TRUST :

Plaintiff-Appellant : C.A. CASE NO. 23160

v. : T.C. NO. 2007 MSC 00138

THE BERNADINE FOCKE FAMILY : (Civil appeal from Common
TRUST, et al. Pleas Court, Probate Division)

Defendants-Appellees :

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OPINION

Rendered on the 13th day of November, 2009.

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FROELICH, J.

{¶ 1} The Henry R. Focke, Sr. Family Trust (“the Henry Focke Trust”) appeals from a judgment of the Montgomery County Court of Common Pleas, Probate Division, which granted judgment after a bench trial on stipulated facts to the Bernadine F. Focke Family Trust (“the Bernadine Focke Trust”) and Thomas Hines, successor trustee of that

trust, on the Henry Focke Trust's claims for rental income and an accounting. For the following reasons, the trial court's judgment will be affirmed.

{¶ 2} Henry R. Focke, Sr. and Bernadine Focke were married, and each had children from a prior relationship. During their marriage, Mr. Focke created the Henry Focke Trust, naming himself as trustee and his son, Henry Focke, Jr., as successor trustee. Mrs. Focke created the Bernadine Focke Trust. The parties' stipulations do not state whether Mrs. Focke was the trustee of her trust during her lifetime, although the parties' arguments suggest that she was. Her son, Hines, was named successor trustee. A copy of the Henry Focke Trust document was attached to the parties' joint stipulation of facts; the parties did not submit a copy of the Bernadine Focke Trust document. The parties agree that the trusts contained a jointly owned condominium at 6600 Green Branch Drive, #1, in Centerville, Ohio.

{¶ 3} According to the parties' stipulated facts, Mr. Focke died on September 9, 1997, at which time Henry Focke, Jr. became successor trustee of his father's trust. Mrs. Focke continued to live at the condominium, with Henry Focke, Jr.'s knowledge, until July 1, 2002. At that time, Mrs. Focke moved to St. Leonards, which, although not specified in the stipulations, we presume is an assisted living facility. Mrs. Focke resided at St. Leonards until her death on May 13, 2006. While Mrs. Focke lived at St. Leonards, her net monthly living expenses increased by \$1,580 per month.

{¶ 4} After moving to St. Leonards, Mrs. Focke rented the condominium for \$700 per month, receiving a total of \$34,650 in gross rental proceeds; half of those gross proceeds was attributable to the one-half interest then-owned by the Henry Focke Trust. Mrs. Focke

paid expenses in the amount of \$16,635. Thus, the net rental income was \$18,015, and the amount attributable to the Henry Focke Trust's one-half interest was \$9,007.50. All net rental income proceeds were deposited into Mrs. Focke's personal checking account. None of the net rental proceeds were received by Hines individually or as successor trustee of his mother's trust. However, during the four-year period that the condominium was rented, Mrs. Focke made monetary gifts to her two children totaling no less than \$60,000.

{¶ 5} During the years that the condominium was rented, Mrs. Focke and Henry Focke, Jr. took no steps to maintain contact with each other, and Mrs. Focke did not advise Henry Focke, Jr. of the rental income. Henry Focke, Jr. did not learn that the condominium had been rented until shortly before Mrs. Focke's death. "It never occurred to the Successor Trustee, Henry R. Focke, Jr., that he was in a position of having the potential to make a decision one way or the other as to the disposition of the use or income generated by the [Henry] Focke Trust's one-half of the condo." (Stipulation at ¶11.)

{¶ 6} On May 11, 2007, the Henry Focke Trust brought suit against the Bernadine Focke Trust and Hines, seeking \$17,325 in rental income from the condominium and an accounting of all finances related to the rental of the property. On the scheduled trial date, the matter was submitted to the trial court on a joint stipulation of facts and oral argument; the parties waived the presentation of additional evidence. At this time, the Henry Focke Trust sought only \$9,007.50, representing half of the net rental income.

{¶ 7} In November 2008, the trial court granted judgment to the Bernadine Focke Trust and Hines, reasoning: "[Mrs. Focke's] alleged wrongdoing was not done in her capacity as trustee of Defendant Trust nor was proof offered that the Defendant Trust is in

possession of the disputed funds. Additionally, as stipulated by the parties, no proceeds were received by Thomas [Hines] individually or as successor trustee.” The court thus concluded that neither the Bernadine Focke Trust nor Hines was a proper defendant.

{¶ 8} Hines and his mother’s trust had also argued that, by failing to maintain contact with Mrs. Focke, Henry Focke, Jr. acquiesced in her rental of the condominium and her use of the net rental proceeds for her maintenance and support. The court did not reach this issue of whether Henry Focke, Jr.’s knowing failure, as successor trustee to his father’s trust, to exercise his discretion to apply the one-half interest in the condominium for Mrs. Focke’s needs “amounted to a de facto exercise of his discretion in favor of the surviving spouse/beneficiary of the trust.”

{¶ 9} The Henry Focke Trust appeals from the trial court’s judgment, claiming that the trial court “abused its discretion in refusing to award Appellant one-half of the proceeds of the marital condominium.”

{¶ 10} In reviewing the trial court’s judgment, we defer to the trial court’s findings of fact. We review the court’s legal conclusions de novo. *Boyd v. Moore*, Champaign App. No. 08-CA-30, 2009-Ohio-5039, at ¶9.

{¶ 11} Based on the limited record before us, the trial court reasonably found that the Henry Focke Trust had not met its burden of proving that the Bernadine Focke Trust and Hines were liable for half of the net rental income received by Mrs. Focke. Assuming that Mrs. Focke was the trustee of her trust while the condominium was being rented, the trial court reasonably concluded that she could have only acted as a trustee with respect to her one-half interest in the property. As to the one-half interest held by her husband’s trust, she

was a beneficiary, not a trustee.¹ And, she had no authority over the Henry Focke Trust, whether she was the trustee of her own trust or not. She could only have acted with respect to the Henry Focke Trust's interest in the condominium in an individual capacity. Because Mrs. Focke did not rent the interest in the condominium held by her husband's trust as a trustee of the Bernadine Focke Trust, the trial court reasonably concluded that her "alleged wrongdoing was not done in her capacity as trustee" of her trust.

{¶ 12} Moreover, we agree with the trial court that the stipulated facts do not establish that the rental proceeds attributable to the Henry Focke Trust were intermingled with assets of the Bernadine Focke Trust. The stipulated facts stated that "[a]ll net rental income proceeds were deposited to the checking account of Bernadine Focke. None of the net rental proceeds attributed to the one-half interest of the Henry R. Focke Sr. Family Trust was received by Thomas Hines individually or by Thomas Hines as successor trustee of his mother's Living Trust." There is no evidence that Mrs. Focke's personal checking account was an asset of the Bernadine Focke Trust. Accordingly, the Henry Focke Trust has not

¹In particular, the Henry Focke Trust provided in Article I, paragraph C:
"After the death of the Grantor, the assets of the trust shall be held and/or disposed of as follows:

"1. Until the death of the Grantor's spouse, the Trustee is authorized, in the Trustee's sole and absolute discretion, to use so much or all of the net income and/or principal of the Family Trust as the Trustee deems advisable to or for the benefit of the Grantor's spouse for her support, maintenance, education and health, taking into consideration her accustomed standard of living and any other sources of income she may have to the knowledge of the Trustee. Any income not so distributed to the Grantor's spouse shall be accumulated and added to the principal of the trust at such time or times as the Trustee, in the Trustee's sole discretion may determine."

established that Mrs. Focke, acting in an individual capacity, placed funds into her trust that the Henry Focke Trust allegedly should have received. The parties have further stipulated that Hines, both individually and as successor trustee of his mother's trust, has not received any net rental proceeds attributable to the Henry Focke Trust. Accordingly, the trial court reasonably concluded that the Henry Focke Trust has not proven that the Bernadine Focke Trust or its successor trustee was ever in possession of rental proceeds that the Henry Focke Trust allegedly should have received. Thus, the trial court did not err in determining that the Henry Focke Trust could not recover against the Bernadine Focke Trust or Hines, and that the Bernadine Focke Trust and Hines were entitled to judgment.

{¶ 13} In reaching our conclusion, we state no opinion as to whether Mrs. Focke acted properly when she rented the condominium without Henry Focke, Jr.'s knowledge, whether Mrs. Focke properly made use of the rental proceeds, or whether Henry Focke, Jr. acted in accordance with his duties as successor trustee of the Henry Focke Trust when he "took no steps to maintain contact with Bernadine Focke during the four years the condo was rented." (Stipulation at ¶8.)

{¶ 14} The assignment of error is overruled.

{¶ 15} The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

Douglas B. Gregg
John B. Huber
Hon. Alice O. McCollum