

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Joel Claffey,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-95
	:	(Prob. No. 518458A)
National City Bank, Trustee et al.,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on September 27, 2011

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*David L. Ahrendt, Mark C. Brookes*, for appellant.

*Frost Brown Todd LLC, Frank J. Reed, Jr., David E. Kauffman and Bonnie L. Wolfe*, for appellee National City Bank, Trustee.

*Gary H. Dicker*, for appellee Dana A. Claffey.

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

TYACK, J.

{¶1} Plaintiff-appellant, Joel Claffey, appeals the decision of the Franklin County Court of Common Pleas, Probate Division. For the following reasons, we affirm the trial court's decision.

{¶2} Claffey has assigned two errors for our consideration:

I. The trial court erred in failing to determine that Trust Estate #1 of the Lynne Claffey Trust, for the benefit of Plaintiff-Appellant, Joel M. Claffey, should be terminated and the corpus and undistributed income should be distributed to Joel M. Claffey.

II. The trial court erred in failing to determine that Plaintiff-Appellant Joel M. Claffey was entitled to compensatory damages for losses sustained by the Trustee's expenditure of trust assets for legal counsel in regard to the environmental claims of the U.S. Army Corps of Engineers and for environmental experts and consultants from the trust assets which Plaintiff-Appellant should have received upon reaching age 35 pursuant to the terms of the Trust.

{¶3} The trust at issue was established in June 1989 by Lynne Claffey. Upon the death of Lynne Claffey, the trust was divided into two equal halves. National City Bank ("NCB") was later appointed as successor trustee. The purpose of the first half of the trust, Trust #1, was to make distributions to Lynne Claffey's son, Joel Claffey, at ages 25 and 30 with the balance of the corpus being distributed when he reached 35. The purpose of the second half of the trust, Trust #2, was to provide a source of benefits for the life of Lynne Claffey's daughter, Dena Claffey.

{¶4} The trust estate holds title to two adjacent parcels of property. The real subject property consists of approximately 15.4 acres of primarily undeveloped real estate, including a 6.9 acre pond. Complaints were submitted to the U.S. Army Corps of Engineers ("USACE") alleging illegal dumping or filling of solid waste material by Joel Claffey into the pond. USACE investigated and, as a result, sent an order dated December 20, 2002 to Joel Claffey requiring him to: cease and desist his unlawful fill activities; within 15 days to provide certain information; to take steps to restore the area;

and to apply for an after-the-fact permit for the dumping that had already taken place. Joel Claffey believes that the USACE does not have jurisdiction over the pond.

{¶5} NCB claims it did not become aware of any problem until two years later when, on May 19, 2005, a letter was sent from the U.S. Environmental Protection Agency ("USEPA") asking NCB to assist Joel Claffey in cooperating with the USACE. The letter warned that failure to comply could result in administrative penalties of \$157,500, civil penalties of up to \$27,500 per day of violation, and criminal prosecution.

{¶6} Once NCB learned of these environmental issues, they retained legal counsel and environmental consulting services to defend the environmental claims on behalf of the trust. The environmental consulting firm opined that the pond is under federal jurisdiction due to its emptying into Alum Creek and that additional dumping had occurred since the initial cease and desist order. Based upon the consultant's advice, NCB submitted a restoration plan in order to resolve the issue.

{¶7} In April 2006, after his 35th birthday, Joel Claffey, through counsel, asked that NCB terminate Trust #1 (his portion of the trust) and stated that he would deal with the USACE. NCB responded explaining that both USACE and USEPA made it clear that remedial action must be taken to address the violations committed. Further, NCB stated that they had an obligation to preserve and restore the trust property for the benefit of both beneficiaries, Joel and Dena Claffey.

{¶8} Joel Claffey filed a civil action in the Franklin County Probate Court on September 20, 2006, seeking to terminate Trust #1 and recover compensatory damages for the money spent by NCB in addressing the environmental concerns. A magistrate

issued an October 14, 2008 decision that Trust #1 should remain open until the matters pending regarding the pond are resolved. NCB filed objections to the magistrate's decision arguing that the magistrate erred in failing to make a decision as to jurisdiction and the reasonableness of NCB's action. The probate judge recused himself from review of the magistrate's decision and the matter was transferred to the general division of the Franklin County Court of Common Pleas.

{¶9} The trial court's December 30, 2010 decision sustained NCB's objections. The court found that NCB's conduct was authorized and can further only be characterized as reasonable and prudent. Joel Claffey is appealing that decision.

{¶10} The first assignment of error asserts that the trial court erred in determining that Trust #1 should not be terminated and that the corpus and undistributed income should not be distributed to Joel Claffey at this time. This presents the question of whether or not NCB actions were reasonable in administering the subject property.

{¶11} NCB, as trustee, has an obligation to both Joel and Dena Claffey as beneficiaries of the trusts. The duties of a trustee include the duty to administer the trust, the duty to exercise reasonable care and skill in administering the trust property, and the duty to defend actions that may result in a loss to the trust estate. Restatement (Second) of Trusts (1959), Sections 169-78. This standard of care and skill required of trustees is an objective standard of a reasonable person in dealing with his or her own property. *Id.* at 174.

{¶12} The trial court examined the various provisions of the trust. NCB is granted the authority:

[t]o sell \* \* \* or otherwise dispose of all or part of the property, real or personal, at any time belonging to the trust estate, upon such terms and conditions and for such considerations as said Trustee shall determine \* \* \*.

To enforce, abandon, defend against, or have adjudicated by legal proceedings, arbitration or by compromise, any claim or demand whatsoever arising out of or which may exist against the trust estate.

\* \* \*

To employ and follow the advice of counsel and agents and to determine and pay to them compensation, whether from principal or income, as the Trustee shall decide.

(Dec. 30, 2010 Decision and Entry, at 2.)

{¶13} The Trust further provides protection to NCB such that:

[t]he Trustee shall incur no liability in the reasonable and prudent exercise of any and all duties, powers, responsibilities and discretions provided in this trust agreement or conferred or impliedly conferred upon or vested in [NCB] by any provision of law now existing or later enacted or otherwise inherent as a trustee function.

Id. at 3.

{¶14} The trial court found that based upon the evidence in the record, NCB's conduct was authorized and can further only be characterized as reasonable and prudent. Further, "[t]here is no basis for a finding that [NCB] is not fulfilling its fiduciary duty owed to the beneficiaries of the Trust or that it is looking out for its own interest. The evidence shows that [NCB] is acting responsibly in attempting to remedy the situation, especially in light of the serious penalties that could be imposed under federal law." Id. at

10.

{¶15} Joel Claffey did not object to the magistrates decision in the trial court. Failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401. Nevertheless, even if a party fails to bring an error to the trial court's attention, an appellate court will review the trial court's judgment for plain error. *Id.* In a civil case, an appellate court only applies the plain-error doctrine if the asserted error "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Id.* at 123.

{¶16} There is no plain error in this case.

{¶17} Further, even if we did not apply a plain error standard, the trial court did not abuse its discretion in coming to its conclusions. NCB's conduct was authorized and was reasonable and prudent in fulfillment of its fiduciary duty.

{¶18} The trust for the benefit of Dena Claffey was intended to be an on-going income stream for Dena. The corpus of the trust had to be administered in a way to provide that income. Simply turning the responsibility for caring for the real estate over to her brother could not guarantee that the real estate and trust corpus would guarantee her any income in the future. NCB needed to protect the real estate for the benefit of both trusts and acted appropriately in attempting to protect the pond and surrounding area.

{¶19} The first assignment of error is overruled.

{¶20} Since NCB really had no choice but to hire an environmental expert and to retain capable legal counsel to attempt to avoid the huge fines and penalties which could have been assessed by the ESEPA, the funds were appropriately expended on behalf of

the trusts. The money and assets in the trusts do not belong to Joel or Dena Claffey yet, if ever. The trust for Joel Claffey cannot be finally terminated until the issues related to the potential liability of the trust and its corpus are resolved. The trial court had no basis for treating the trust assets as already being the property of Joel Claffey and was correct to refuse to award him the funds expended to protect the trust corpus.

{¶21} The second assignment of error is overruled.

{¶22} Having overruled both assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT, P.J., and KLATT, J., concur.

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