

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank One Trust Company, N.A.,	:	
	:	Nos. 08AP-494
Plaintiff-Appellee,	:	08AP-517 &
v.	:	08AP-526
	:	(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 24, 2009

Zeiger, Tigges & Little, LLP, John W. Zeiger, Steven W. Tigges and Stuart G. Parsell, for appellee Bank One Trust Company, N.A.

McFadden, Winner, Savage & Segerman, and *James S. Savage*, for appellee guardian ad litem.

Morgan Associates, PLC, and *Kenneth B. Morgan*, for intervenor-appellee Park National Bank.

Wiles, Boyle, Burkholder & Bringardner Co., LPA, James M. Wiles and David D. Cook, for appellant Ronald E. Scherer, Sr.

Ingleson & Donoghue, and *Harry Ingleson, II*, for appellant Linda S. Talbott.

Ronald E. Scherer, Jr., Patricia Johnson and Amie Swaddling, appellants pro se.

APPEALS from the Franklin County Court of Common Pleas,
Probate Division.

BRYANT, J.

{¶1} Defendants-appellants, Ronald E. Scherer, Sr. ("Ronald Sr."), Linda Scherer Talbott, Ronald E. Scherer, Jr. ("Ronald Jr."), Patricia Johnson, and Amie Swaddling appeal from a judgment of the Franklin County Court of Common Pleas, Probate Division, dismissing defendants' counterclaims against appellee, Bank One Trust Company, N.A., granting Bank One Trust Company, N.A. judgment against Ronald Sr. in the amount of \$6.2 million, approving Bank One Trust Company, N.A.'s final accounting, and allowing Bank One Trust Company, N.A. to terminate its role as trustee. Because (1) the probate court properly exercised jurisdiction over the litigation seeking judgment against Ronald Sr., (2) the probate court abused its discretion, except as to Ronald Sr., in dismissing the counterclaims of all defendants as a discovery sanction, (3) the manifest weight of the evidence supports the probate court's monetary judgment against Ronald Sr., and (4) defendants did not seek the guardian ad litem's removal in the probate court, we affirm in part and reverse in part.

I. Procedural History

A. The Parties and the Trusts

{¶2} These consolidated appeals from the final judgment of the Franklin County Court of Common Pleas, Probate Division, are the latest in a long and contentious course of litigation arising from the administration of trusts that the late Roger L. Scherer established. Due to the voluminous record, we note only those facts pertinent to resolving the issues raised in this appeal.

{¶3} The plaintiff and appellee is the former trustee, J.P. Morgan Chase Bank, formerly known as Bank One Trust Company, N.A ("Bank One"). The other parties to the

case are the various individual beneficiaries of the trusts as well as a court-appointed guardian ad litem representing the interests of the minor beneficiaries of those trusts. In addition, we granted permission for a successor trustee, Park National Bank ("PNB"), to intervene as an appellee only.

{¶4} Roger L. Scherer restated an existing inter vivos trust agreement in 1981 and funded it with various assets. 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 both Roger's mother, Flora E. Scherer, and his surviving wife, Betty J. Scherer ("wife and mother trust").

{¶5} The trusts' terms established income beneficiaries with distribution benefits, as well as remainder beneficiaries. The income beneficiaries are the named beneficiaries for each trust. The remainder beneficiaries for the RES trust are Ronald Sr.'s adult children, Ronald Jr., Amie Swaddling, and Patricia Johnson. The remainder beneficiary for the LST trust is Talbott's daughter, Tracy Scherer Immel, who was not a party to the action in the probate court and has not appeared in this appeal. When no named beneficiary of the wife and mother trust is living, the assets of that trust will be divided among the RES and LST trusts.

{¶6} Attorney James S. Savage, III, is the court-appointed guardian ad litem representing the interests of minor contingent beneficiaries, a group as of the time of judgment comprised of the ten grandchildren of Ronald Sr., and the class of yet-unborn descendants. The guardian ad litem clarified that the interests of his charges, the minor

children and unborn beneficiaries, are at present remote because their interests are contingent upon their parents, the three children of Ronald Sr., predeceasing their father.

B. Trust Assets

{¶7} Before establishing the trusts, Roger Scherer achieved considerable success in the wholesale magazine distribution business. As a result, the principal assets conveyed to the three new trusts at his death comprised, directly or indirectly, the stock of entities engaged or affiliated with this business sector: (1) Northern News Company ("NNC"), operating in northern Michigan; (2) Scott Krauss News Agency, later named Ohio Periodical Distributors, Inc. ("OPD"), operating in central Ohio; (3) West Virginia Periodical Distributors, Inc. ("WVPD"), operating in West Virginia; and (4) Wholesalers Leasing Corporation, Inc. ("WLC"), which owned the delivery vehicles essential to the business and leased them to the three distribution companies. Other assets included real estate separately owned but used by these companies, most notably a large facility at 777 West Goodale Boulevard in Columbus, Ohio, a retail bookstore business, and an interest in several oil wells.

{¶8} 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. Some of the provisions in the trust agreement favor such an eventuality. In particular, one provision stated that when the two original trust advisors resigned, positions that two of Roger's long-time colleagues in the magazine distribution business initially held after Roger's death, Ronald Sr. and Talbott would assume the roles of trust advisors under the agreement. 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.

{¶9} Ronald Sr. eventually assumed executive authority over the collective family businesses and also served as a trust advisor under the trust agreement. The parties vigorously disagree over the details and causes of friction between the trustee and Ronald Sr., if not the other beneficiaries, over the years between 1982 and 2004, when this action began. Beyond dispute is the strained, when not entirely adversarial, relationship between the trustee, as owner of the various family businesses and assets, and Ronald Sr., as the manager of those assets. Without giving credence to one view over the other, we note nearly inevitable conflict between the trustee'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 forebear's business legacy.

{¶10} The tension between the trustee's attempts to monitor, if not direct, the day-to-day operation of the family businesses and Ronald Sr.'s desire to operate those businesses without interference is reflected repeatedly in communications of record between the parties. It is particularly evident on March 26, 1985, when Ronald Sr. and Talbott became trust advisors, and in 1994, when Bank One filed a declaratory judgment action asserting that Ronald Sr. and Talbott prevented Bank One from properly keeping track of the various family businesses. The 1994 lawsuit ended with a settlement in which the defendants agreed to provide Bank One the necessary information.

{¶11} Although a number of trust-property transactions are at issue in this matter, most of the litigation arises from the decline and eventual extinction of the family

magazine distribution businesses. The first step to that end took place in 1990, when Ronald Sr. sold the distribution business assets of WVPD, though not the corporation proper or its owned real estate. Ronald Sr. invested most of the proceeds in the stock of another business that he ran, National Wholesale Drug Co., which up to that point was not among the trust assets. By 1993 National Wholesale Drug was defunct and its trust-owned stock worthless.

{¶12} By far the most significant transaction, however, took place in February of 1998, when Ronald Sr., in an attempt to cope with the nationwide evolution of the periodical distribution business generally, combined the remaining family businesses with comparable other regional magazine distributors into a larger, and presumably more commercially viable, entity known as Unimag. The parties do not dispute that, when seeking the trustee's approval, Ronald Sr. championed the Unimag transaction and promoted its importance to the survival of the family businesses. After the Unimag transaction closed, the RES and LST trusts each owned large quantities of Unimag stock and debentures, as well as the shares of the surviving family companies, now stripped of their magazine distribution assets but still in possession of real estate and other property.

{¶13} The Unimag combination was unsuccessful. Within months, after a failed attempt to sell the business to a competitor, Unimag ceased operations; Unimag stock became worthless. A resulting lawsuit against competitors, which for a time was carried as an asset on the Unimag books, ended unsuccessfully in 2008. *United Magazine Co., Inc. v. Curtis Circulation Co.* (C.A.2, 2008), 279 Fed.Appx. 14.

{¶14} After the catastrophic outcome of the Unimag combination, Bank One, still dissatisfied with the amount of information available for the remaining trust assets,

attempted to resign as trustee. Again, Bank One was unable to obtain satisfactory information from Ronald Sr. regarding the remaining assets of the family businesses and other holdings of the trust. Bank One thus lacked the information necessary to prepare a final accounting. In addition, Bank One concluded Ronald Sr. had conveyed various trust assets to himself or companies he controlled without informing the trustee or seeking approval.

C. The Litigation

{¶15} As a result, Bank One commenced this case formally on September 14, 2004 with a declaratory judgment action to compel the defendants 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. The bank eventually added claims against Ronald Sr. personally, reflecting his alleged conversion of trust assets to his own profit. The beneficiaries counterclaimed, asserting the bank breached various fiduciary duties in administering the trusts. After finding he had a conflict in the matter, the sitting probate judge for Franklin County placed the case in the hands of a judge of the common pleas court's general division specially assigned to sit in the probate court. The then-sitting probate judge having left office, the conflict no longer exists.

{¶16} Due to continued battles over access to information regarding the family businesses and their assets, the litigation in this case reflects frequent discovery clashes between opposing counsel and, more significantly, between counsel for Ronald Sr. and the assigned trial judge. As a result, the matter has been before us on four prior occasions:

- In *Bank One Trust Co., N.A. v. Scherer*, 10th Dist. No. 06AP-70, 2006-Ohio-5097, we affirmed the probate court's order finding Ronald Sr.'s former attorneys in contempt ("*Scherer I*").
- In *Bank One Trust Co., N.A. v. Scherer*, 176 Ohio App.3d 694, 2008-Ohio-2952, we affirmed the probate court's judgment finding Ronald Sr. in criminal contempt ("*Scherer II*"). The case also highlighted an ongoing cause of friction between the trial judge and counsel for defendants, as the probate court correctly noted counsel for Ronald Sr. properly could not also represent the other beneficiaries of the trust, given the potential conflict of interest that arose when Bank One accused Ronald Sr. of appropriating trust assets to the detriment of other beneficiaries. We also affirmed in *Scherer II* a finding of contempt against attorney James Wiles, then representing Ronald Sr., but found to be excessive the ten-day sentence the trial judge imposed.
- In *Bank One Trust Co., N.A. v. Scherer*, 10th Dist. No. 08AP-288, 2008-Ohio-6910 ("*Scherer III*"), we affirmed the finding of contempt against attorney Dale D. Cook, also counsel for Ronald Sr.
- Finally, in *Bank One Trust Co., N.A. v. Scherer*, 10th Dist. No. 09AP-117, 2009-Ohio-3241 ("*Scherer IV*"), we revisited the resentencing of attorney Wiles on the prior contempt finding.

{¶17} While the contempt actions involving counsel for Ronald Sr. are not in themselves particularly important to the present appeal, at least two aspects of *Scherer II* regarding the probate court's findings are significant. Initially, the probate court determined Ronald Sr. repeatedly and willfully obstructed discovery efforts in the case. In

prior appeals, we adopted and approved the probate court's findings with respect to those discovery violations, making them the law of the case. See *Scherer II* at ¶¶25-29. Also significant is that, as a result of the probate court's order giving rise to *Scherer II*, counsel for Ronald Sr. no longer represents the other beneficiaries. Separate counsel represented Ronald Sr.'s three adult children in the latest proceedings in probate court, and they now represent themselves in this appeal. Similarly, separate counsel represented Talbott in the probate court after *Scherer II*, and the same attorney represents her in this appeal. A guardian ad litem now represents the interest of the minor beneficiaries.

{¶18} As the matter approached trial and final resolution in the probate court, the court on February 1, 2007, April 17, 2007, May 25, 2007, and June 8, 2007 entered a series of orders resolving the many ongoing discovery disputes and imposing various sanctions on the defendants:

- The probate court's February 1, 2007 judgment entry dismissed all defendants' counterclaims and claims with prejudice pursuant to Civ.R. 37(B)(2)(c) for various discovery violations. The same entry imposed sanctions on counsel that were the subject of our decision in *Scherer III*.
- The probate court's April 17, 2007 entry precluded the defendants from presenting the testimony of two accountants, Kenneth Dean and David Thompson, whom Ronald Sr. or his companies employed. The order arose out of Ronald Sr.'s repeated refusal to cooperate and his continued interference with their availability for the depositions that Bank One noticed concerning certain trust assets that Ronald Sr. allegedly misappropriated after the Unimag transaction failed.

- The probate court's May 25, 2007 entry denied defendants' motions for an extension of time to file objections to the trust accounting, quashed ten depositions Ronald Sr. "belatedly" noticed, and struck certain objections to the final accounting that Ronald Sr.'s counsel filed purportedly on behalf of other defendants.
- The probate court's June 8, 2007 order granted Bank One's additional motions for sanctions and reaffirmed the order dismissing with prejudice all of defendants' counterclaims. It further extended the order prohibiting rebuttal evidence regarding the assets Ronald Sr. allegedly took from the trust to additionally prohibit Talbott, Ronald Jr., Swaddling, and Johnson from introducing evidence about those assets. The June 8 order also gave all defendants, other than Ronald Sr., the opportunity to retain their own independent legal counsel and to provide their individualized objections to the final trust accounting.

{¶19} Trial began in August 2007. The court struck most of the beneficiaries' objections to the final accounting on the basis that the objections were attempts to restate the previously stricken counterclaims. The court further adhered to its prior rulings prohibiting certain evidence as a result of Ronald Sr.'s obstructive conduct during discovery. The court allowed, over objection, a modified final accounting Bank One submitted at the outset of trial that incorporated certain amendments addressing some inaccuracies raised in the beneficiaries' objections to the original accounting the bank earlier submitted. The court also initially allowed the testimony of the beneficiaries' expert witness on trust management, Alan Acker. Bank One opposed the testimony on the basis that Acker recently performed legal work for Bank One, and the bank could invoke

attorney-client privilege. Despite admitting the testimony, the court subsequently disregarded most of Acker's opinions, finding him not credible.

{¶20} On May 14, 2008, the probate court entered its final judgment in the case, addressing and resolving a wide range of issues:

- The probate court first entered judgment in favor of the RES and the LST trusts against Ronald Sr. in the amount of \$6,202,623 due to Ronald Sr.'s conversion of trust assets over the course of several years following the failure of the Unimag transaction and the demise of the family businesses.
- The court's decision overruled all objections defendants filed to Bank One's final accounting for all three trusts. The court approved certain payments Bank One made to the United States Treasury pursuant to notices of levy the Internal Revenue Service brought, and the court authorized future payments from the trusts for additional amounts the IRS was to levy.
- The court approved Bank One's resignation as trustee for each of three trusts and barred any further objections to Bank One's final accountings or claims against Bank One arising from or relating to Bank One's administration of the trusts over the years.
- The court authorized payment of expenses to the court-appointed guardian ad litem.
- Finally, the court appointed a successor trustee, ordered Ronald Sr. removed as a trust advisor, and prohibited him from re-appointment.

II. Assignments of Error

{¶21} Ronald Sr. appeals, assigning the following errors:

1. The Probate Court abused its discretion by dismissing the Defendants' counterclaim in its entirety for Mr. Scherer's alleged failure to produce some of over 25 years of corporate records and denying Mr. Scherer's motion for reconsideration on this issue.
2. The Probate Court abused its discretion by granting a protective order precluding any meaningful discovery on the Final Account in the absence of a journalized discovery cutoff.
3. The Probate Court abused its discretion by excluding, as a discovery sanction, any explanation at the hearing on the Final Account of the so-called unauthorized transactions and by overruling Mr. Scherer's second motion to compel.
4. The Probate Court erred in striking all but two of Mr. Scherer's timely filed objections to the Final Account.
5. The Trial Court erred in not striking the so-called Supplemental Final Account which was submitted for the first time on August 13, 2007.
6. The Probate Court erred in overruling Mr. Scherer's motion for directed verdict on the Trustee's third-party complaint as the counterclaim had been dismissed and the damage claims against Mr. Scherer were not within the subject matter jurisdiction of the Probate Court.
7. The judgment against Mr. Scherer was against the manifest weight of the evidence as Bank One, through decades of inaction, waived any alleged requirement that the money flow through the Trust and Bank One's claims of unauthorized transactions by Mr. Scherer were unsupported by any competent evidence based on personal knowledge.
8. The Probate Court's approval of the Final Account and finding that Bank One properly administered the Trusts was against the manifest weight of the evidence and is based on misstatements and material omissions by the Trustee.
9. The Probate Court erred in approving the Final Account as it did not track receipts and disbursements as required by Ohio Revised Code §2109.303(A).

10. The Probate Court erred when it failed pursuant to Ohio Revised Code to inquire into and consider all matters relative to the accounting.

{¶22} Talbott appeals, assigning the following errors:

1) The Probate Court's denial of the August 1, 2007 and August 13, 2007 Motion to Continue Trial and Permit Discovery is an abuse of discretion.

2) The Probate Court's Findings of Fact that the Trustee properly managed and properly accounted for the assets of the Wife and Mother Trust during its administration is against the manifest weight of the evidence, were clearly erroneous and constitutes reversible error.

3) The Probate Court's Conclusion of Law that the Trustee fulfilled its duty to manage, prudently invest and account for the Wife and Mother Trust is erroneous and constitutes reversible error.

4) The Probate Court's Findings of Fact that the Trustee kept beneficiaries informed about the administration of the Trusts is against the manifest weight of the evidence, were clearly erroneous and constitutes reversible error.

5) The Probate Court's Conclusion that Trustee fulfilled its duty to keep the beneficiaries informed is clearly erroneous and constitutes reversible error.

6) The Probate Court's Findings of Fact that Trustee prudently invested the assets of the Trusts from 1983 to 2007, were against the great weight of the evidence, were clearly erroneous and constitute reversible error.

7) The Probate Court's Findings of Fact that the Trustee's Final Accounting, as supplemented, were consistent with the quarterly account statements, and included sufficiently itemized statements of receipts and disbursements are against the manifest weight of the evidence.

8) The Probate Court's Conclusion of Law that the Trustee fulfilled its duties during its administration is erroneous and constitutes reversible error.

9) The Probate Court's denial of Appellant's Motion for New Trial was an abuse of discretion and constitutes reversible error.

10) The Probate Court erred in its Findings of Fact that rents at 777 Goodale Ave. to have been principle rather than income.

11) The Probate Court abused its discretion when it purported to disregard some of the testimony of Mr. Alan Acker, Trust Expert for Appellants.

{¶23} Ronald Jr., Johnson, and Swaddling appeal, and in their joint brief filed propose assign the following errors:

1) The Probate Court's Order of Dismissal dismissing the Counter Claim against Appellee for supposed discovery violations by different beneficiary was premised upon a fraud upon the Court and constitutes reversible error.

2) The Probate Court's Dismissal of the Counter Claim of Appellant for supposed discovery violations by one beneficiary, was a result of the Court's bias and abuse of discretion and a conscious failure to adopt a less dramatic alternative, and therefore, constitutes reversible error.

3) The Probate Court's Findings of Fact in support of its conclusion that the Trustee fulfilled its duties as Trustee are against the manifest weight of the evidence, and therefore, constitutes reversible error.

4) The Probate Court erred in finding the Trustee fulfilled its duties owed to all beneficiaries in the administration of the Trusts and in approving the Final Account.

5) The Probate Court erred in overruling the Motion to Remove James S. Savage, III as Guardian ad Litem in view of Savage providing related representation to Appellee and its attorneys in this same matter constituting an actual conflict of interest, resulting in the denial of a legally qualified GAL to protect the interest of the minor and unborn beneficiaries through the trial and in the settlement stage of the proceedings.

{¶24} In addition, intervenor-appellee PNB filed a brief on appeal, addressing some aspects of the final trust accounting that present potential tax complications for the future administration of the trusts. PNB also presents jurisdictional arguments that support Ronald Sr.'s sixth assignment of error, questioning the subject matter jurisdiction of the probate court over Bank One's claims against Ronald Sr. personally.

{¶25} We first address Bank One's pending motion to strike PNB's brief. Bank One points out that when we denied PNB's motion to intervene as an appellant, we granted PNB the right to participate only as an appellee. As such, Bank One argues, PNB's brief purporting to raise an assignment of error must be struck.

{¶26} Contrary to Bank One's argument, PNB's brief does not raise an assignment of error, but presents arguments to support an error one of the parties assigned. While our granting PNB leave to intervene in the proceedings as an appellee precluded PNB from filing assignments of error on its own behalf, Bank One cites no authority to suggest an appellee's brief should be struck because it fails to unconditionally support every aspect of the judgment under review. The situation here is analogous to one in which an appellee chooses to concede error in some aspects of a judgment, and no more improper. Bank One's motion to strike PNB's brief accordingly is denied.

{¶27} The various appellants' assignments of error in this case fall into five broad categories, although they may raise a diversity of sub-issues: (1) the jurisdiction of the probate court to consider Bank One's claims against Ronald Sr. personally, including whether such claims are so minimally related to trust management that they should have been brought in the general division of the Court of Common Pleas; (2) the propriety of the discovery sanctions the probate court imposed against Ronald Sr. and the other

beneficiaries; (3) the weight of the evidence supporting the probate court's judgment against Ronald Sr.; (4) a series of manifest weight arguments questioning the probate court's conclusion that the final trust accounting Bank One presented was adequate and accurate; and (5) issues related to the qualifications and performance of the guardian ad litem representing the minor and unborn remainder beneficiaries. We will address these five areas in the order noted, which inescapably leads us to address the individual assignments of error out of numerical order.

A. Jurisdiction of the Probate Court

{¶28} Ronald Sr.'s sixth assignment of error asserts the probate court erred in allowing Bank One's damage claims against him to proceed in probate court; he asserts such claims are not within the probate court's subject matter jurisdiction. Ronald Sr. further argues that because Bank One's claim for damages against him is derivative of Bank One's potential liability for damages on the counterclaim the beneficiaries filed, Bank One's claim did not survive when those counterclaims were dismissed. Our resolution of other aspects of this case will render Ronald Sr.'s last argument moot.

{¶29} The probate court in Ohio is a court of limited and special jurisdiction. The probate court has only those powers the pertinent statutes grant to it. *Corron v. Corron* (1988), 40 Ohio St.3d 75, 77; R.C. 2101.24(A). The matters in which the court has exclusive jurisdiction are enumerated in R.C. 2101.24(A)(1), but the probate court has concurrent jurisdiction with the general division of the court of common pleas in certain other matters, which are enumerated in R.C. 2101.24(B)(1). Among these is the authority to "hear and determine * * * any action that involves an inter vivos trust." R.C. 2101.24(B)(1)(b). No one, therefore, disputes the probate court's jurisdiction over the

underlying action here, as Bank One sought approval for its final trust accounting and its resignation as trustee.

{¶30} In exercising its jurisdiction over matters arising out of issues more typically within the probate court jurisdiction, the probate court also has a broader authority to address collateral matters, including "plenary power at law and in equity to dispose fully of any matter that is properly before the court." R.C. 2101.24(C); see also *State ex rel. Sladoje v. Belskis*, 149 Ohio App.3d 190, 2002-Ohio-4505. Here, the probate court properly exercised that jurisdiction over matters both necessary to and inextricably entwined with the principal matter before the court: Bank One's final accounting as trustee pursuant to its resignation as trustee. *Fox v. Stockmaster*, 3d Dist. No. 13-01-34, 2002-Ohio-2824 (extending such jurisdiction to actions necessary to recover trust estate assets). The probate court thus had jurisdiction to pursue an accounting from Ronald Sr., corporate officer of a company the trust owned, who allegedly diverted trust assets for his own use. Such a conclusion is particularly compelling when Ronald Sr., as a beneficiary, invoked the jurisdiction of the probate court through multiple claims against the trustee. Ronald Sr.'s sixth assignment of error is overruled.

B. Discovery Sanctions

{¶31} As discovery sanctions, the probate court barred all the defendants' counterclaims due to the misconduct of Ronald Sr. and his attorney during discovery. Ronald Sr.'s first four assignments of error and the first and second assignments of error of Ronald Jr., Johnson, and Swaddling contest the propriety of such an extreme sanction.

{¶32} The previous decisions of this court addressing interlocutory appeals that arose out of the frequent and bitter discovery disputes between the parties over discovery

proceedings and disclosure of pertinent information reveal a process painful for all involved. Our prior decisions affirmed the probate court's order imposing various discovery sanctions against Ronald Sr., and, in doing so, we expressly determined he repeatedly and consistently violated the probate court's discovery orders and obstructed many reasonable attempts at discovery in this case. Nothing in the more recent record before this court today, including the transcript of Ronald Sr.'s trial testimony, demonstrates that his resistance to any attempt to investigate his personal transactions with the trust companies has abated.

{¶33} After the February 1, 2007 trial court order that was appealed in *Scherer III*, the trial court faced further discovery difficulties. Bank One filed another motion for sanctions on April 11, 2007, citing difficulty in obtaining documents and resistance to scheduling depositions of Ronald Sr.'s accountants. Bank One also complained that, when documents were ultimately provided, they were furnished in a form and location that unduly hindered inspection: shrink-wrapped in large bundles on pallets in an unheated warehouse lacking facilities to handle and examine the documents.

{¶34} The probate court's ultimate orders on these matters, issued on June 8, 2007, noted Ronald Sr.'s continuing resistance to discovery and made two primary rulings in response: (1) the court struck all of the defendants' counterclaims that asserted Bank One mismanaged the trust and breached its fiduciary duty; and (2) the court precluded Ronald Sr. and all other defendants from introducing any evidence to rebut Bank One's evidence that he diverted trust assets to his own use. Among the transactions included in the order were those involving conversion of rents from the Goodale property, forgiveness

of large loans Ronald Sr. owed to the businesses, and disposal of a luxury motor coach a trust company owned.

{¶35} While the probate court has inherent power to manage the discovery proceedings before it and impose sanctions for noncompliance with its discovery orders, "the sanction of dismissal should only be used in extreme situations * * * 'where circumstances demonstrate evasion and total avoidance of responsibility by a party to respond to discovery requests.' " *Fairfield Commons Condominium Assoc. v. Stasa* (1985), 30 Ohio App.3d 11, 15, quoting *Smith v. Smith* (1982), 5 Ohio App.3d 185, 189. A trial court's decision to impose discovery sanctions will not be disturbed on appeal absent an abuse of discretion. *Toney v. Berkemer* (1983), 6 Ohio St.3d 455. A court, however, abuses its discretion when it dismisses a case due to discovery violations unless a showing of willfulness, bad faith, or fault is made. *Toney* at 458; *Societe Internationale v. Rogers* (1958), 357 U.S. 197, 212, 78 S.Ct. 1087, 1096.

{¶36} In ruling on discovery violations and sanctions, the trial court should examine such factors as "the history of the case; all the facts and circumstances surrounding the noncompliance, including the number of opportunities and the length of time within which the faulting party had to comply with the discovery or the order to comply[.]" *Russo v. Goodyear Tire & Rubber Co.* (1987), 36 Ohio App.3d 175, 178. In addition, it should consider "what efforts, if any, were made to comply; the ability or inability of the faulting party to comply; and such other factors as may be appropriate." *Id.* In that context, the probate court agreed with Bank One's argument that Ronald Sr.'s conduct in frustrating Bank One's attempted discovery, either by association with or peripheral participation of the other beneficiaries, could be imputed to those beneficiaries

so that the counterclaims against Bank One of not only Ronald Sr., but also the beneficiaries, should be struck.

{¶37} The probate court appropriately dismissed Ronald Sr.'s counterclaims as a discovery sanction. His own testimony at trial makes apparent that Ronald Sr. is the individual who had both the actual managerial control of the businesses and the opportunity to produce or, more frequently, not to produce relevant documents from the family businesses. He managed the businesses personally from soon after his father's death until the failure of the remaining businesses in the Unimag transaction, and he had both actual and titular control over the disposition of assets following the failure of those family businesses. Our prior decisions have noted his egregious conduct and affirmed contempt findings against him, apparently without mollifying his decision to frustrate the orderly and productive course of litigation. Given the law of this case, confirmed in the continuing actions of Ronald Sr. to cripple discovery proceedings, the probate court did not abuse its discretion in the discovery sanctions it imposed against Ronald Sr.

{¶38} The other beneficiaries, however, are in a different position. Bank One cites several failures of Ronald Jr. and his sisters to answer interrogatories completely, some participation of Ronald Jr. in the Goodale real estate transactions, and the probate court's express conclusion that all defendants refused to produce the requested information concerning the family businesses. A discovery request directed at a person not competent to satisfy it hardly can give rise to misconduct on the part of the recipient; the court must consider "the ability or inability of the faulting party to comply." *Russo* at 178.

{¶39} Nothing in the record supports the proposition that a discovery request directed at any of the other beneficiaries would be calculated to produce the needed

information. Indeed, counsel for Bank One summed up the frustrations of the trustee in his opening statements by comparing the recent discovery difficulties with the extended period of refusal of Ronald Sr., and only Ronald Sr., to share crucial business information about trust assets over the life of the trusts. To the extent the other beneficiary defendants played any role in the discovery obstruction that impeded this case, that participation is entirely subordinate to Ronald Sr.'s direction and control over the corporations and their assets.

{¶40} While Talbott served as a trust advisor from 1985 to 2002, and was succeeded by Ronald Jr., the trust advisors had no superior access to corporate information than did the trustee itself, or at least not by dint of being trust advisors. With respect to the individual transactions by which trust assets disappeared, Bank One's narrative at trial intimates Ronald Sr.'s children were possible recipients of some proceeds from the disposed assets; similarly some evidence suggests Ronald Jr. personally participated in diverting the Goodale property rents. Such factors, however, do not establish that these beneficiaries could have supplied the requested corporate information while the businesses were firmly in Ronald Sr.'s control.

{¶41} The probate court's decision to impose the most drastic sanction possible against all parties precludes any examination of the substantial issues raised concerning Bank One's conduct as trustee and forecloses any meaningful adjudication of any trust issues other than Ronald Sr.'s willful nondisclosure of information pertaining to the family businesses and alleged diversion of assets from those businesses. Although Bank One and the probate court framed the discovery problems as attributable to the defendants collectively, their characterization of the issues does not address or resolve the actual

underlying obstacles to discovery, which, at least as the record now stands, are almost entirely attributable to Ronald Sr.

{¶42} Bank One cites another ground to support the probate court's blanket dismissal of all the defendants' counterclaims. Bank One notes that for much of the discovery period the same attorney "secretly," as the probate court characterized it, represented Ronald Sr. and all the other defendants as well. Under those circumstances, Bank One argues the misconduct of counsel must be imputed to all represented parties. While generally the neglect or misconduct of the party's attorney will be imputed to the party, *Swan v. Swan*, 10th Dist. No. 04AP-1089, 2005-Ohio-4636, ¶10, and *Argo Plastic Prods. v. Cleveland* (1984), 15 Ohio St.3d 389, the misconduct of counsel in this case primarily concerned discovery matters that Ronald Sr. resisted and over which the other beneficiaries had little, if any, control. Indeed, the probate court's characterizing such representation of the other beneficiaries as "secret" gives some idea of their limited involvement with the litigation.

{¶43} About the same time, the issue arose whether Ronald Sr.'s attorney properly could represent the other beneficiaries at a time when a conflict of interest between other beneficiaries and Ronald Sr. existed. The probate court properly concluded each beneficiary should retain counsel, or at least cease to allow counsel for Ronald Sr. to represent them. Without passing on whether the "secret" nature of the representation affects the degree to which counsel's conduct may be imputed to a client, little reason exists to impute the conduct of Ronald Sr.'s counsel to the beneficiaries when that representation, at best, does not appear to further the beneficiaries' interests.

{¶44} In the end, the probate court did not abuse its discretion when it dismissed Ronald Sr.'s personal counterclaims as a discovery sanction, but it erred in striking all other counterclaims based on what was principally and most egregiously Ronald Sr.'s misconduct during discovery. From this conclusion follows the additional conclusion that the probate court's decision to strike many of the beneficiaries' objections to the final accounting was erroneous as well, because the decision to strike them was predicated on the probate court's observation that the objections paralleled the stricken counterclaims.

{¶45} Finally, underlying many of the assigned errors addressed in this section is the repeatedly stated argument that the specially-assigned trial judge throughout the case exhibited a bias against Ronald Sr. and the other beneficiaries that is reflected in the outcome of the case.

{¶46} Counsel for Ronald Sr. have filed four separate affidavits of prejudice against the trial judge. The Chief Justice of the Supreme Court of Ohio has, by entries dated October 25, 2006, May 11, 2007, August 9, 2007, and March 19, 2008, denied all motions for disqualification. When the Chief Justice denies a motion for disqualification, that denial has the effect of *res judicata* as to all matters raised and addressed in the motion. *Scherer IV* at ¶14; *State v. Getsy*, 84 Ohio St.3d 180, 185, 1998-Ohio-533. The last two such entries issued are particularly significant because they are respectively dated immediately before and well after the trial on the merits in the present case, and therefore chronologically cover issues that the beneficiaries again raise on appeal. The appellants do not raise questions outside those the Chief Justice already addressed, and which we are foreclosed from revisiting once he disposed of them.

{¶47} As a result, Ronald Sr.'s first, second, third, and fourth assignments of error are overruled in part insofar as they pertain to his counterclaims, but sustained insofar as they relate to the counterclaims of the other beneficiaries. The first and second assignments of error of Ronald Jr., Swaddling, and Johnson are sustained in part, but overruled to the extent they suggest the court's error was based upon the trial judge's bias.

C. Monetary Judgment against Ronald Sr.

{¶48} The third principal question in the case considers whether the probate court erred in granting judgment to Bank One against Ronald Sr., as Ronald Sr. asserts in his seventh assignment of error.

{¶49} Ronald Sr. argues that the judgment in favor of Bank One on its claims against him is against the manifest weight of the evidence for two reasons. Initially, he asserts it lacks support because it is based on documentary and circumstantial evidence rather than the testimony of persons having personal knowledge of the contested transactions. Secondly, he argues it lacks evidentiary support because Bank One, through years of lax or disinterested supervision of the trusts, waived any requirement that income generated by, or proceeds flowing from asset sales of, the trust companies be routed through trust accounting before distribution to beneficiaries. The probate court found Ronald Sr. improperly diverted \$6.2 million dollars of trust assets, generally beginning in 1999 after the Unimag combination failed.

{¶50} 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. 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.

{¶51} According to the evidence presented at the trial in the probate court, a number of large transactions, many consisting of outright transfers from the family businesses to Ronald Sr.'s wholly-owned non-trust company, Maximum, Inc., made up part of the sum awarded to the trusts against Ronald Sr. Other factors in the sum involved forgiveness of various loans that trust companies made to Ronald Sr., and payment to Maximum, Inc. of rents received from a third party lease of the Goodale property. In addition, Bank One's forensic accounting analysis detailed the unauthorized transfer of a luxury motor coach from WLC to Ronald Sr.; it delineated the liquidation of trust real estate that WLC and WVPD owned, with the proceeds passing outside the trust; and it noted comparable improper proceeds distribution when NNC's residual assets were liquidated.

{¶52} In attacking the probate court's findings of fact, Ronald Sr.'s principal difficulty actually is two-fold. Initially, his testimony at trial largely corroborated the nature of the transfers, either asserting without any meaningful basis that the transactions were not improper or failing to rebut them in any relevant way. Secondly, Bank One's conduct

during the period following the failed Unimag venture does not support Ronald Sr.'s claim that Bank One in some way ratified the transactions or, at least through inaction, waived any argument that the transactions were improper. Without passing on the question of whether the trustee could or should have acted differently to safeguard the trust assets, the conduct of Bank One after 1999 and particularly during the course of the present litigation, demonstrates no implicit or explicit approval of the contested transactions, but only frustrated attempts to gain information about them.

{¶53} The record thus discloses that, while Bank One had to overcome a difficult discovery process in reconstituting the record of the transactions that formed the basis of the probate court's award, the evidence not only is sufficient to sustain the probate court's factual conclusions regarding the transactions but is nearly one-sided in support of those conclusions. The manifest weight of the evidence supports the probate court's monetary judgment in favor of Bank One against Ronald Sr. Ronald Sr.'s seventh assignment of error accordingly is overruled.

D. Adequacy of Bank One's Accounting

{¶54} Ronald Sr.'s fifth, eighth, ninth, and tenth assignments of error, the third and fourth assignments of error of Ronald Jr., Swaddling, and Johnson, and Talbott's second, third, fourth, fifth, sixth, seventh, eighth, and tenth assignments of error assert the manifest weight of the evidence does not support the probate court's decision to adopt Bank One's final accounting as trustee. In addition, Talbott's first, ninth, and eleventh assignments of error raise procedural issues related to this premise.

{¶55} With the exception of the counterclaim Ronald Sr. asserted, we, through this decision, are reversing the probate court's decision to strike the defendants'

counterclaims. In doing so, we also reverse the probate court's decision to strike defendants' various objections to the final accounting. Such resolution of those two issues inevitably compels the probate court take up the matter of the final accounting anew on remand and determine whether the counterclaims or objections, or both, have merit. Because the probate court will undertake new proceedings addressing counterclaims and objections to the final accounting and related matters, and because Bank One's post-appeal new final accounting inevitably will incorporate issues resolved in this appeal, Ronald Sr.'s fifth, eighth, ninth, and tenth assignments of error, the third and fourth assignments of error of Ronald Jr., Swaddling, and Johnson, and all of Talbott's assignments of error are all moot.

{¶56} In addition, we note that Ronald Sr.'s fifth assignment of error alone, were it not moot, would merit reversal of the probate court's judgment regarding the probate court's decision on Bank One's final accounting. His fifth assigned error asserts the probate court erred in permitting Bank One to submit a "supplemental" trust accounting that differed in several significant respects from the initial trust accounting Bank One submitted at the outset of trial.

{¶57} Bank One submitted its supplemental accounting after the beneficiaries filed their objections to the final trust accounting. The transcript confirms that the beneficiaries objected to submission of the supplemental accounting. In particular, Talbott's objections challenged not only changes in the detailed aspects of the accounting but also in actual accounting practices that allegedly differed from the trustee's practices over the life of the trust. As counsel for Ronald Sr. aptly noted, the beneficiaries could not review adequately in the middle of trial the significant changes represented in the supplemental accounting.

{¶58} On appeal, the beneficiaries point out that R.C. 2109.33 provides the beneficiaries or other interested persons shall be given a minimum of 15 days notice before the hearing on final account. As they argue, sudden significant modifications to the final account during the course of the hearing defeat the purpose of the provision, which is to allow interested parties to prepare and submit objections at the hearing. Perhaps no prejudice to the beneficiaries may have resulted had the modifications in the supplemental accounting merely adopted positions taken in objections to the initial accounting. Here, however, particularly with respect to the allegations related to accounting practices, the supplemental accounting appears to have done considerably more than that. On this basis alone, the probate court's decision to adopt Bank One's final accounting for the trust would be reversed if we had not already done so on other grounds.

E. Guardian ad Litem

{¶59} The fifth assignment of error of Ronald Jr., Johnson, and Swaddling asserts the probate court erred in overruling a motion to remove James S. Savage as guardian ad litem. The motion was premised on the fact that Savage previously represented Bank One and had a resulting conflict of interest. In support of their argument for removal, these beneficiaries also argue various other deficiencies in the guardian ad litem's performance before the probate court. They nonetheless do not rebut Bank One's argument on appeal that they never moved in the probate court to remove the guardian ad litem. Limiting our review to those matters actually assigned as error, we overrule the fifth assignment of error of Ronald Jr., Johnson, and Swaddling on the basis that the

probate court could not have erred in refusing to remove the guardian ad litem, as no motion was filed in the probate court seeking his removal.

III. Summary of Dispositions

{¶60} In summary, Linda Scherer Talbott's eleven assignments of error are rendered moot with our reinstatement of her counterclaims against Bank One and objections to the bank's final trust accounting. Ronald Scherer, Sr.'s first, second, third, and fourth assignments of error are sustained in part and overruled in part, his sixth and seventh assignments of error are overruled, and his fifth, eighth, ninth, and tenth assignments of error are moot. The first and second assignments of error of Ronald Scherer, Jr., Patricia Johnson, and Amie Swaddling are sustained in part and overruled in part, their fifth assignment of error is overruled, and their third and fourth assignments of error are moot.

{¶61} The judgment of the Franklin County Court of Common Pleas, Probate Division, is affirmed or reversed as follows: (1) the court's judgment in favor of Bank One against Ronald E. Scherer, Sr. is affirmed, as is the court's judgment striking Ronald E. Scherer, Sr.'s counterclaim against Bank One for non-compliance with discovery orders; (2) the court's judgment striking the counterclaims of Ronald E. Scherer Jr., Patricia Johnson, Amie Swaddling, and Linda Scherer Talbott, as well as their objections to the final accounting, is reversed; and (3) the probate court's disposition of all matters relating to unborn and minor beneficiaries the guardian ad litem represents, including establishment of a separate fund to protect their interests, is affirmed. The matter is 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 E. Scherer Sr., and all other matters necessary to the winding up of Bank One's trusteeship.

*Motion to strike denied;
judgment affirmed in part and
reversed in part; case remanded.*

FRENCH, P.J., and TYACK, J., concur.
