

[Cite as *In re Estate of Taggart v. Smith*, 2009-Ohio-6557.]

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE ESTATE  
OF MARCELLA B. TAGGART,  
DECEASED

NELSON E. MILLER, ET AL.

Plaintiffs-Appellees

-vs-

CATHY ANN SMITH

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 09CA0016

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 63281-B

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 7, 2009

APPEARANCES:

For Defendant-Appellant

For Plaintiffs-Appellees

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*Farmer, P.J.*

{¶1} In 1996, Marcella Taggart created an inter vivos trust and executed a power of attorney. Ms. Taggart's great niece, appellant, Cathy Smith, was named the power of attorney and successor trustee.

{¶2} On August 31, 2004, Ms. Taggart fell and was hospitalized and then placed into a nursing home. Appellant took over Ms. Taggart's affairs on said date. On July 19, 2005, Ms. Taggart died. Appellant was appointed executrix of her estate.

{¶3} On November 29, 2005, appellees, Nelson Miller (Ms. Taggart's nephew) and a majority of the beneficiaries of the trust, filed a complaint for statutory removal of appellant and declaratory judgment for removal of appellant and naming appellee Miller as successor trustee. On December 2, 2005, appellant filed an answer and counterclaim. On February 2, 2006, appellees filed a motion for judgment on the pleadings. By entries filed September 12, 2006, the trial court removed appellant as trustee, dismissed her counterclaim, and named James Keller, Esq. as successor trustee. Mr. Keller was the trustee of the Nelson P. Taggart Trust. The trial court ordered appellant to produce a final account which she filed on December 18, 2006.

{¶4} On March 26, 2007, appellees filed objections to the final accounting, questioning disbursements of Ms. Taggart's personal property and funds. A bench trial commenced on October 15, 2007. By judgment entry filed February 17, 2009, the trial court found appellant breached her fiduciary duties, and ordered appellant to return all claimed "gifts" and any monies she paid to herself and reimburse the trust \$1,900.00 she had paid to her husband and \$4,898.30 she had paid to her attorney.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT THE FARM EQUIPMENT AND PERSONAL PROPERTY WERE ASSETS OF THE MARCELLA B. TAGGART TRUST WHERE THERE WAS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THIS FINDING."

II

{¶7} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE ACCOUNT OF CATHY ANN SMITH WAS IN UNACCEPTABLE FORM WHERE THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THIS FINDING."

III

{¶8} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING CATHY ANN SMITH TRUSTEE FEES WHERE THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THIS FINDING."

IV

{¶9} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REQUIRING CATHY ANN SMITH REIMBURSE THE MARCELLA B. TAGGART TRUST FOR EXPENSES AND ATTORNEY FEES WHERE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THIS FINDING."

{¶10} Appellant's four assignments of error challenge specific findings of the trial court as being against the sufficiency of the evidence.

{¶11} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9.

{¶12} With the above standard of review as a guide, we will address the assignments of error.

I

{¶13} Appellant claims there is insufficient evidence to support the trial court's findings that certain farm equipment and personal property were assets of the Marcella B. Taggart Trust. Appellant claims a John Deere Tractor, a Ford Tractor, three grandfather clocks, a corner cupboard, and a set of diamond earrings were gifts to her from Ms. Taggart. Appellant also claims a Ford loader, two hay wagons, a post-hole digger, a hand cornsheller, a three-point blade, a John Deere plow, a Ford plow, and a shotgun were never the property of Ms. Taggart and therefore were not assets of the trust.

{¶14} In its judgment entry filed February 17, 2009, the trial court concluded the following:

{¶15} "Cathy Ann Smith had a fiduciary relationship with Marcella B. Taggart based upon the Power of Attorney executed by Marcella B. Taggart in 1996 and fully exercised beginning August 31, 2004 when Cathy Ann Smith took over total control of Marcella's personal and real property, including all business affairs. Cathy Ann Smith

also had a fiduciary relationship with all of the beneficiaries of the Marcella B. Taggart Trust by virtue of the fact that she was the Successor Trustee of the Marcella B. Taggart Trust. A fiduciary relationship is defined as one in which special confidence and trust is reposed in the integrity and fidelity of another and as a resulting position of superiority or influence, acquired by virtue of this special trust. *Ed Schory & Sons, Inc. v. Society National Bank* (1996), 75 Ohio St.3d 433, 422. The person who holds the Power of Attorney bears the burden of proof on the issues of fairness of the transaction.

{¶16} "With that fiduciary relationship in mind, the Plaintiffs claim that the John Deere tractor, the Ford tractor, three grandfather clocks, a corner cupboard and a set of diamond earrings, which were clearly the property of Marcella B. Taggart at one time, were not given to Cathy Ann Smith as she claims and should be declared the property of the Trust. There are three elements to a gift: (1) intent of the donor to make a gift; (2) delivery of the property to the donee; and (3) acceptance of the gift by the donee. *Bolles v. Toledo Trust* (1936), 132 Ohio St. 21.

{¶17} "The Court finds that the diamond earrings are property of the Trust. Despite Cathy Ann Smith and her mother's claims, the Court finds there was no delivery of the property since Marcella continued to wear the earrings on a regular basis until and including the last day she lived a regular life before going to the hospital and nursing home and the donative intent was not proven.

{¶18} "This Court finds that the three grandfather clocks and the corner cupboard also are the property of the Marcella B. Taggart Trust because, again, delivery of the property never occurred to Cathy Ann Smith and her family and donative intent was not proven. Although Cathy claims Marcella gave these items to her and her

family years ago, the items remained in Marcella's home until the Spring of 2005. She claims that the gift was completed years ago yet, she told a story about going to the nursing home or hospital and asking Marcella if she could take the items. She claims Marcella, although she could not talk, squeezed her hand yes when she was asked if Cathy could remove the items. This story makes no sense as Cathy would not need to ask Marcella if the gifts were already made years ago. The Court does not believe the gift was made of these items.

{¶19} "Likewise, the Court finds that the John Deere tractor and Ford tractor owned by Marcella B. Taggart is the property of the Marcella B. Taggart Trust. Again, the Court finds there was no delivery of these tractors as it is clear that the John Deere tractor continued to be at Marcella's farm often, was brought to Marcella's farm upon her demand and the Ford tractor was generally maintained on Marcella's farm."

{¶20} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶21} The believability of appellant's version of how the items were gifted to her rests upon the testimony that Ms. Taggart had promised the items to her prior to her fall and had reaffirmed those promises after her fall when she was 90 years old and unable to communicate. October 15, 2007 T. at 34, 46, 55, 57; October 16, 2007 T. at 99, 101, 105. Appellant argues via her witnesses that after her fall, although Ms. Taggart was

unable to speak, she was aware, could follow a person with her eyes, and indicated her wishes by squeezing hands or blinking her eyes. October 16, 2007 T. at 6, 36-37, 67.

{¶22} As noted by the trial court, the essential elements to prove an inter vivos gift are: (1) intent of the donor to make a gift; (2) delivery of the property to the donee; and (3) acceptance of the gift by the donee. *Bolles*, supra. The burden rests on the donee to prove the donor's intent by clear and convincing evidence. *In re Fife's Estate* (1956), 164 Ohio St. 449. "Clear and convincing evidence" is defined as evidence sufficient to "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶23} The evidence presented contrary to appellant's assertions that the items in question were gifted to her was circumstantial. Circumstantial evidence is that which can be "inferred from reasonably and justifiably connected facts." *State v. Fairbanks* (1972), 32 Ohio St.2d 34, paragraph five of the syllabus. "[C]ircumstantial evidence may be more certain, satisfying and persuasive than direct evidence." *State v. Richey*, 64 Ohio St.3d 353, 1992-Ohio-44. It is to be given the same weight and deference as direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶24} The two tractors were seen at both Ms. Taggart's farm and appellant's property. October 15, 2007 T. at 145, 149-150. At one point, Ms. Taggart told appellant to bring the John Deere tractor back to her farm. *Id.* at 158. The Ford loader, the two hay wagons, the post-hole digger, the hand cornsheller, the Ford three-point blade, the John Deere plow and the Ford plow were on Ms. Taggart's farm immediately preceding her fall and after her fall in August of 2004. *Id.* at 149.

{¶25} When Ms. Taggart fell, she was wearing the diamond earrings in question. Id. at 58-59. Appellant would take them out of Ms. Taggart's ears every time she went to the hospital in case something would happen to her. Id. at 58. Ms. Taggart always wore the earrings unless she was in the hospital. Id. at 182. Appellant testified the earrings were gifted to her and she let Ms. Taggart wear them. October 16, 2007 T. at 71-72. Appellant's mother, Jacqueline Holbrook, and appellant's daughter, Katie Cupp, both testified Ms. Taggart had gifted the earrings to appellant, but Ms. Taggart continued to wear them except for when she was in the hospital. October 15, 2007 T. at 349; October 16, 2007 T. at 8.

{¶26} Appellant also claims a shotgun was hers, but at trial she testified she never saw it after Ms. Taggart's fall. October 15, 2007 T. at 32. Ms. Taggart kept a shotgun in her bedroom or at her bed at all times. Id. at 151-152, 185.

{¶27} The basis of appellant's claims to the grandfather clocks and the cupboard was that Ms. Taggart referred to them as "Cathy's clock" and "Cathy's cupboard" and prior to her fall, told appellant to go ahead and take them. October 16, 2007 at 63, 67, 103. Appellant claimed she did not have the room or the time to move the items. October 16, 2007 T. at 63.

{¶28} All of these assertions do not reference a present intent to gift the subject items to appellant. There was never delivery of the items to appellant. In reviewing the evidence as a whole, appellant's assertiveness about the items being gifted to her by Ms. Taggart do not meet the clear and convincing standard.

{¶29} Upon review, we conclude the trial court did not err in finding no donative intent to create an inter vivos gift to appellant. The items were correctly found to be property of the trust.

{¶30} Assignment of Error I is denied.

## II

{¶31} Appellant claims the trial court erred in finding appellant's accounting was in unacceptable form. Appellant claims the account was eventually reconciled and therefore the finding was in error. We disagree.

{¶32} Whether a trustee has met the burden necessary to support an accounting rests in the trial court's sound discretion. *Huntington National Bank v. Wolfe* (1964), 99 Ohio App.3d 585. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶33} In its judgment entry filed February 17, 2009 at Finding of Fact No. 31, the trial court found the following:

{¶34} "Cathy Ann Smith failed to file her account with the court as ordered; she then filed a 'book' that was in unacceptable form; she was ordered to provide her records to Buckeye Accounting to prepare an account that could be accepted by the court at the cost of \$2,050. Despite her previous statements, she never presented a check register for the checks she wrote for the Trust and she did not provide proper and acceptable receipts, invoices or other records of her disbursements, such as submitting an unknown checking account debit of \$454.91 during 2005; \$6,087.75 Chase Credit Card charges with no statements; and claims thousands of dollars for herself and her

immediate family with no records other than a calendar with a few notes and some checkmarks."

{¶35} All of these findings are supported by record. The successor trustee, James Keller, testified the accounting was so late, he was forced to file a contempt action. October 15, 2007 T. at 203-204. Mr. Keller testified the accounting he eventually received was not a typical accounting, as all receipts and all disbursements were not supported with documentation. Id. at 206-207. In fact, appellant's records were comprised of checkmarks on a calendar to demonstrate what she had done on a particular day. Id. at 60, 66, 69, 72, 123; October 16, 2007 T. at 81. It was through this method that she submitted bills for servicing the farm.

{¶36} Faced with this slipshod accounting method and appellant paying herself \$21,000 for "fees" after she had learned that the trial court was going to remove her as trustee, the trial court's findings were appropriate.

{¶37} Assignment of Error II is denied.

### III

{¶38} Appellant claims the trial court erred in denying her trustee fees as there was no evidence to support the conclusion that she did not faithfully discharge her duties. We disagree.

{¶39} R.C. 5807.08 governs compensation of trustee and states the following:

{¶40} "(A) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

{¶41} "(B) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less

compensation if the duties of the trustee are substantially different from those contemplated when the trust was created or the compensation specified by the terms of the trust would be unreasonable low or high."

{¶42} In its judgment entry filed February 17, 2009, the trial court found the following on the issue of trustee fees:

{¶43} "The Court finds that Cathy Ann Smith breached her fiduciary duties by: (1) improperly appropriating property of the Trust and claiming it to be gifts to herself and her family; (2) submitting excessive and undocumented requests for payments to her and her immediate family; (3) paying herself and her immediate family excessive, undocumented fees unjustified by any services actually performed; (4) failing to keep reasonable and satisfactory records of her actions as a fiduciary; (5) leasing to herself trust property for three years for \$1.00; and (6) paying her personal attorney, John Harker, from Trust assets to oppose her removal as Trustee and defend her unreasonable actions as Trustee.

{¶44} "Because of these breaches, the Court finds Cathy Ann Smith is not entitled to any fiduciary fees. She has already paid herself \$30,197.04 according to the Account filed. This Court orders that she is therefore not entitled to the additional fees she is requesting and she must return the \$30,197.04 to the Marcella B. Taggart Trust."

{¶45} Appellant testified she never exercised her power of attorney until Ms. Taggart's fall in August 2004. October 15, 2007 T. at 13; October 16, 2007 T. at 61. It was after this time, in the spring of 2005, that appellant began a systematic purging of items from Ms. Taggart's home (grandfather clocks, cupboard). October 15, 2007 T. at

47, 52, 56; October 16, 2007 T. at 65. Appellant unnecessarily kept Direct TV, overdraft protection, and newspapers coming to a vacant house. October 15, 2007 T. at 62-63.

{¶46} As stated in Assignment of Error II, appellant paid herself as soon as she learned she was about to be removed as trustee. Appellant's record-keeping was undocumented, and the successor trustee was forced to file a contempt action to receive an accounting.

{¶47} We note the successor trustee requested appellant "to continue doing what I had still been doing, cleaning, mowing, taking care of the cats, all of that" after his appointment and before the auction. October 15, 2007 T. at 116, 125-126. Appellant helped out with the auction by boxing up items and cleaning the house, but charged an inordinate amount for the work done. October 15, 2007 T. at 66-67, 258-262. Mr. Keller testified that he authorized continued mowing only. Id. at 210-211.

{¶48} Appellant charged feeding the barn cats at the farm to the trust while she leased the barns and outbuildings for three years for \$1.00. October 15, 2007 T. at 23, 94; October 16, 2007 T. at 130.

{¶49} Given the evidence presented, we find the trial court did not abuse its discretion in denying appellant fiduciary fees.

{¶50} Assignment of Error III is denied.

#### IV

{¶51} Appellant claims the trial court erred in ordering her to reimburse the trust for expenses and attorney fees. We disagree.

{¶52} In its judgment entry filed February 17, 2009 in Finding of Fact Nos. 30 and 32, the trial court found the following:

{¶53} "Cathy Ann Smith is asking the Trust to pay her husband, Paul Smith, for fifty-five hours of work on behalf of the Trust, for 'a lot of mowing' for the amount of \$1,455. Cathy Ann Smith already paid Paul Smith, her husband, \$700 and \$1,200 for mowing on November 22, 2005 and June 20, 2006, respectively.

{¶54} "Cathy Ann Smith paid her attorney, John Harker, \$4,898.30 out of the Trust account and reasonable documentation has not been provided to the Court to show those services were for anything but opposing her removal as Trustee and defending her actions as Attorney-in-Fact and Trustee."

{¶55} The trial court ordered appellant to reimburse the trust \$1,900.00 that she had paid to her husband and \$4,898.30 that she had paid to her attorney.

{¶56} No evidence was presented in the form of a bill or invoice to document the amount due and owing to her husband for mowing services. Likewise, no evidence was presented to rebut the trial court's conclusion that the attorney fees were only generated to defend appellant's position as the fiduciary.

{¶57} Assignment of Error IV is denied.

{¶58} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W/ Scott Gwin

s/ William B. Hoffman

JUDGES

SGF/sg 1120

