

**IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO
PROBATE DIVISION**

BEVERLY S. NICHOLS ET AL

Plaintiffs

vs.

JEFFREY J. BIXLER

Defendant

) **CASE NO. 226829**

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) **HONORABLE DIXIE PARK**

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) **PLAINTIFFS' PROPOSED FINDINGS OF FACT**

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FINDINGS OF FACT

**JUDGE DIXIE PARK
STARK COUNTY PROBATE COURT**

INTRODUCTION

1. Jo L. Bixler was an honest, hardworking man who spent his entire life living and working on a farm.
2. Attorney E. Lang D'Atri ("Attorney D'Atri") and Jo L. Bixler have been friends since they were both young boys.
3. In addition to their friendship, Jo L. Bixler became a client of Attorney D'Atri.
4. Attorney D'Atri was involved in all of Jo. L Bixler's estate planning, including the formation of the The Jo L. Bixler Trust ("Trust"). (Exhibit 1)
5. As part of the estate planning, Jo L. Bixler, on the advice of Attorney D'Atri, transferred all of his farming equipment and chattels to an LLC called J. Bixler Farms LLC.
6. Initially, Jo L. Bixler was the sole member of J. Bixler Farms LLC.
7. As part of the estate planning, Jo L. Bixler transferred all of the real estate he owned to an LLC called Bixler & Son LLC.
8. Jo L. Bixler was the sole member of Bixler & Son LLC until he assigned his entire interests to the Trust in September 2005. (Exhibit 4)
9. Currently, Bixler & Son LLC owns the following parcels:
 - a. Kent Ave. N.E. OH (Parcel No. 1900261)
 - b. Kent Ave. N.E. OH (Parcel No. 1900767)

- c. 12845 Bixler Ave. N.E. (Parcel No. 1900962)
- d. Bixler Ave N.E. OH (Parcel No. 1900963)
- e. 13000 Bixler Ave. N.E. (Parcel No. 1903174)
- f. 44 State Route 43 (Parcel No. 36-021-00-00-021-000)
- g. Manning Rd (Parcel No. 36-030-00-00-003-000) (Exhibit 20)

INTENT

- 10. Over the course of the past three decades, Federal and Ohio laws have changed drastically as it pertains to how estates are taxed. (Exhibit 21)
- 11. Prior to January 1, 2013, both the Ohio and Federal governments taxed estates and inheritance heavily.
- 12. Prior to January 1, 2013, Jo L. Bixler, through counsel (Attorney D'Atri), devised an estate plan aimed at reducing the tax burden on the potential estate of Jo. L. Bixler.
- 13. By January 31, 2013, the Federal estate tax exemption was raised to \$5,000,000.00 and Ohio had removed its estate tax. (Exhibit 21)
- 14. On or about March 17, 2013, Jo. L. Bixler signed the Restatement of Trust Agreement for the Jo. L. Bixler Trust. (Exhibit 1)
- 15. The Trust states in part at Section 6.2 -Option to Purchase as follows:

"It is my intention and direction that my trust estate, after payment of all taxes and expenses pursuant to Section 5.2 hereof, be divided among my beneficiaries as set forth in Section 6.3 below. Such division of property may be made in money, units of Bixler & Son, LLC, or other property at my Trustee's sole discretion, and need not be pro-rata distributions of particular types of property. The Trustee shall exercise these powers of distribution in a fiduciary capacity primarily in the interests of the beneficiaries, subject to the valuation of units of Bixler & Son, LLC, as directed below.

I hereby give and grant to my son, Jeffrey J. Bixler, the first right and option to purchase any or all of the units of Bixler & Son, LLC, owned by me and held in my trust within 18 months after my death at a valuation based upon the underlying value of real estate owned by Bixler & Son, LLC. The valuation of said units shall be based upon the agricultural use value of said real estate, and each unit shall have a value of one-hundredth (1/100) of the total value of such real estate holdings. It is my intention and direction that Jeffrey J. Bixler shall have the right and authorization to purchase said units even though he may be serving as Fiduciary and Trustee of my Trust estate at the time of purchase.

Should Jeffrey J. Bixler not exercise his right and option to purchase units of Bixler & Son, LLC, as set forth in the above paragraph totally or in part, then Anthony C. Nichols shall have the second right and option to purchase any remaining units upon the same terms and conditions as granted to Jeffrey J. Bixler in the above paragraph. The option to purchase granted to Anthony C. Nichols shall expire 24 months after my date of death." (Exhibits 13 and 14)

16. Prior to executing the Restatement of the Trust, Jo L. Bixler and Attorney D'Atri discussed how Jo. L. Bixler intended his farm land to be passed.
17. Jo L. Bixler wanted to give his son, Jeff Bixler, an option to buyout the beneficial interests of the other beneficiaries of the Trust, so that Jeff Bixler could continue the farming business.
18. Since Jeff Bixler was already approaching sixty years of age, Jo L. Bixler wanted to give his grandson, Anthony Nichols the second option to buyout out the other Trust beneficiaries.
19. In determining the amount either Jeff Bixler or Anthony Bixler would have to pay to the other beneficiaries, Attorney D'Atri and Jo L. Bixler discussed fair market value, the price farm land was selling for in the community, and the value assessed by the county auditors.
20. Jo L. Bixler did not believe that the amounts set by the county auditor was enough value for the buyout option under the Trust.
21. Jo L. Bixler specifically intended that the CAUV tax assessment was not the valuation system he wanted used in the Trust.
22. Jo L. Bixler's intended valuation system was for either Jeff Bixler or Anthony Nichols to buyout the land at the price farmers were paying for land intended to be farmed.
23. Attorney D'Atri used the term "agricultural use value" to describe Jo L. Bixler intent that the valuation of the land be what farmers were paying for farm land.

AGRICULTURAL USE VALUE

24. On or about January 30, 2014, Jo L. Bixler passed away.
25. Jeff Bixler, Pamela Bixler, Timothy Bixler, Beverly Nichols and Anthony Nichols had not seen the Trust or knew of its specific terms until after Jo L. Bixler's death.
26. Prior to Jo L. Bixler's death, the only person, other than Jo L. Bixler, who had knowledge of the Trust and its terms was Attorney D'Atri.
27. Pursuant to the Trust, upon the death of Jo L. Bixler, Jeffery J. Bixler became the Successor Trustee. (Exhibits 1, 13 and 14)
28. Beverly S. Nichols and Anthony C. Nichols are beneficiaries of Trust. (Exhibits 1, 13 and 14)
29. The Trust provides that the assets of the Trust should be divided by the following percentages:

- a. Jeffrey J. Bixler (son) 52%
- b. Timothy J. Bixler (son) 7%
- c. Beverly S. Nichols (daughter) 13%
- d. Pamela S. Rose (daughter) 10%
- e. Anthony C. Nichols (grandson) 18% (Exhibits 1, 13 and 14)

30. Pursuant to the Trust, Defendant Jeff Bixler has indicated that he wanted to exercise his option and buyout the remaining beneficiaries at “agricultural use value”.
31. Attorney D’Atri requested licensed appraiser, Jason Kiko, to perform an appraisal of (1) Manning Rd (Parcel No. 36-030-00-00-003-000), (2) 13000 Bixler Ave. N.E. (Parcel No. 1903174), (3) Kent Ave. N.E. OH (Parcel No. 1900767), and (4) 44 State Route 43 (Parcel No. 36-021-00-00-021-000).
32. Mr. Kiko was asked to perform a valuation of both the fair market value and “agricultural use value” or farm value.
33. Mr. Kiko was told that “agricultural use value” or farm value meant land being purchased by a farmer for farming purposes.
34. Mr. Kiko inspected the properties, researched recent comparable sales of farm land sold to farmers, and reviewed county auditor’s appraisals for the value of the buildings on the parcels.
35. To a reasonable degree of professional certainty, Mr. Kiko opined the following values:

| Lot Description/Parcel No. | Fair Market Value | Agriculture Use Value |
|---|--------------------------|------------------------------|
| Manning Rd (Parcel No. 36-030-00-00-003-000) | \$185,000.00 | \$185,000.00 |
| 13000 Bixler Ave. N.E. (Parcel No. 1903174) | \$2,059,000.00 | \$1,280,800.00 |
| Kent Ave. N.E. OH (Parcel No. 1900767) | \$195,000.00 | \$195,000.00 |
| 44 State Route 43 (Parcel No. 36-021-00-00-021-000) | \$480,000.00 | \$480,000.00 |
| TOTAL: | \$2,919,000.00 | \$2,140,800.00 |

36. Based on the certified copies of the property card from Stark County, 12845 Bixler Ave. N.E. (Parcel No. 1900962), the appraised value of the property is \$102,800.00 in 2015.
37. Based on the certified copies of the property card from Stark County, Kent Ave. N.E. OH (Parcel No. 1900261), the appraised value of the property is \$800.00 in 2015.
38. Based on the certified copies of the property card from Stark County, Bixler Ave N.E. OH (Parcel No. 1900963), the appraised value of the property is \$2,500.00 in 2015.

SPECIFIC PERFORMANCE

39. Plaintiff are entitled to specific performance of the terms, conditions, and provisions, by court decree, among other things, ordering defendant to complete conveyance of the property described in the Trust and/or Assignment of Personal Property. (Exhibits 13 and 14)
40. Section 6.1 of the Trust provides that the personal property shall be distributed "...in accordance with instructions which may have been communicated to him (my trustee) by me orally or in writing from time to time during my lifetime, by me orally or in writing from time to time during my lifetime." (Exhibits 1, 13 and 14)
41. In an "Assignment of Personal Property" and "Requests Made by Jo L. Bixler in Conversation with E. Lang D'Atri Regarding Distribution of Certain Tangible Person [sic] Property Upon His Death", Jo L. Bixler made specific requests for distribution of certain tangible property including,
 - a. The first choice of Jo's mother's antique furniture is to be made by my daughter, Beverly, and the balance to be divided among her and her siblings as they may determine.
 - b. Diamond rings to be divided between my daughters, Pamela and Beverly, as they may determine.
 - c. Jo's mother's dishes to my daughters, Pamela and Beverly, to be divided as they may determine.
 - d. My Ljutic single barrel trap gun to my grandson, Anthony C. Nichols.
 - e. All reloading equipment and supplies to my grandsons, Anthony C. Nichols and Michael Baum.
42. Demand has been made by Plaintiffs to Defendant and Trustee Bixler, for an accounting and distribution of non-business tangible personal property pursuant to the terms of the Trust and communications of the Donor. (Exhibits 13 and 14)
43. Beverly Nichols has not received any personal property items including first choice of Jo's mother's antique furniture and diamond rings.
44. Anthony Nichols has not received any personal property items including the Ljutic single barrel trap gun or any reloading equipment.
45. Defendant-Trustee Jeff Bixler has failed to secure the personal property of the Trust and continues to leave the personal items in an unlocked home.

46. Although Defendant-Trustee Jeff Bixler claims that guns, diamonds and other items cannot be located, he has not conducted any investigation and did not alert the police department.

TRUST ACCOUNTING

47. Plaintiff also seeks an accounting for all trust assets from the time Defendant became Trustee to present. This includes personal property, real property, rental payments from real property, bank accounts, and/or cash assets. (Exhibits 13 and 14)
48. Discovery including interrogatories and requests for production of documents were sent to Defendant-Trustee Jeff Bixler with the Complaint. (Exhibit 13)
49. Jeff Bixler, Tim Bixler and Pamela Bixler were deposed on January 24, 2017 where it was discovered that numerous documents were not produced in discovery.
50. Attorney D'Atri indicated that he provided several "banker's boxes" of documents to Defendant Trustee Jeff Bixler.
51. The Court granted a motion to compel requiring Defendant to produce the following documents by May 30, 2017, i.e. the day before trial:
- a. Books, receipts, invoices and accounting for Bixler & Son LLC, Jo. L. Bixler Trust and/or Bixler Farm LLC;
 - b. All bank statements, agreements, copies of checks or any other documents purporting to sell, transfer or convey the shares of Bixler & Son LLC;
 - c. All bank statements or other documents showing income from Bixler & Son LLC and/or Jo. L. Bixler Trust. This includes all deposits (by cash, check or money order);
 - d. Any and all written leases involving Bixler & Son LLC properties;
 - e. The expenses of the Trust including invoices and receipts showing the source of the expense;
 - f. Documentation of profits and expenses of the Trust; and
 - g. All documentation, including, but not limited to bank statements, checks, and withdraws regarding Huntington Bank Account and KeyBank Account.
52. Defendant-Trustee was unaware of the Court's order to compel the above listed documents.
53. Defendant-Trustee, on the advice of his counsel, did not provide the above listed documents.

54. Defendant-Trustee, on the advice of his counsel, did provide the bankers boxes of documents provided by Attorney D'Atri.
55. Defendant-Trustee paid \$95/acre for rental of land for his farming, but only pays Bixler & Son LLC \$60/acre.
56. Defendant-Trustee continues to live in Bixler & Son LLC properties for rent free and has lived rent-free on Bixler & Son LLC for all relevant times.
57. Defendant-Trustee has deposited income belonging to Bixler & Son LLC into J. Bixler Farms LLC, thus commingling the funds.

CONCLUSIONS OF LAW

1. The Court has the power, pursuant to R.C. Chapter 2721.03 et al to enter a declaratory judgment regarding the construction or validity arising from a trust.
2. When the language of the trust instrument is unambiguous, a court can ascertain the settlor's intent from the express terms of the trust itself, and extrinsic evidence is not admissible to interpret the trust provisions. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314, 612 N.E.2d 706, 708. However, where ambiguity exists or the settlor's intent is unclear, a court may look to extrinsic evidence to determine the settlor's intent. (*Emphasis added*) *Craft v. Shroyer* (1947), 81 Ohio App. 253, 258, 37 O.O. 77, 79–80, 74 N.E.2d 589, 592; *Lourdes College of Sylvania v. Bishop* (C.P.1997), 94 Ohio Misc.2d 51, 57, 703 N.E.2d 362, 366; *Woodward v. Ameritrust Co.* (C.A.6, 1984), 751 F.2d 157, 161.
3. The Court finds that the term “agricultural use value” is an ambiguous term requiring the Court to consider additional evidence of the Trustor’s intent.
4. The Trustor’s intended “agricultural use value” to mean the price a farmer would pay for the property that would be used for farming or agricultural purposes.
5. The agricultural use value of the seven parcels owned by Bixler & Son LLC is as follows:

| Lot Description/Parcel No. | Agriculture Use Value |
|---|-----------------------|
| Manning Rd (Parcel No. 36-030-00-00-003-000) | \$185,000.00 |
| 13000 Bixler Ave. N.E. (Parcel No. 1903174) | \$1,280,800.00 |
| Kent Ave. N.E. OH (Parcel No. 1900767) | \$195,000.00 |
| 44 State Route 43 (Parcel No. 36-021-00-00-021-000) | \$480,000.00 |
| 12845 Bixler Ave. N.E. (Parcel No. 1900962) | \$102,800.00 |
| Kent Ave. N.E. OH (Parcel No. 1900261) | \$800.00 |

| | |
|---|-----------------------|
| Bixler Ave N.E. OH (Parcel No. 1900963) | \$2,500.00 |
| TOTAL: | \$2,246,900.00 |

6. The respective beneficiary shares of the Trust are as follows:

- | | |
|----------------------------------|-----|
| a. Jeffrey J. Bixler (son) | 52% |
| b. Timothy J. Bixler (son) | 7% |
| c. Beverly S. Nichols (daughter) | 13% |
| d. Pamela S. Rose (daughter) | 10% |
| e. Anthony C. Nichols (grandson) | 18% |

7. Defendant Trustee Jeff Bixler has thirty (30) days complete the exercise of his option and pay the sums of:

- | | |
|----------------------------------|--------------|
| a. Jeffrey J. Bixler (son) | N/A |
| b. Timothy J. Bixler (son) | \$157,283.00 |
| c. Beverly S. Nichols (daughter) | \$292,097.00 |
| d. Pamela S. Rose (daughter) | \$224,690.00 |
| e. Anthony C. Nichols (grandson) | \$404,442.00 |

8. If Defendant-Trustee fails to complete his option within thirty (30) days, Anthony Nichols shall have an additional sixty (days) to exercise and complete his option.

9. Pursuant to Ohio Revised Code Section 5808.13 et al and R.C. 2109.303, the Trustee has an obligation to provide information, documents and an accounting to the beneficiaries.

10. Defendant Trustee Jeffrey Bixler did not provide a complete and full accounting as required by Ohio law.

11. Revised Code Section 5807.06 provides that a court may remove a trustee on its own initiative if the trustee has committed a serious breach of trust or "Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries."

12. Defendant Trustee Jeffrey Bixler failed to provide an accounting, failed to secure personal property as required under R.C. 5808.09, and otherwise failed to carryout his fiduciary duties as a Trustee. These actions and inactions are a serious breach of trust. In addition, the court determines that Trustee Jeffrey Bixler is unfit, unwilling to be the trustee and his removal as the trustee is in the best interests of the beneficiaries. The Court will appoint an independent Trustee to replace Defendant Jeffrey Bixler.

13. In compliance with Revised Code Chapter 5800 et al, the independent Trustee will immediately inventory and distribute the personal property in an equitable manner and make the following specific distributions:

- a. The first choice of all Jo's mother's antique furniture is to be made by my Beverly Nichols;
 - b. Diamond rings to be divided between Pamela Bixler and Beverly Nichols;
 - c. Jo's mother's dishes to be divided between Pamela Bixler and Beverly Nichols;
 - d. The Ljutic single barrel trap gun to Anthony C. Nichols.
 - e. All reloading equipment and supplies to Anthony C. Nichols and Michael Baum.
14. In compliance with Revised Code Chapter 5800 et al, the independent Trustee will immediately provide a detailed accounting of all Trust assests, profits and expenses from January 30, 2014 to present.
15. In compliance with Revised Code Chapter 5800 et al, the independent Trustee will pursue any claims against J. Bixler Farms LLC for all unpaid rent for both farm land and residential property. Farm land rental shall be paid at \$95.00/acre/year from January 30, 2014.
16. The Court has determined that the failure to provide documentation ordered to be disclosed by the Court's Order entered May 22, 2017 is a violation of Rule 37(B) of the Ohio Rules of Civil Procedure.
17. Rule 37 (B) (3) provides that, "...the court shall order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure...". Within fourteen days of this order, Plaintiffs' counsel shall submit to the Court an accounting of the expenses, costs and attorney's fees incurred as a result of Defendant's failure to produce the documents as ordered by the Court.
18. Upon receipt the accounting of the expenses, costs and attorney's fees incurred as a result of the Defendant's failure to produce the documents as ordered by the Court, the Court will determine the amount the Defendant and/or his attorney shall pay Plaintiffs.
19. Pursuant to 2721.16(A)(1)(c), "Regardless of whether a claim for declaratory relief is granted under this chapter, a court of record awards attorney's fees to a fiduciary, beneficiary, or other interested party, the attorney's fees are to be paid out of trust property, estate property, or other property that is the subject of a fiduciary relationship and that is involved in that claim or proceeding for declaratory relief, and the attorney's fees are awarded in accordance with equitable principles that permit recovery of attorney's fees incurred for services that are beneficial to the trust or estate."
20. All remaining costs and attorneys' fees incurred by Plaintiffs Beverly Nichols and Anthony Nichols shall paid by the Trust before distributions to the beneficiaries.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was propounded via regular U.S. fax, electronic mail and/or hand-delivery this 9th day of June, 2017 upon the following:

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Respectfully submitted,



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