

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

FILED

MAY 01 2019

JUDGE DIXIE PARK
STARK COUNTY PROBATE COURT

BEVERLY S. NICHOLS ET AL

Plaintiffs

vs.

JEFFREY J. BIXLER

Defendant

) CASE NO. 226829

) HONORABLE THOMAS A. SWIFT

) PLAINTIFFS' POST HEARING BRIEF ON
) TIMOTHY BIXLER'S MOTION TO
) RECONSIDER

Introduction

On May 31, 2017, after one year and eight months of litigation, a bench trial was held on Plaintiffs' claims of Declaratory Judgment, Construction of Trust, and for an Accounting and Injunction from Transferring Trust Assets. On July 18, 2017, Honorable Judge Park issued a sixteen (16) page, detailed journal entry issuing findings of fact and conclusions of law. *Attached for the Court's convenience.*

The primary issue before the Court was how to interpret the term "agricultural use value." The term was used in Section 6.2 in the trust of Jo L. Bixler to determine the price that Jeffrey Bixler should pay to buy out the remainder of the beneficiaries under an option to purchase.

On March 27, 2017, Defendant filed a Motion for Partial Summary Judgment contending that the term meant CAUV, which stands for Current Agricultural Use Value, and is a mechanism for taxing farm land. After extensive briefing, Judge Park issued a May 22, 2017 order that denied Defendant's Motion for Partial Summary Judgment. Judge Park's order effectively found that the terms of this trust provision were not CAUV as a matter of law, and that there were genuine issues of material fact.

At a May 31, 2017 hearing, the Court found that the term “agricultural use value,” was not CAUV. After hearing the evidence, on July 18, 2017, Judge Park ruled as follow: “This Court finds that the term, ‘agricultural use value’ as it appears in Section 6.2 of the Restated Trust means the price a willing farmer would pay a farmer willing to sell the collected properties as a farm.” *Journal Entry at pg. 12.*

Timothy Bixler, a successor trustee who is bafflingly attempting to minimize assets for the trust, has asked this Court in a February 28, 2019 Motion for Partial Reconsideration, to set the dangerous precedent of reconsidering the well-considered decision of Judge Dixie Park when that responsibility lies with the Fifth District Court of Appeals. Plaintiffs oppose such a collateral attack on Judge Park’s ruling and asks this Court to deny Timothy Bixler’s Motion.

Hearing on Motion to Reconsider

On April 17, 2019, this Court held a hearing regarding Timothy Bixler’s Motion for Partial Reconsideration. Timothy Bixler’s basis for asking this Court to reconsider Judge Park’s ruling is based on a mostly inaudible surreptitiously recorded meeting—a recording which was not brought forward previously because Timothy Bixler believed he was committing a crime.

This recording was used to cross-examine Attorney Lang D’Atri, and call into question his testimony that Judge Park found to be credible. The primary inquiry attempted to get Attorney D’Atri to admit that the term “agricultural use value” in Section 6.2 of the trust meant CAUV. No such testimony was presented to this Court. The only testimony of Attorney D’Atri was that the Donor’s intent was not CAUV. In the entirety of this recording, the term CAUV never appears and at no time did Attorney D’Atri state that CAUV was intended by Jo Bixler.

There was inquiry related to Attorney D'Atri checking with the county auditor, but Attorney D'Atri's testimony was that he was checking with the county auditor because, in his experience as a landowning farmer in the community, the fair market value used by the auditor can be instructive as to "agricultural use value."

Without testimony contrary to the assertion that CAUV is never used, there is no cause to reconsider Judge Park's ruling, and to do so at this juncture would set a dangerous precedent.

Analysis

I. There is No Justification for this Court to Reconsider Judge Park's Decision

Judge Park had the benefit of an entire day's trial following nearly a year of managing the case. She personally observed the testimony of the witnesses, and was able to assess their credibility. There is no reason to second-guess Judge Park's decision, as Defendant is entitled to review of that decision on appeal.

The Trust now argues that Judge Park's decision following trial was interlocutory, and thus able to be reconsidered. This argument is completely contrary to the Trust's previous position as set forth in its opposition to Plaintiff's motion to dismiss their appeal in the Fifth District, and the Trust should be estopped from asserting it.

Even if this Court were not to estop the Trust from asserting its contradictory position, there are very real concerns with the type of second-guessing urged by the Trust. In *Shade v. Kaiser*, 2nd Dist. Montgomery No. 24974, 2012-Ohio-4979, the trial court had twice denied the defendant's motion for summary judgment. *Id.* at ¶10-12. Then, a new trial court judge took over the case and granted the motion to reconsider as well as the summary judgment motion. *Id.* at ¶13. While the Second District ultimately agreed with the legal conclusion reached, Judge Froelich

wrote separately to express concern over the manner in which the conclusion was reached—by second guessing the prior trial court judge rather than allowing the matter to proceed to appeal:

It would be difficult to conclude that the decision was based on anything other than the new trial judge's differing interpretation of the same law that had been rejected twice before by the previous trial judge. There is nothing legally wrong with this or, for that matter, if the same judge were to have reconsidered his own previous interlocutory decision. However, both advocates and courts must be continually conscious of the appearance of such “fluidity.”

Id., (Froelich, J., concurring) at ¶39. This same concern has been echoed in the Ohio Supreme Court in *Fairchild v. Miami Valley Hosp., Inc.*, 109 Ohio St.3d 1229, 849 N.E.2d 292, 2006-Ohio-3055, where Justice Lundberg Stratton dissented from a decision to dismiss an appeal as improvidently allowed, noting that a party who believes there has been an unfair decision made in the lower courts may appeal, but that courts should not permit “abusive maneuvering by parties who want a second bite at the apple following an unfavorable interlocutory decision.” *Id.* at ¶9. Here, the Trust invites such a reconsideration not only of an interpretation of the law, but also of the prior judge’s assessment of credibility. To do so would promote more than the “appearance of fluidity,” and would simply endorse “abusive maneuvering by parties who want a second bite at the apple.”

II. Reconsideration of Judge Park’s Decision Would Set a Dangerous Precedent

Granting a motion to reconsider given the procedural posture of this case would simply promote gamesmanship. When the Trust lost at trial, it fired its prior counsel, John Kuhn, and retained attorney Jeffrey Jackmides to prosecute its appeal. It then blamed its failures on John Kuhn and others. When this strategy failed and the Trust lost its appeal, it hired its third lawyer, Craig Conley. This counsel change resulted in the Trust being able to disqualify Judge Park who had ruled adversely to it.

While the Trust is certainly entitled to counsel of its choosing, and counsel is entitled to an impartial fact-finder, neither are entitled to a second bite of the apple once a matter has been fully litigated. To do so would encourage a dangerous precedent where any litigant in Stark County Probate Court who is displeased with an interlocutory ruling made by Judge Park could retain Mr. Conley, disqualify Judge Park, and ask to have the entire matter retried. Litigants are entitled to appeal of adverse rulings—but not strategic maneuvers to obtain some type of intermediate appeal.

Conclusion

Defendant has provided nothing new to reconsider. The only evidence put on was of Attorney D'Atri. Attorney D'Atri's testimony at trial, and at this hearing, continued to be "not CAUV."

Plaintiffs respectfully request that this Honorable Court deny this sideshow Motion for Reconsideration and proceed to the only remaining issue: the valuation of the farm consistent with Judge Park's ruling. If Timothy Bixler disagrees with the Court's interpretation, the proper remedy will ultimately be an appeal to the Fifth District, which is available to him after a valuation is set consistent with Judge Park's ruling.

Respectfully submitted,

TIMOTHY J. MOORE (0083991)
Bixler Moore, LLC
318 E. Main Street
Louisville, Ohio 44641
T: 330.491.2222
F: 330.871.8207
E: tjmoore@bixlermoore.com

RYAN J. MELEWSKI (0084956)
Rafidi, Pallante & Melewski LLC
105 N. Broad St.
Canfield, Ohio 44406
T: 330.536.3529
F: 330.286.9196
E: rmelewski@lawrpm.com

Attorneys for Plaintiffs

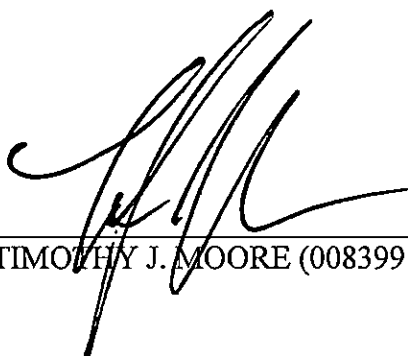
CERTIFICATE OF SERVICE

A copy of the foregoing was propounded via regular U.S, fax, electronic mail and/or hand-delivery this 1st day of May, 2019 upon the following:

Craig Conley
604 Huntington Plaza
220 Market Avenue South
Canton, Ohio 44702
F: (330) 453-2170

Jack S. Kuhn
437 Market Avenue North
Canton, Ohio 44702
F: 330-455-5200

Robert B. Preston III
220 Market Avenue South, Suite 1000
Canton, Ohio 44702
F: (330) 456-5767


TIMOTHY J. MOORE (0083991)

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JUDGE DIXIE PARK
STARK COUNTY PROBATE COURT

BEVERLY S. NICHOLS, <i>et al.</i> ,)	Case No. 226829
)	
Plaintiffs,)	JUDGE DIXIE PARK
)	
-vs.-)	
)	
JEFFREY J. BIXLER, Individually)	JOURNAL ENTRY
And as Trustee of the Jo L. Bixler)	
Trust,)	
)	
Defendant)	

This matter came before the Court for trial on May 31, 2017 on Plaintiff's Complaint for Declaratory Judgment, Construction of Trust, and for an Accounting and Injunction from Transferring Trust Assets, filed on August 10, 2016 and on Defendant's Answer, filed on September 29, 2016.

I. PROCEDURAL BACKGROUND

In their Complaint, Plaintiffs request that the Court determine the meaning of the trust language in order to establish a value for the real properties owned by Bixler & Son, LLC, to order an accounting of the Trust assets, to order specific performance for the distribution of Donor, Jo L. Bixler's, personal property per the Trust and for an injunction to prevent the Successor Trustee from selling the real property owned by the Trust.

Defendant Jeffrey Bixler filed an Answer on September 29, 2016. In his Answer, Defendant states that the Donor transferred all of his real property to the Jo L. Bixler Trust prior to his death, and the Trustee has made all personal property available to the Trust beneficiaries.

On March 27, 2017, Defendant Jeffrey Bixler filed a Motion for Partial Summary Judgment, which was denied on May 22, 2017.

A trial was conducted on May 31, 2017. Following the trial, the parties submitted proposed findings of fact and conclusions of law. Therein, the Plaintiffs have additionally requested that this Court remove Defendant Jeffrey Bixler as Trustee of the Jo L. Bixler Trust. Plaintiffs also seek an award of their attorneys' fees.

The Court admitted the following exhibits at the May 31, 2017 trial:

1. Plaintiff's Exhibits: 1, 2, 3, 4, 8 over objection, 9, 13, 14, 15, 20 and 21.
2. Defendant's Exhibits: A, B, C, D, E, F, G, I, J, K, N, P, Q over objection, R, and S.

II. FACTUAL BACKGROUND

Jo L. Bixler ("Donor") created The Jo L. Bixler Trust ("Trust") on September 16, 2005. Donor amended the trust several times and restated the terms of the trust on March 17, 2013. In the Restatement of Trust, Donor named Jeffrey J. Bixler as Successor Trustee and primary beneficiary. Donor passed away on or about January 30, 2014.

Donor was the third generation of the Bixler family to reside on and operate a farm consisting of seven parcels of real estate just north of Hartville totaling 204.11 acres in Stark County an additional 82.6 acres in Portage County.

Donor has four living children: Defendant Jeffrey Bixler, Timothy Bixler, Pamela Bixler and Plaintiff Beverly Nichols. Donor's grandson Anthony Nichols is also a Plaintiff in this action.

Three of Donor's children, Jeffrey Bixler, Timothy Bixler, and Pamela Bixler reside at the farm. Jeffrey Bixler and Timothy Bixler live in the main farmhouse. Jeffrey Bixler has lived

there his entire life without paying rent. Donor granted Pamela Bixler a life tenancy in another dwelling on the property. In addition, two tenants lease units in a duplex on the property. Donor transferred ownership of the farm's real estate, including the duplex and duplex rental income, to Bixler & Son, LLC. The Bixler & Son, LLC, is owned by the Jo L. Bixler Trust.

In addition to the Bixler & Son, LLC, the Trust assets include any other property that the trust would receive from Donor's estate. The Restated Trust specifies at Section 6.1 that "Trustee shall distribute my clothing, personal effects, furniture and household furnishings, automobiles and other non-business tangible personal property owned by me at the time of my decease to my children, Jeffrey J. Bixler, Timothy J. Bixler, Beverly S. Nichols, and Pamela S. Bixler, per stirpes, and in accordance with instructions which may have been communicated to him by me orally or in writing from time to time during my lifetime."

When he executed his Will on September 16, 2005, Donor specified that after all of the taxes and other obligations of his estate were paid, the residue of his estate would pass to the Trust. However, on January 19, 2013, Donor signed a document entitled, "Request Made by Jo L. Bixler In Conversation With E. Lang D'Atri Regarding Distribution of Certain Tangible Person [sic] Property Upon His Death," which noted that Donor wished to bequest to specific members of his family specific items of furniture, jewelry, dishes, firearms, and loading equipment when he died. D'Atri's signature is on this document.

On March 30, 2013, approximately two weeks after executing the Restated Trust, Donor signed a document entitled, "Assignment of Personal Property," in which Donor assigned "all right, title and interest in and to all of my tangible personal property to Jo L. Bixler, Trustee of The Jo L. Bixler Trust dated September 16, 2005, and restated March 30, 2013, which personal property shall include, but not be limited to, clothing, jewelry, household goods and furnishings,

and other tangible personal property owned by me.” No other signature appears on the document.

Following Donor’s death, Attorney D’Atri met with Jeffrey Bixler, Timothy Bixler, Beverly Nichols, and Anthony Nichols, and disclosed the terms of the Trust. Upon Jeffrey Bixler’s request, D’Atri gave Jeffrey Bixler his entire file concerning Donor’s estate plans, consisting of at least one banker’s box of documents.

FINDINGS OF FACT

Following review of the testimony and other documentary evidence submitted by the parties, and ascertaining the credibility of the parties who testified at the trial on the Plaintiff’s Complaint, the Court makes the following findings of fact:

1. During his lifetime, Donor consulted on several occasions with attorney E. Lang D’Atri to plan Donor’s estate.
2. D’Atri was one of Donor’s neighbors, and he and Donor had been friends since childhood.
3. Prior to changes in the Federal and State of Ohio estate tax in January 2013, Donor’s chief estate planning concern was to minimize the amount of estate taxes his heirs would be obligated to pay.
4. In order to minimize the taxable value of his eventual estate, Donor set up two limited liability companies to control the farm’s assets prior to the estate tax changes.
5. The first company, the J. Bixler Farm, LLC, managed the farm’s daily operations and owned its personal property, including all of the livestock and farming equipment. At its inception, Donor owned all or nearly all of that LLC’s assets. Over time, Donor permitted Jeffrey Bixler to become the sole owner of J. Bixler Farm, LLC’s property.

6. After the January 2013 abolishment of the Ohio estate tax, Donor became more concerned with maximizing the benefits to his heirs and equitably dividing the trust proceeds among them.
7. In doing so, Donor was mindful of the benefits some of his heirs had received or were already receiving, such as his grant of a life tenancy to Pamela Bixler in a house on the farm, the assets that Donor had already transferred to Defendant's control, and Donor's forgiveness of a \$250,000 loan he had made to Defendant. D'Atri testified that it was against the backdrop of these facts that Donor executed the March 2013 Restated Trust.
8. Once Donor restated the Trust, the only amendments he made to it were with respect to the percentage of shares that each beneficiary would receive.
9. The last amendment Donor made to the Restated Trust, in October 2013, states at Section 6.3 that Defendant is entitled to 52 shares; Plaintiff Beverly Nichols is entitled to 13 shares; and Plaintiff Anthony Nichols to 18 shares.
10. When Donor restated the Trust, he intended to maximize the value of the real estate.
11. Donor was aware that the Ohio calculation of a property's CAUV for property tax purposes requires and takes into account such things as soil testing.
12. The terms "Current Agricultural Use Value" or "CAUV" do not appear in the Trust.
13. Donor knew how the farm would be appraised for its Current Agricultural Use Value or CAUV.
14. Donor intended that the land be valued at the amount that a willing farmer would pay to a farmer willing to sell a farm to be used for farming purposes.

15. Jeffrey Bixler testified that when Donor referred to “agricultural use value,” Donor meant what a farmer would pay for the land if the land was going to be farmed.
16. The parties have proffered that the CAUV value of the Trust assets may be \$600,000, versus an estimated farmer-to-farmer value of approximately \$2.1 million.
17. The last time a licensed real estate appraiser assessed the farm’s value was in 2015.
18. Donor did not discuss with Jeffrey Bixler or Timothy Bixler the terms of the Trust or his plans for the farm after his death.
19. The Plaintiffs filed Interrogatories and Requests for Production of Documents when they filed their Complaint in this matter in August 2016, and those discovery requests were served upon the Defendant with the Complaint.
20. The discovery requests sought production of a written statement of accounts, an inventory of all personal and real property, income, disbursements, accounting books from both the Trust and the Bixler & Son, LLC; the Trust itself; all appraisals of the real property belonging to the Bixler & Son, LLC; documents related to life insurance policy proceeds; the operating agreement, tax returns, leases, deeds, and contracts of the Bixler & Son, LLC; and all correspondence related to the Bixler & Son, LLC, and the Trust, all dating from the date Donor died through the date the requests were served.
21. In March 2017, after Plaintiffs had taken depositions, Plaintiffs filed a Motion to Compel the Defendant to produce all books, receipts, invoices, accounting statements, electronically-produced and handwritten spreadsheets, bank statements, copies of checks, documents related to the sale or proposed sale of real estate, leases, profit and loss statements, and expenses for the Trust and the Bixler & Son, LLC, and the

documents related to life insurance proceeds. Defendant did not respond to said Motion.

22. This Court granted the Motion and ordered the Defendant to produce the aforementioned documents by May 30, 2017.

23. On May 23, 2017, the Defendant filed with this Court a Notice of Filing Trust Accounting, accompanied by a number of copies of canceled checks and other documents.

24. During the May 31, 2017, hearing before this Court, Defendant and Pamela Bixler testified that they possess additional documents that are responsive to the Plaintiffs' discovery requests, that this Court had ordered Defendant to produce said documents, but they had not produced them.

25. The items Donor listed that were to be distributed to Plaintiffs, to Michael Baum, and to Michael Rose, have not been distributed to them.

26. The house in which Donor lived was not locked during his lifetime, and has not been secured since.

Pamela Bixler testified that Donor discussed the Trust with her at the time he gave her the life tenancy. She further testified that Donor wanted Jeffrey Bixler to be able to exercise his option for the least amount of money possible, and she averred that when Donor referred to "agricultural use value," he meant CAUV. The Court did not find this testimony to be persuasive.

III. LAW AND ANALYSIS

a. Declaratory Judgment

Ohio Revised Code §2721.05(C) provides, in pertinent part:

Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, an incompetent person, or an insolvent person, may have a declaration of rights or legal relations in respect thereto in any of the following cases:

(C) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

R. C. Ann. §2721.05 (C) (2015). In *Arnott v. Arnott*, the Ohio Supreme Court affirmed the Fourth District Court of Appeals holding that a court may proceed in a declaratory judgment action if the court finds the following: 1. the action is within the spirit of the Declaratory Judgments Act; 2. A real and justiciable controversy exists between the parties, and; 3. that speedy relief is necessary to preserve rights that may otherwise be impaired or lost. . *In re Arnott*, 190 Ohio App.3d 493, 2010-Ohio-5392, 942 N.E.2d 1124 (4th Dist.) ¶17, affirmed by *Arnott v. Arnott*, 132 Ohio St. 3d 401, 2012-Ohio-3208, 972 N.E.2d 586 (2012).

In the instant case, Plaintiffs allege that Defendant intends to misinterpret the Trust, and the remaining beneficiaries' interests in the Trust will be substantially diminished if the Defendant proceeds to the sale of the Trust property. The Court finds that this action is in the spirit of the Declaratory Judgments Act, that a real and justiciable controversy exists between the parties, and that speedy relief is necessary to preserve the rights that may otherwise be impaired or lost. Therefore, the Court finds that there are grounds to proceed on this declaratory judgment action.

b. Trust Construction

In constructing a trust, the Court must interpret the terms of the trust to effectuate the donor's intent. See *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14, citing *Domo v. McCarthy*, 66 Ohio St.3d 312, 612 N.E.2d 706 (1993); see also *In re McCauley*

Irrevocable Trust, 5th Dist. No. 2013CA00188, 2014-Ohio-3692, 2014 WL 4198251, ¶ 34.

This Court does so as a matter of law. See *Arnott* at id.

The Court determines the donor's intent by reading all trust's provisions together, considering the language Donor used in light of the applicable law and the circumstances surrounding Donor's execution of the Restated Trust. See *McCauley* at ¶ 35, citing *Central Trust Co. of Northern Ohio, N.A. v. Smith*, 50 Ohio St.3d 133, 553 N.E.2d 265 (1990). The Court ordinarily presumes that a settlor used the words in the trust according to their common, ordinary meaning, and will determine the settlor's intent from the trust's express terms. See *McCauley* at id, citing *In re Trust of Brooke*, 82 Ohio St.3d 553, 697 N.E.2d 191 (1998), and *Oliver v. Bank One, Dayton, N.A.*, 60 Ohio St.3d 32, 573 N.E.2d 55 (1991). However, the Court will consider extrinsic evidence when the trust's express language creates doubt regarding the settlor's intent. See *McCauley* at id.

Accordingly, the Court must review the terms of the Trust to determine whether the intent of the settlor can be ascertained from the plain language of the Trust. In pertinent part, the March 17, 2013 Restatement of the Jo L. Bixler Trust, Section 6.2 states:

Section 6.2 Option to Purchase

It is my intention and directions 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-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.

(Emphasis added.) With regard to Section 6.2, Defendant Jeffrey Bixler, contends that the meaning of the term “agricultural use value” is unambiguous, and it means “current agricultural use value.” Plaintiffs contend that the term “agricultural use value” is the value of the property if the property is restricted to agricultural use.

The Court must determine if the Donor’s intent can be determined from the plain language of the trust. If a technical term is used, it will be interpreted according to its technical sense. A plain reading of the entire Trust reveals that the legal term “current agricultural use value” (“CAUV”) is not used in the Trust. By all accounts, Donor was a sophisticated landowner who had long been aware of the process used by Ohio to calculate a property’s CAUV for real property taxation purposes, and also of the impact estate taxation could have on his estate. Had he intended for his property to be appraised pursuant to the CAUV, he would have used that term in the Restated Trust. The Court finds that the term “agricultural use value” is not synonymous with the technical term “current agricultural use value.”

Due to the fact that the technical term is not used in the Trust, the Court must determine whether the Donor’s intent regarding the phrase “agricultural use value” can be determined from a plain reading of the entire trust when the words are used only in their ordinary sense.

According to Section 1.1 of the March 17, 2013, Restated Trust, the Trust had three purposes: 1) to manage the Trust property; 2) to provide for the care and support of Jo Bixler and his family; and 3) to eventually be distributed to Donor’s heirs after his death. Donor named himself the Trustee, and his son Jeffrey J. Bixler (Defendant) as the Successor Trustee, and

required in Section 10.14 of the Restated Trust that its trustee act for the Trust as a fiduciary, and to act primarily in the interest of the Trust's beneficiaries.

When read as a whole, the Trust expresses the Donor's intent to provide the Trustee/Beneficiary Jeffrey Bixler with the majority of the Trust's assets. Donor does not plainly assert a preference for the continuation of Bixler and Son, LLC, although it is evident that there is a preference for Jeffrey Bixler. However, the Donor tempers the preference for the Trustee by requiring the Trustee to exercise his powers of distribution in a fiduciary capacity primarily in the interest of the beneficiaries. Donor also tempers Trustee's fiduciary responsibility by subjecting the real estate valuation to an agricultural standard. The Court finds that the agricultural standard could be interpreted to mean the taxable agricultural standard or merely the price at which land could be sold if used only for agricultural purposes, as opposed to the highest and best possible use.

Even in the context of the entire Trust, the Court finds that the term "agricultural use value" is ambiguous and could be logically interpreted to justify a variety of valuation schemes. Therefore, the Court must allow the introduction of extrinsic evidence to aid in the interpretation of the trust language.

At trial, evidence was submitted in the form of testimony and documentation. Attorney Lang D'Atri testified that he was a childhood friend of the Donor, that he was the Donor's estate planning attorney, that he prepared the documents in question, that he personally made Donor aware of the CAUV taxation valuation for land, and that Donor did NOT intend for CAUV to be the appraisal valuation upon the death of the Donor. Attorney D'Atri further testified that Donor intended the property would be valued at what a willing farmer would pay a farmer willing to

sell a farm in the community, when the use of the land is restricted to farming purposes. The Court finds the testimony of Attorney D'Atri to be credible.

Defendant Jeffrey Bixler testified that when Donor referred to "agricultural use value," Donor meant what a farmer would pay for the land if the land was going to be farmed.

This Court finds that the term, "agricultural use value" as it appears in Section 6.2 of the Restated Trust means the price that a willing farmer would pay a farmer willing to sell the collected properties as a farm. This definition furthers Donor's purposes created in the 2013 Restated Trust, which was not to diminish the impact of estate taxation, but to provide for the Donor and the Trust's other beneficiaries.

The Court does not find the testimony of Pamela Bixler to be credible. Pamela Bixler testified that based on her conversations with her father, she understood that Donor intended for the Trust assets to be valued at the lowest possible price because she believed Donor wanted Jeffrey to be able to exercise his option to purchase the remaining shares for "nothing." Such a construction would frustrate the Trust's overarching purposes of providing for Donor's family during his life and after his death, as stated in Section 1.1.

Furthermore, it is inconsistent with the Trustee's duties under Section 10.14 of the Restated Trust to ask this Court to adopt a definition of "agricultural use value" that inures only to the Trustee's benefit. Section 10.14 imposes the duty on the Trustee to act as a fiduciary for the benefit of *all* of the beneficiaries.

c. Valuation of the Real Property of the Bixler Trust

The Court declines to set the value of the real property at issue at this time, as the appraisals presented to the Court are at least two years old and do not provide this Court with appropriate guidance.

d. Trustee Removal, Order of Accounting, Specific Performance and Injunctive Relief

Pursuant to R.C. 5807.06, the Court may remove a trustee on the Court's own initiative when the trustee has committed a serious breach of trust or the trustee has persistently failed to administer the trust effectively, and removal of the trustee best serves the interests of the beneficiaries. See R.C. 5807.06(A) and (B). The Court may alternatively compel the trustee to perform his or her statutory duties; may enjoin further breaches of the trust; may compel the trustee to redress a breach of the trust by paying money or restoring property; compel the trustee to provide a full account; suspend the trustee; or order a special fiduciary take possession of the trust property and administer the trust. See R.C. 5807.06(C); R.C. 5810.01. Although R.C. 5807.06 does not define the conduct that constitutes a serious breach of trust, at least one court has noted that a serious breach can consist of a single act that causes significant harm or involves flagrant misconduct, or can consist of a series of smaller acts that, while not individually justifying a trustee's removal when standing alone, collectively do when they are considered together. See *Kidd v. Alfano*, 2nd Dist. Montgomery No. 26598, 2016-Ohio-7519, 64 N.E.3d 1052, ¶ 37. The *Alfano* Court noted that a trustee's failure to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information can constitute a serious breach of the trustee's duty that would render the trustee's removal appropriate. See *Alfano* at id.

Pursuant to R.C. 2109.24, the Court is also empowered to remove a trustee who fails to make and file an inventory or to render a "just and true account" of the trustee's administration of the trust more than 30 days after being notified by the Court to do so. Further, the Ohio Trust Code imposes duties upon all trustees, and these duties include but are not limited to informing trust beneficiaries of the existence of a trust; furnishing them with a copy of the trust instrument;

keeping the current beneficiaries “reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests”; and providing a period accounting or “report” to the beneficiaries, unless a particular beneficiary waives his or her right to receive a report. See R.C. 5808.13. If provisions in a trust instrument that purport to excuse a trustee from fulfilling the duties imposed under the Trust Code, those provisions are contrary to Ohio public policy and the Code controls over those provisions of the trust. See *Zimmerman v. Zirpolo Trust*, 5th Dist. Stark No. 2011CA00142, 2012-Ohio-346, ¶ 22; see also *McHenry v. McHenry*, 5th Dist. Stark No. 2016CA00158, 2017-Ohio-1534, -- N.E.3d --, ¶ 44 (“Further, even when a trust confers broad authority upon a trustee, a trustee cannot take advantage of the liberal provisions of the trust instrument to relieve himself from his legal responsibilities as a fiduciary.”).

The Court finds that the accounting in this case provided by the Defendant as Successor Trustee, is inadequate with regard to the assets, liabilities, income, and expenses of the Trust and the personal property that became part of the Trust assets upon Donor’s death. It is impossible, from what little information Successor Trustee has provided, to determine the true value of the Trust’s personal property assets.

This inadequacy has been compounded by the fact that the Plaintiffs requested a full accounting and supporting documentation in their Interrogatories and Requests for Production of Documents that were served on Defendant in August 2016, and that Defendant still did not produce documents requested by the Plaintiffs even after this Court ordered him to do so by May 30, 2017.

The Court finds that the Defendant Successor Trustee's performance in accounting for and securing the Trust's assets constitutes a serious breach of trust and warrants the Trustee's removal pursuant to R.C. sections 5807.06, 5810.01 and 2109.24.

The Court finds that the request for injunctive relief to enjoin the Defendant Successor Trustee from purchasing, transferring or selling the subject property until a proper appraisal is made is well-taken and is hereby GRANTED.

The Court finds that an order for specific performance cannot be granted until the Trust assets are inventoried and accounted.

e. Attorney's Fees

Pursuant to R.C. 5810.04, the Court may award reasonable attorney's fees in a proceeding involving the administration of any trust to any party, as justice and equity may require. See R.C. 5810.04; see also *McHenry* at ¶ 54-56.

The Court finds that the Plaintiffs are entitled to their reasonable attorney's fees in an amount that the Court shall determine after Plaintiffs submit an itemization for the attorneys' fees that are requested.

IV. CONCLUSION

WHEREFORE, this Court Decrees and Orders the following:

- This Court finds that the term, "agricultural use value" as it appears in Section 6.2 of the Restated Trust means the price that a willing farmer would pay a farmer willing to sell the collected properties as a farm, if the use was restricted to farming purposes;
- That Stark County Permanent Parcel Nos. 1900963, 1900962, 1903174, 1900261, and 1900767, and Portage County Parcel Nos. 36-030-00-00-003-000 and 36-021-00-00-021-

000 be appraised by a real property appraiser licensed by the State of Ohio to perform such an appraisal, to determine the above-defined agricultural use value of the parcels;

- That the above-ordered appraisal take place forthwith at the expense of the Trust;
- That the Defendant Successor Trustee shall forthwith take all reasonable actions to secure all Trust assets, including but not limited to all structures and all personal property contained therein, and to preserve them for inventory, appraisal, and disbursement;
- That the Defendant Successor Trustee forthwith produce a complete accounting of all Trust assets, liabilities, income, and expenses, including but not limited to a complete and detailed inventory of all items of non-business personal property included in the Trust pursuant to the terms of Donor's Will and Section 6.1 of the Trust, which shall include but shall not be limited to records of all leases, rental payments, life insurance proceeds, monthly bank account statements, and tax returns from the date of Donor's death until the present;
- That Jeffrey Bixler is hereby removed as Successor Trustee of the Jo. L. Bixler Trust; and
- That the Plaintiffs shall file their application for attorney's fees with this Court by August 21, 2017.

IT IS SO ORDERED.

'JUL 18 2017



HON. DIXIE PARK
Probate Judge

cc: Attys. T. Moore and R. Melewiski
Attys. R. Preston and W. Willitis
Atty. J. Kuhn