

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

IN THE MATTER OF THE TRUST
CREATED BY ITEM IX OF THE
WILL OF JAMES F. MELLOTT, DECEASED.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0004

Civil Appeal from the
Court of Common Pleas, Probate Division, of Belmont County, Ohio
Case Nos. 53 TR 57356 B; 53 TR 57356 C

BEFORE:

Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:

Reversed and Remanded.

Atty. Todd M. Kildow, Emens & Wolper Law Firm Co., LPA, 250 West Main Street, Suite A, St. Clairsville, Ohio 43950, for Plaintiff-Appellant

Atty. John R. Estadt, *Atty. Kyle W. Bickford*, and *Atty. Erik A. Schramm, Jr.*, Hanlon, Estadt, McCormick & Schramm Co., LPA, 46457 National Road West, St. Clairsville, Ohio 43950, for Respondents-Appellees.

Dated: June 29, 2020

WAITE, P.J.

{¶1} Appellant Board of Trustees of Bellaire Public Library (“Library Board”) appeals the January 14, 2019 determination by the Belmont County Court of Common Pleas, Probate Division, regarding trusts established by James F. Mellott. Appellees are Edwin Douglass and Larry Gautschi, (“Mellott Trustees”). The issue in dispute is a determination of the assets appropriately placed into each trust. For the reasons that follow, the judgment of the trial court is reversed and the matter is remanded for further proceedings.

Factual and Procedural History

{¶2} James F. Mellott died on August 10, 1952. His last will and testament was filed and accepted for probate in Belmont County. The will made various gifts and specific bequests. Item IX of the will is at issue in this matter. It provided that the remainder and residue of Mellot’s estate was to be placed in trust for the specific purposes described in that section of the will. The Belmont County Probate Court at the time determined that Item IX of the will created three trusts, each having their own particular funding and purpose. The separate trusts were established and initially funded pursuant to the trustee’s inventory filed February 13, 1957. Those trusts have continued to be administered since that time by successive trustees. Each of the three trusts has its own case number within the probate system. They are referred to as “Trust A”, “Trust B” and “Trust C.”

{¶3} Trust A provided that shares of First National Bank in Bellaire, Ohio (or proceeds from the sale thereof) were to be used for the upkeep of the Mellott burial lot in

Greenwood Cemetery in Bellaire, Ohio. Any unused income from Trust A is to be transferred every five years into the general purposes trust, Trust B. Trust A is known as the “cemetery upkeep trust” by the parties, and is not directly at issue in this appeal.

{¶4} Trust B, the general trust, was set up pursuant to the language in Item IX of the will which required the remainder value and worth of the trust estate, “other than from one hundred (100) shares of stock of said First National Bank in Bellaire, Ohio and all of my said stock of The Union Savings Bank in Bellaire, Ohio” to be used for “the construction of a library building that will be a credit to the City of Bellaire.” (Will, page 7, lines 1-21.) In addition, any remaining trust funds “excepting therefrom one hundred (100) shares of the stock of First National Bank in Bellaire, and all of the stock which I may own at the time of my decease in the Union Savings Bank of Bellaire, Ohio” were to be used to erect a community center building. (Will, page 7, lines 22-33, page 8, lines 1-7.)

{¶5} As Trust C, Item IX provided that “the income from the one hundred (100) shares of stock of First National Bank in Bellaire, Ohio, and the income from the shares of stock belonging to my estate of The Union Savings Bank of Bellaire, Ohio, [excepted from Trust B, discussed above] shall be paid by my said Trustees annually to the Board of Trustees of said library building, to be used by said board for the upkeep of said building.” (Will, page 9, lines 24-30.) Trust C is referred to as the library upkeep trust.

{¶6} The Mellott Memorial Library Building and Community Center Room were constructed and completed by 1960 with funds from both the William D. Mellott Trust and Trust B of the James F. Mellott Trust. William D. Mellott, who predeceased James, was James’ brother. William D. Mellott had also included a provision in his will for the construction of a library in Bellaire, Ohio. As the City of Bellaire chose not to take title to

the building, the real estate was conveyed to the James F. Mellott Trustees in a judgment entry dated July 26, 1960.

{¶17} After construction of the library and community center, the language in Item IX later defined by the probate court as Trust C, provided:

if said library building and community center building shall be constructed, the remaining surplus from my estate and the income therefrom, other than the principal and income from said one hundred (100) shares of First National Bank in Bellaire, and all of the shares of The Union Savings Bank of Bellaire, Ohio, may be used at anytime by my said Trustees for the remodeling of said library and community center building, in order to keep the same up to the standards of the times, and may further be expended and used by said Trustees in their discretion for the operation and running expenses of said public library and community center, or said Trustees may transfer the corpus of said remaining surplus, other than the above-mentioned shares of said banks, to the library Trustees and to the City of Bellaire, in such proportions as they may elect to be used for such purposes.

In the event the library building shall be constructed, the income from the one hundred (100) shares of stock of First National Bank in Bellaire, Ohio, and the income from the shares of stock belonging to my estate of The Union Savings Bank of Bellaire, Ohio, shall be paid by my said Trustees annually to the Board of Trustees of said library buildings, to be used by said board for the upkeep of said building.

(Will, page 9, lines 9-30.)

{¶8} Trust C, then was determined to be comprised of the principal and income from 100 shares of First National Bank stock and all of the Mellot's shares in The Union Savings Bank. This was originally to be paid to the library board annually for maintenance and upkeep of the building. Pursuant to an application filed by the James F. Mellott Trustees, in a judgment entry dated October 26, 1960 the probate court changed the way the money was to be expended. Instead of paying it out to the Library Board on an annual basis, the income from these stocks was to be retained by the estate's trust, used for maintenance and upkeep of the buildings, and paid at the discretion of the Mellott Trustees.

{¶9} The remainder of the assets of the estate, except for the bank shares and their derivative income that were placed in Trust C, were to be used for remodeling the library and community center building as needed. The record reveals that all other remaining assets have been consistently included in the annual accountings for Trust B filed with the probate court.

{¶10} The trusts have operated continually with only minor modifications of their respective assets. Trust C has continued to hold the converted and derivative bank shares (now JP Morgan Chase) from the initial funding, along with other investments at JP Morgan Chase Bank that arose from stock dividends and accumulated interest on the investments of stock income. Trust B has continued to hold the remainder miscellaneous assets not fully consumed in the library construction, including a parcel of Texas real estate, proceeds from a real estate sale, and proceeds from an oil lease. Regular

accountings for all three trusts have been consistently filed with the probate court annually since the trusts were established.

{¶11} In 2017 the Mellott Trustees located and secured newly discovered additional assets of James F. Mellott which had not previously been accounted for in the trust estates. These assets included real estate and mineral rights for a number of parcels of land. The Mellott Trustees entered into six oil and gas leases, naming the lessors as “Edwin Douglass and Larry Gautschi, as Trustees of the James F. Mellott General Trust for the Benefit of the Bellaire Library.” The Lessees included various oil and gas companies. All of the leases were executed between the months of April and October of 2017.

{¶12} The Mellott Trustees filed an accounting for each separate trust estate for the 2017 accounting period on January 19, 2018. The account for Trust B again included the parcel of land in Pecos County, Texas purchased in 1962. This real estate had continuously been listed as an asset on the Trust B accounting ledger since its acquisition. Pecos County, Texas real estate taxes, Texas school district taxes, and oil lease income and proceeds from real estate sales have also consistently been listed as expenses or profit in Trust B since the acquisition of the Texas property in 1962. Interestingly, the 2017 account for Trust C included a line item consisting of income from oil and gas leases totaling \$907,637.10. The Trust C accounting did not include copies of any lease agreements from which the oil and gas income was generated or a listing of the real estate on which any mineral rights may be based.

{¶13} On February 15, 2018, the Library Board filed exceptions to the 2017 Trust B and Trust C accountings. In the exceptions for Trust C they alleged: (1) the revenues

from the oil and gas leases should have been listed as an asset under Trust B; (2) the real estate and mineral interests which generated the oil and gas income should be listed as assets of Trust B; (3) Trust C did not list the value of the 135,197 shares of J.P. Morgan Chase Stock; (4) certain checks written from the Trust C account lack a description of the purpose and nature of the payment; and (5) there is no accounting or tax expense for any required IRS filings for income received or expenses paid on behalf of Trust C.

{¶14} On March 22, 2018, the Mellott Trustees filed both an amended accounting and a response to the Library Board's exceptions. The response asserted: (1) Trust C owns the real estate, mineral interests and the associated oil and gas leases, and all revenues have been properly reported in the amended accounting for Trust C; (2) the real estate, mineral interests, and associated leases are properly located within Trust C and do not belong in Trust B; (3) Trust C owns 135,197 shares of common stock of J.P. Morgan Chase and the value of those stocks has been listed annually on each accounting as \$47,178.00, the base value of the stock at its distribution date from the estate of James F. Mellott; (4) a more complete listing of the nature and purpose for checks written from the account are listed in the amended accounting; and (5) the 2017 income tax return for the Trust is not yet due and no accounting or tax expense is shown in the 2017 accounting for Trust C.

{¶15} On June 22, 2018, the Library Board submitted a memorandum supporting their exceptions to the accounting in response to the amended accounting filed by the Mellott Trustees. They also attached several exhibits to the memorandum, including copies of James F. Mellott's will, previous judgment entries, and annual accountings filed for the trusts spanning several years. The Library Board reiterated that Trust B has

historically held the estate's remaining miscellaneous assets not fully used by the construction of the library. The Library Board also pointed out that the Mellott Trustees failed to include ownership of the library property in either trust accounting in their initial 2017 accounting, but in the subsequent amended accounting they improperly placed ownership of the property within Trust C. Finally, they argued that in the amended accounting the Mellott Trustees reallocated the Texas property to Trust C, despite the fact that the property had been included as an asset of Trust B since its purchase in 1962. The Library Board maintained that the only assets appropriately contained in Trust C are the 100 shares of First National Bank stock and the 1066 shares of The Union Savings Bank stock and the derivatives of dividends and income from the conversion of those shares. Trust C should contain no other assets.

{¶16} A hearing on the exceptions was held on June 22, 2018. Present were counsel for the Library Board and every member of the board; the James F. Mellott Trustees, and counsel for the estate. Mellott Trustee Edwin Douglass provided the only testimony at the hearing. The primary issue was the Mellott Trustees' discretionary power to allocate assets and, more specifically, whether the trust language required the real estate, mineral interests, oil and gas leases and their associated income to be allocated as assets of Trust B or as assets of Trust C. This would determine what funds would be available for the operational expenses of the Bellaire Library and community center, which are disbursed from Trust B assets. Again, Trust C assets were allocated for building upkeep and maintenance costs.

{¶17} Douglass testified on direct examination that he had been a trustee for the estate for 26 years and had served as co-trustee with three other individuals during that

time, including Larry Gautschi, his current co-trustee. He testified that when he became a trustee he “continued reporting the way that had been reported in the past.” (6/22/18 Tr., p. 14.) He testified the Texas property was included in Trust B, “[b]ut how that ever got in there is beyond me. I mean, the B Trust, in our opinion, nothing funded the B Trust.” (6/22/18 Tr., p. 14.) He also testified that the Texas property had never been an issue until this matter arose. Douglass testified that Trust B held only the remaining money left after the library building was built “to let the Trust maintain that building for perpetuity.” (6/22/18 Tr., p. 15.) He testified that over the years, money was taken from Trust B “to replenish their operating expenses for that building or that community room.” (6/22/18 Tr., p. 15.) Douglass testified that Trust C included approximately 100,000 shares of J.P. Morgan Chase stock and that the income exceeds expenses, “[s]o, well we’ve accumulated money over the years, so there’s savings account, there’s a checking account, and there’s multiple Certificates of Deposit.” (6/22/18 Tr., p. 16.) He also testified that \$2 million was taken out of Trust C to remodel the library approximately 15 years earlier. He stated that the assets from Trust C were to be used only for upkeep and maintenance and not for operational costs of the library.

{¶18} On cross-examination Douglass was asked about the purpose of Trust B, since most of the assets were in Trust C. He responded, “I can’t actually, frankly, see any purpose in it.” (6/22/18 Tr., p. 23.) He stated that at one point several years earlier, he and a co-trustee considered requesting the court to collapse Trust B into Trust C, although it was not pursued. He testified that he continued to operate the trusts separately and confirmed they each had separate federal tax identification numbers, tax filings, and accountings. He also testified, “I don’t know what the role of the B Trust is

right now, I guess that's what we'll determine." (6/22/18 Tr., p. 25.) He testified that originally Trust C was funded only with the requisite bank shares and that everything else was allocated as an asset of Trust B, and that the will provided for operational support of the library using funds from Trust B. (6/22/18 Tr., p. 38.)

{¶19} Finally, on redirect examination Douglass testified that he interpreted the word "discretion" as written in the trust language to mean that he and his co-trustee had the authority to decide whether the library needed operational funds and where the oil and gas revenues should be allocated, and they decided to place these in Trust C. (6/22/18 Tr., pp. 40, 42.)

{¶20} At the conclusion of the hearing the court ordered the parties to file supplemental briefs on the matter. The Mellott Trustees filed a brief in support of the amended accounting on July 13, 2018. The Library Board filed a supplement in support of its exceptions on August 24, 2018. In a judgment entry dated December 18, 2018, the trial court issued general findings and an order overruling the Library Board's exceptions to the accounting and ordered all assets at issue to be included in Trust C. On December 21, 2018, the Library Board filed a motion requesting separate findings of fact and conclusions of law. The trial court ordered both parties to submit proposed findings of fact and conclusions of law. On January 14, 2019, the trial court issued a judgment entry adopting the Mellott Trustees' findings of fact and conclusions of law in their entirety.

{¶21} The Library Board filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

The Trial Court erred when it accepted the Proposed Findings of Fact and Conclusions of Law filed by the Trustees of the Trust created by Item IX of the Will of James F. Mellott, Deceased.

{¶22} The Library Board challenges several of the findings of fact and conclusions of law proposed by the Mellott Trustees and adopted by the trial court in its January 14, 2019 judgment entry.

{¶23} A basic tenet of trust law is that a beneficiary is entitled to an accurate accounting of funds in a trust. *Nozik v. McDonald*, 99 Ohio App.3d 353, 357, 660 N.E.2d 923 (11th Dist.1994). A trustee has the responsibility, as fiduciary, of keeping clear and accurate account records for a trust. *Teegardin v. Teegardin*, 10th Dist. Franklin No. 97APE08-982, 1998 WL 97261, *2. A trustee need not provide receipts, invoices or other documentation if other credible evidence supports the propriety of the accounting, including testimony. *Id.* Whether a trustee has provided evidence to support an accounting is a factual matter and will not be disturbed absent an abuse of discretion. *Diemert v. Diemert*, 8th Dist. Cuyahoga No. 82597, 2003-Ohio-6496, ¶ 12.

{¶24} “A trial court may adopt a party’s proposed findings of fact and conclusions of law as long as the trial court has thoroughly reviewed the document and ensured it is accurate.” *Fernwalt v. Our Lady of Kilgore*, 7th Dist. Carroll No. 15 CA 0906, 2017-Ohio-1260, 88 N.E.3d 499, ¶ 26. Thus, the Library Board must demonstrate that the court’s findings of fact are not supported by competent, credible evidence and the conclusions of law are not supported by legally sufficient evidence. *Maloney v. Patterson*, 63 Ohio App.3d 405, 409, 579 N.E.2d 230 (9th Dist.1989).

{¶25} The Library Board contends the trial court erred in adopting finding of fact number 4 and the corresponding conclusion of law, which both relate to a July 26, 1960 judgment entry. Finding of fact number 4 reads: “On July 26, 1960 this Honorable Court ruled all real estate would be transferred to the Trustees of the Trust created by Item IX to effectually provide for the continued and perpetual use of the library building.” (1/14/19 J.E.)

{¶26} Conclusion of law number 4 reads:

Specifically this Court ruled over fifty years ago the Trustees would hold legal title to the library building and any other real estate to come into the hands of the Trustees. This Court further found it would be in the best interest of the Trust and in carrying out the Testator’s intent as stated in Item IX of the Last Will and Testament to use their discretion to continue to use the income of the trust for the repair, remodeling and upkeep of the library building.

(1/14/19 J.E.)

{¶27} The Library Board argues there is no judgment entry dated July 26, 1960 in this matter, and the evidence does not support the conclusion that all income or proceeds from real estate was to be used for the repair and upkeep of the library. The judgment in question was issued in the probate court as part of the estate of James F. Mellott’s brother, William D. Mellott, and was attached as an exhibit by the Library Board to their memorandum in support of the exceptions to the account. The pertinent language in that entry reads:

On consideration thereof the Court finds that petitioners hold legal title to certain real estate described in their application situated in the City of Bellaire, Ohio, upon which the library and community center building has been erected by the use of funds from their trust * * *, as trustees of the trust created by Item IX of the will of James F. Mellott, deceased, for such purposes.

(7/26/60 J.E.)

{¶28} The trustees of William D. Mellott’s estate filed an application with the probate court to transfer real estate located in Bellaire, Ohio to the Mellott Trustees to be used as additional land for the library and community center. The court ordered the trustees for William D. Mellott “to convey the real estate described in their application to [the Mellott Trustees] for the benefit of Bellaire City Library and Community Building[.]”

(7/26/60 J.E.)

{¶29} The Mellott Trustees contend, and their proposed finding of fact number 4 and conclusion of law 4 assert, that the judgment entry dated July 26, 1960 allows for all real estate in any Mellott trust to be used in any fashion for the maintenance and repair of the library building. The Library Board maintains that the July 26, 1960 judgment entry addressed only the transfer of the Bellaire, Ohio property from one brother’s estate to the other. It is not disputed that the intent of James F. Mellott as testator was to provide for the upkeep and maintenance of the library and community center building. The issue in dispute is which assets are to be allocated in which trust and how that affects the monies available to be disbursed to the Library Board for library operational expenses.

{¶30} A review of the July 26, 1960 judgment reveals that the only real estate subject to that entry was the land obtained from William D. Mellott and located in the City of Bellaire on which the library was to be built. The entry refers to “said” real estate, not all real estate. It is clear from the language of the judgment entry that it solely ordered the estate of William D. Mellott to transfer real estate located in the City of Bellaire, Ohio to the estate of James F. Mellott to be used as the location for Bellaire library and community center.

{¶31} There was no testimony at trial regarding this judgment entry and no other evidence was presented. Hence, there is nothing in this record that supports the trial court’s finding that the July 26, 1960 judgment entry ordered that all of the real estate in the James F. Mellott estate was to be used for upkeep, repair and remodeling of the library building. As such, the Library Board is correct that finding of fact number 4 is not supported by competent, credible evidence and conclusion of law number 4 is not supported by legally sufficient evidence. Therefore, the trial court abused its discretion in adopting both of these provisions.

{¶32} In their first assignment of error, the Library Board also challenge the court’s findings of fact 5, 6, 7 and 17 and conclusion of law number 6, relating to trust monies being utilized to pay the operational costs of the library. Finding of fact number 5 reads:

Thereafter, the obligation to pay the income to the Board of Trustees of the Bellaire Public Library was completely changed by Journal Entry filed October 26, 1960 which directed the Mellott Trustees to retain all such income rather than paying it out annually to the Board of Trustees of the Bellaire Public Library for operational costs.

(1/14/19 J.E.)

{¶33} Finding of fact number 6 reads:

In particular, the July 29, 1960 Journal Entry states:

“Upon consideration thereof, the Court finds that the applicant Trustees have legal title to said Library and Community Center building and by virtue thereof are charged with the upkeep and maintenance of said structure and that the income provided from the heretofore mentioned bank stock afford said Trustees the only means of financing such upkeep and maintenance of said building.

The Court further finds that it would be for the best interest of said Trust in that it would be best to carry out the intention of their Testator that said Library and Community Center building be adequately kept up and maintained, that said Trustees retain and use the income from said bank stocks for the maintenance and upkeep of said structure, rather than paying the same annually to such group of Library Trustees, either private or public, who at the time might be charged with the operation of such facilities.”

(1/14/19 J.E.)

{¶34} Finding of fact number 7 reads:

This Honorable Court, over a half century ago, ruled the real estate should be held in Trust C and the funds should be used for the maintenance and

upkeep of the real estate rather than to the Library Trustees for operation of the library and community center.

(1/14/19 J.E.)

{¶35} Finding of fact number 17 reads:

Again, as provided by this Honorable Court in its 1960 ruling, said funds may only be expended and used by said Trustees in their discretion for the operation and running expenses of said Public Library and Community Center building. Otherwise the Trustees may transfer the corpus of the remaining surplus, other than the above mentioned shares of bank stock, to the principal of said Trust C, which they have done.

(1/14/19 J.E.)

{¶36} Conclusion of law number 6 reads:

The Court reiterates its prior rulings and follows the law of the case and hereby again holds the oil and gas leases recently entered into with Gulfport Energy Corporation and XTO Energy Corporation and the Pecos County, Texas, real estate have properly been accounted for in Upkeep Trust C.

(1/14/19 J.E.)

{¶37} After the construction of the Bellaire library in 1960, the estate of James F. Mellott filed an application seeking authorization to disburse the income generated from the 100 shares of stock in First National Bank of Bellaire, Ohio and the income from all shares of stock in The Union Savings Bank of Bellaire, Ohio (the funding sources of Trust

C) for the maintenance and upkeep of the building at their discretion, rather than to automatically transfer it annually to the Library Board. In an October 26, 1960 judgment entry, the probate court approved the application and ordered that, rather than paying the income proceeds of Trust C to the Library Board annually for maintenance and upkeep of the building, the Mellott Trustees were to “retain and use the income from said bank stocks for the maintenance and up-keep of said structure.” (10/26/60 J.E.) The court reasoned that, as fiduciaries, they were in the best position to manage the income from the bank stocks that the trust provided were to be used for the maintenance and upkeep of the library building.

{¶38} The October 26, 1960 judgment entry is significant for two reasons. First, it ordered that the income derived from the bank stocks that funded Trust C would not be automatically transferred to the Library Board. Instead, it would be retained by the Mellott Trustees and disbursed at their discretion as fiduciaries of the estate for the specific purpose of maintenance and upkeep of the premises. Second, despite the Mellott Trustees’ assertion, this judgment entry does not order any real estate to be included in Trust C. In fact, the only reference to real estate is the court’s determination that the James F. Mellott estate has “legal title to said Library and Community Center building.” (1/14/19 J.E.)

{¶39} Turning to the court’s findings of fact and conclusions of law relating to the October 26, 1960 judgment entry, finding of fact number 5 is erroneous to the extent that it states the October 26, 1960 judgment entry related to “operational costs.” Finding of fact number 6 is merely a quote from the October 26, 1960 judgment entry and appears accurate. Finding of fact number 7 is erroneous because there is no language in this

entry ordering real estate to be held in Trust C for the maintenance and upkeep of the library. Finding of fact number 17 is erroneous for two reasons: first, the trial court's October of 1960 ruling did not discuss operational expenses. Second, there is no language in the order permitting the Mellott Trustees to transfer "the corpus of the remaining surplus, other than the above mentioned shares of bank stock" to Trust C. There is no mention at all of any transfer of trust assets.

{¶40} The Mellott Trustees argue the October, 1960 judgment entry ordered real estate to be held in Trust C. This is clearly erroneous. Further, at the hearing, Douglass testified that historically the accounting of Trust C only included the income and derivative assets from the original bank stocks. This appears to comport with the trust language. Not until the 2017 accounting did this accounting inexplicably change. (6/22/18 Tr., pp. 27-29.)

{¶41} Conclusion of law 6 is also erroneous. There is nothing in this record, either in the language of the trust or by way of other court rulings, that allow oil and gas leases and Texas real estate to be listed as assets of Trust C. The Mellott Trustees have not presented any evidence to support the contention that any newly acquired oil and gas leases in 2017 or the previously-owned Texas real estate may be allocated as an asset of Trust C.

{¶42} The Trust B accounting filed in 1962 lists Texas real estate as an asset. In a note to the accounting, it states: "During Accounting Period, Trustees purchased an undivided ½ interest in Texas Land owned by the Trust Created by the Will of W.D. Mellott, Deceased, for the total price of \$1,500." (Case No. 57356, 2/13/62 Trustees Acct.) While there is no evidence in this record regarding the source of the funds utilized

in 1962 to purchase the Texas real estate, the record does reveal that the Mellott Trustees allocated all real estate assets to Trust B. First, in the 1959 accounting for Trust B, there is a line item for \$700, “[f]rom sale of York Township Real Estate” (Case No. 57356, 1/12/1959 Trustees Acct.) Another example of a Trust B real estate asset is a line item in the 1981 Trust B accounting, “[o]il lease on Texas land” (Case No. 57356, 1/28/1991 Trustees Acct.)

{¶43} The record also reflects the Mellott Trustees have consistently interpreted the trust language differently than they now assert. In 1992, the Mellott Trustees filed a declaratory judgment action seeking a court order to allow for the expansion of the library building. In count one, paragraph 4 of the complaint, citing to Trust B, the Mellott Trustees asserted:

This trust was to be funded with the residue of [Mellott’s] estate (and with funds from the Estate of William D. Mellott) but excluding therefrom 100 shares of the common stock of the First National Bank of Bellaire and all shares owned by him of the Union Savings Bank of Bellaire.

(12/29/92 Complaint, p. 1.)

{¶44} Count two, paragraph 14, of the complaint, pertaining to Trust C, states: “This trust was to be funded with 100 shares of the common stock of the First National Bank of Bellaire and 1,066 shares of the common stock of the Union Savings Bank of Bellaire.” (12/29/92 Complaint, p. 3.)

{¶45} The above language appears to mimic language found in James F. Mellott’s will setting up these trusts. It is clear from the Mellott Trustees’ own prior interpretation

of this trust language that Trust B includes “the residue” of the estate and Trust C is solely comprised of the bank shares and related derivatives and income.

{¶46} Further, Mellott Trustee Douglass, who was a trustee during the 1992 declaratory judgment action, testified on direct examination in this matter about his accounting reports as trustee:

Well I continued reporting the way that had been reported in the past. But reports have always went to the Probate Court, and there was never any question about those, so I reported the same way they had. So, there was, the Texas land, was on those reports. But how that ever got in there is beyond me. I mean, the B Trust, in our opinion, nothing funded the B Trust.

(6/22/18 Tr., p. 14.)

{¶47} In his testimony Douglass acknowledges that he filed accountings in conformance with the manner in which they had been filed in the past, listing the Texas real estate in Trust B. Moreover, he was a trustee at the time of the 1992 declaratory judgment action and acknowledged in that complaint that Trust B include the residual assets of the estate, Trust C solely contained bank shares and related derivatives and income. While he may have no knowledge as to whether the trusts contained these assets and only these assets, he certainly recognized the different types of assets in each trust.

{¶48} A review of the record and evidence presented at trial reveals the Library Board has demonstrated that findings of fact 5, 7 and 17 are not supported by competent, credible evidence. Further, conclusion of law 6 is not supported by legally sufficient

evidence. It appears, then, the trial court did not review the proposed findings of fact and conclusions of law at issue to ensure accuracy and failed to interpret the trust language consistent with the testator's intent. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14.

{¶49} Based on the above, the trial court abused its discretion in adopting the Mellott Trustees' findings of fact and conclusions of law. The Library Board's first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

The Trial Court erred by failing to recognize the previous findings of the Probate Court and the subsequent confirmation by the Ohio Supreme Court in *In re Mellott's Estate (two cases) Mellott v. Estate of Mellott, et al. (two cases)*, 162 Ohio St. 113 (Ohio 1954).

{¶50} The Library Board asserts the trial court erred in not adhering to the law of the case because it failed to follow the previous holdings of the trial court and the Ohio Supreme Court in past disputes that had arisen between the parties. See *In re Mellott's Estate*, 162 Ohio St.113, 121 N.E.2d (1954). The Mellott Trustees contend the issues that were earlier before the Supreme Court have no bearing on the current litigation and, even if they did apply, do not prevent the Mellott Trustees from allocating assets into whichever Trust they desire.

{¶51} The law of the case doctrine, longstanding in Ohio jurisprudence, "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and

reviewing levels.” *Estate of Hohler v. Hohler*, 197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219, ¶ 23 (7th Dist.). Although not binding as a rule of law, the doctrine is necessary “to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.” *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 15 citing *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979).

{¶52} There has been a long history of litigation regarding the James F. Mellott estate. The earliest appears to have begun in 1952. On December 10, 1952, Elizabeth Mellott, the testator’s surviving spouse, filed an application with the probate court to purchase certain personal property and real estate assets of the estate, including 400 of the 1,066 shares of stock of The Union Savings Bank of Bellaire, Ohio. The Mellott Trustees as well as the Library Board both objected to the purchase of the bank shares, contending that all of the bank shares had been specifically bequeathed under the terms of the testator’s will. The court granted the application except for the purchase of shares of The Union Savings Bank of Bellaire, Ohio, concluding that these bank shares had been specifically bequeathed in the will. On appeal, the trial court was reversed. On further appeal to the Ohio Supreme Court in *In re Mellott’s Estate, supra*, the sole question before the Court was whether the 400 shares of bank stock were specifically bequeathed in the will. After first providing an overview of specific and general legacies, the Court held that the 400 shares of bank stock had been specifically bequeathed in the will and could not be purchased by the surviving spouse. *Id.* at 118. The Court then determined:

In analyzing the provisions of item IX the Court of Probate listed the following grounds for the conclusion that the testator clearly indicated an intention to specifically bequeath all his Union Savings Bank stock for the purposes named:

“1. The intention of the testator to separate this stock from the balance of his personal property is clearly shown in paragraph 2 of item IX, where there are detailed instructions as to voting for a consolidation or merger of the First National Bank and the Union Savings Bank and where it is specifically directed that the trustees cannot sell or dispose of the shares in these banks ‘except as hereinafter provided.’

* * *

“3. In paragraph 4 if a merger is not effected then all of the income from all of the shares of the Union Savings Bank is to be placed by the trustees in the ‘general fund’ until the library is constructed and then the income may be used for upkeep.

“4. The library building is authorized in paragraph 8 and specifically authorized is the expenditure of all of the balance in the trust estate, for the construction of a library ‘other than 100 shares of stock in First National Bank and all of my said stock of the Union Savings Bank,’ and further ‘except’ those shares again in the last clause of that paragraph.

“5. It is provided in paragraph 9 that after the library is built, all of the remainder of his estate may be used for a community center building, ‘excepting therefrom 100 shares of the stock of First National Bank in Bellaire, and all of the stock which I may own at the time of my decease in the Union Savings Bank of Bellaire, Ohio.’

“6. It is further provided in paragraph 14, that if there is a surplus after the library and community center building have been constructed the remaining surplus may be used for remodeling and for running expenses, “excepting principal and income from said 100 shares of First National Bank in Bellaire, and all of the shares of the Union Savings Bank.” And it is further provided in said paragraph that said surplus, “other than the above mentioned shares of stock” may be transferred to the library trustees and to the city of Bellaire.

* * *

“[I]tem IX of the will sets up three separate trusts. One for the library building for which any of the assets except the stocks in these banks may be used *** and one for the upkeep of the library which is to be definitely the income from 100 shares of First National Bank stock and all of his stock in the Union Savings Bank.”

Id. at 116-118.

{¶53} The court then stated: “A careful study of the provisions of item IX has convinced this court that the analysis by the Court of Probate is correct and that the specific nature of the bequest to the trustees is not changed by reason of the remote possibility that the title may be divested subsequently by failure of the city to provide the necessary building sites within a maximum period of 20 years.” *Id.* at 118. In adopting the language of the trial court regarding the assets to be allocated to each trust, the Supreme Court interpreted all of the will language, including the language setting up the trust at issue, as well as the testator’s intent relative to the allocation of assets. The library upkeep fund was to consist of the bank stock and its income. The library building fund was to consist of “any of the assets except the stocks in these banks.” *Id.* Thus, in adopting the probate court’s interpretation of the trust language, the Supreme Court has previously interpreted the provisions of the will at issue and held that Trust C was to contain the shares of bank stock and its associated income and Trust B was to contain any asset except the bank stock. This determination as to the content of, and purpose for, the trusts is the law of the case as it applies to the allocation of assets within the trusts.

{¶54} Subsequent to the Supreme Court’s interpretation, the conduct of the parties themselves over the decades-long existence of these trusts reveals that the Mellott Trustees have consistently reported the bank shares, their income, and derivatives as the sole assets of Trust C. This remained unchanged until the amended accounting for 2017 filed after the execution of certain oil and gas leases. Moreover, the first acquisition of real estate accounted for by the Mellott Trustees in the record was the Texas property which first appears in the 1962 accounting, shortly after the property was

acquired. The property was allocated to the general trust (Trust B), and the accounting ledger dated February 13, 1962 reads, in pertinent part:

Note: During Accounting Period, Trustees Purchased an Undivided $\frac{1}{2}$ Interest in Texas Land owned by the Trust Created by the Will of W.D. Mellott, Deceased, for the total price of \$1500.00

(2/13/62 General Trust, fifth partial account.) Edwin Douglass, a Mellott Trustee, testified that he allocated assets as they had always been allocated in the past by prior trustees. The record reflects that real estate assets were consistently allocated to the general trust (Trust B) throughout the existence of the trust at issue.

{¶55} In its judgment entry, the probate court does not address the Ohio Supreme Court *Mellott* case despite the fact that the Library Board raised the issue in their exceptions to the accounting and despite the fact that it appears to be seminal to this case. In failing to acknowledge that the language creating the trusts has already been interpreted by the Supreme Court in *In re Mellott's Estate, supra*, the court erred in its attempt to reinterpret the Supreme Court's previous determination that Trust C is only to consist of specific bank stocks and the derivative income. In failing to recognize and apply this law of the case, the trial court abused its discretion.

{¶56} The Library Board's second of assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 3

The Trial Court erred when it concluded that prior rulings of the court hold that the oil and gas leases recently entered into with Gulfport Energy

Corporation and XTO Energy Corporation and the Pecos County, Texas, real estate have properly been accounted for in the Upkeep Trust C.

{¶57} The Library Board’s third assignment of error challenges conclusion of law number 8 in the trial court’s judgment entry:

The evidence, facts, and testimony circumstances demonstrate the Successor Trustees filed proper accountings in Case No. 53-TR-57356(B) and 53-TR-57356(C) and the Pecos County, Texas real estate, oil and gas interests, and oil and gas leases were properly credited to the Testamentary Residuary Trust of Item C for the continuing upkeep of the Bellaire Public Library and Community Center.

(1/14/19 J.E.)

{¶58} The Library Board contends that the Mellott Trustees’ discretionary authority does not allow them to reallocate assets between the trusts in a manner contrary to the testator’s intent. The Mellott Trustees contend they have absolute discretion to expend funds from either trust and can use funds for the remodeling, upkeep or repair of the library building regardless of the source of the funds so long as the expenditures comport with the testator’s intent. They also contend their discretion permits them to transfer surplus assets, in addition to the bank stocks themselves, to the principal of Trust C.

{¶59} It is axiomatic that “[w]hen 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.” *Evans v.*

Evans, 4th Dist. Jackson Nos. 12CA5, 12CA6, 2014-Ohio-4450, 20 N.E.3d 1139, ¶ 23. The court may consider evidence outside the language of the document when a situation arises “that was not specifically provided for in the will under examination.” *Casey v. Gallagher*, 11 Ohio St.2d 42, 47, 227 N.E.2d 801 (1967).

{¶60} As discussed in the second assignment of error, an interpretation of the trust language at issue was undertaken in 1952 when Mellott’s surviving spouse sought to purchase real estate and personal property, including shares of bank stock, from the estate. The Ohio Supreme Court interpreted the language of paragraph 14 of the will in *In re Mellott’s Estate, supra*, holding that assets allocated to Trust C were “to be definitely the income from 100 shares of First National Bank stock and all of his stock in the Union Savings Bank.” *Id.* at 118. The court also held that the assets to be allocated to Trust B were “any of the assets except the stocks in these banks.” *Id.* There have been no other court orders since that time that have interpreted the trust language to permit the Mellott Trustees to allocate trust assets differently or to give the Trustees absolute discretion in the allocation or transfer of trust assets between the trusts. The October 1960 judgment entry referred to by the Mellott Trustees was limited to how the income derived from the bank shares was to be disbursed. Contrary to the Mellott Trustees’ assertions, that judgment did not grant them the power to allocate or transfer real estate or other assets not related to the original funding bank shares into Trust C. The trial court erred in concluding that the Mellott Trustees did possess this discretion.

{¶61} The Library Board’s third assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 4

The Trial Court erred by finding that the Trustees' discretionary power to expend Funds includes the discretion to allocate surplus assets contrary to the express purposes for those surplus assets as set forth by the testator in the Last Will and Testament at Item IX.

ASSIGNMENT OF ERROR NO. 6

The Trial Court erred when it concluded that the evidence, facts and testimony circumstances demonstrate the Successor Trustees filed proper accountings in Case No. 53 TR 57356(B) and Case No. 53 TR 57356(C) and the Pecos County, Texas real estate, oil and gas interests, and oil and gas leases were properly credited to the Testamentary Residuary Trust of Item C for the continuing upkeep of the Bellaire Public Library and Community Center.

{¶62} Assignments of error four and six challenge conclusions of law numbers 6 and 8 which are identical in substance. Thus, these assignments will be addressed together.

{¶63} The Library Board challenges the trial court's conclusion of law number 6, which reads:

The Court reiterates its prior rulings and follows the law of the case and hereby again holds the oil and gas leases recently entered into with Gulfport Energy Corporation and XTO Energy Corporation and the Pecos County, Texas, real estate have properly been accounted for in Upkeep Trust C.

(1/14/19 J.E.)

{¶64} They also challenge conclusion of law number 8:

The evidence, facts, and testimony circumstances demonstrate the Successor Trustees filed proper accountings in Case No. 53-TR-57356(B) and Case No. 53-TR-57356(C) and the Pecos County, Texas real estate, oil and gas interests, and oil and gas leases were properly credited to the Testamentary Residuary Trust of Item C for the continuing upkeep of the Bellaire Public Library and Community Center.

(1/14/19 J.E.)

{¶65} The Library Board asserts that we should conduct a *de novo* review and determine that conclusion of law number 6 is plain error as it adversely affects their interests. The Mellott Trustees' brief recites this assignment, but contains no response to this assignment.

{¶66} As noted above, a decision regarding whether a trustee has provided evidence to support an accounting is a factual matter. It will not be disturbed absent an abuse of discretion. *Diemert* at ¶ 12. In considering the trial court's conclusion of law, we must determine whether it is supported by legally sufficient evidence. *Maloney* at 409. We have already concluded that the 1960 judgment entry on which the probate court relied does not pertain to the allocation of real estate assets. It involved only the income derived from the bank shares that initially funded Trust C. Further, we have concluded that the Supreme Court interpreted the trust language in 1954 and determined that Trust C is only to contain the assets related to the initial bank shares. *In re Mellott's Estate*,

supra. In addition, the evidence in the record demonstrates that throughout the history of this trust administration, Trust C has only contained the initial bank shares, their derivatives and income. The remainder of the estate's assets have consistently been allocated in Trust B, the general trust. This includes the Texas real estate. Therefore, the trial court's conclusion of law number 6 granting the Mellott Trustees the ability to reallocate real estate, oil and gas leases, and revenues into Trust C was error. Likewise, the trial court's conclusion of law number 8 granting the Mellott Trustees the ability to allocate real estate, oil and gas leases, and revenues into Trust C was also erroneous.

{¶67} The Library Board's fourth and sixth assignments of error have merit and are sustained.

ASSIGNMENT OF ERROR NO. 5

The Trial Court erred when it concluded that the Trustees of the Trust created by Item IX of the Will of James F. Mellott, Deceased, are charged with considering the Library Board's assets and not use income to assist with paying expenses of the operation of the library.

{¶68} In their fifth assignment of error, the Library Board challenges the trial court's conclusion of law number 7, which states:

This Court further notes the Board of Trustees of the Bellaire Public Library has over Seven Hundred Thirty Thousand Dollars (\$730,000.00) in which to use for the library operations and the Trustees were properly charged with taking this fact into consideration. In addition, the Trustees are charged with continuing to use the income from whatever source of assets owned

by the Trust for the repair, remodeling and upkeep of the library building, rather than paying the same to the Board of Library Trustees charged with the operation of the library.

(1/14/19 J.E.)

{¶69} The Library Board argues that there was no evidence presented at trial to demonstrate that they have over \$730,000 in assets other than the following exchange on direct examination of Mellott Trustee, Edwin Douglass:

[COUNSEL]: Ok, do you know how much money the Bellaire Trustees Libraries have in their general fund and reserve?

[DOUGLASS]: In the library?

[COUNSEL]: The Library Trustees?

[DOUGLASS]: In reserve?

[COUNSEL]: Yes.

[DOUGLASS]: It's in the neighborhood of \$700,000.00 (seven hundred thousand dollars).

(6/22/18 Tr., p. 40.)

{¶70} The Mellott Trustees did not present any other evidence on the matter and there is no other evidence in the record. The Library Board counsel did not object to this testimony at trial. An “appellant’s failure to object to these questions at trial waives all but

plain error.” *Fearer v. Humility of Mary Health Partners*, 7th Dist. Mahoning No. 06 MA 84, 2008-Ohio-1181, ¶ 119. “Plain error is present when ‘there is an obvious deviation from a legal rule that affected the defendant’s substantial rights by influencing the outcome of the proceedings.’ ” *Andes v. Winland*, 7th Dist. Belmont Nos. 15 BE 0060, 15 BE 0080, 2017-Ohio-766, 85 N.E.3d 1098, ¶ 45 quoting *In re T.J.W.*, 7th Dist. Jefferson Nos. 13 JE 12, 13 JE 13, 13 JE 14, 2014-Ohio-4419, ¶ 11. The plain error standard should only be applied in the civil context in exceptional circumstances where the error affects the “basic fairness, integrity, or public reputation of the judicial process.” *Kirin v. Kirin*, 7th Dist. Mahoning No. 08 MA 243, 2011-Ohio-663, ¶ 19.

{¶71} The Mellott Trustees provided testimony in this case regarding the total funds in the Library Board’s reserve without providing any foundation or other support for the testimony. While the Library Board failed to object to this testimony, it is immaterial to the issue in this case. The amount of money held in reserve by the Library Board has no bearing on the question at hand, which is whether the Mellott Trustees have the discretion to reallocate funds held in the separate trusts. Because the testimony has no bearing on the outcome of this matter, there is no plain error, here.

{¶72} The Mellott Trustees claim it is within the purview of their fiduciary duties to consider the funds available to the Library Board when determining whether to disburse funds from the trust. In Ohio, a fiduciary is defined as “a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.” (Emphasis omitted.) *Evans v. Chambers Funeral Homes*, 8th Dist. Cuyahoga No. 89900, 2008-Ohio-3554, ¶ 21. A trustee is charged with the duty of exercising reasonable care, skill and caution in administering a trust. R.C. 5808.01; R.C.

5808.04. The duties and powers of the trust are determined by the terms of the trust instrument subject to limitations and requirements of fiduciary duty. *In re Sedgwick's Will*, 7th Dist. Belmont, 74 Ohio App. 444, 460-461, 59 N.E.2d 616 (1944).

{¶73} In exercising reasonable care, the Mellott Trustees, as fiduciaries, have discretion to utilize the trust funds prudently in the manner intended by the testator, and are presumed to be exercising proper diligence. R.C. 5808.14.

{¶74} Over the decades-long history of the administration of the trusts, the parties have enjoyed a nearly unblemished relationship, including undertaking a two million dollar library renovation project without incident. The parties do not dispute that the Mellott Trustees have the discretion to utilize trust funds for the benefit of the library. The record reveals a longstanding relationship wherein the Mellott Trustees have exercised diligence in obtaining information about the Library Board's financial status in order to ascertain whether it was prudent to disperse trust monies. The Mellott Trustees have considered the amount of money available to the Library Board for operational expenses, and it appears to be a valid exercise of the Mellott Trustees' fiduciary duties to ensure trust assets are spent prudently. No plain error exists regarding the consideration of the library's finances.

{¶75} However, the portion of the trial court's conclusion of law number 7 which states that the Mellott Trustees may use any source of trust income for the upkeep, repair, and remodeling of the library building is plain error. The trust language at issue, as interpreted by the Ohio Supreme Court, clearly delineates that Trust C is to be utilized for building upkeep. All other operational support is to be undertaken with assets held in Trust B. The Mellott Trustees presented no evidence in the record demonstrating that

their discretion to determine the best way to utilize funds includes the discretion to allocate funds contrary to the testator's intent and the law of the case. To the extent the trial court's conclusion of law number 7 appears to grant the Mellott Trustees the power to utilize funds from any source of trust assets for building repair, remodeling, and upkeep, this conclusion is not supported by legally sufficient evidence and is erroneous.

{¶76} The Library Board's fifth assignment of error is sustained in part.

Conclusion

{¶77} Based on the foregoing, the Library Board's first, second, third, fourth, and sixth assignments of error have merit and are sustained. The fifth assignment is sustained in part. Therefore, the judgment of the trial court is reversed and the matter remanded for further proceedings.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first, second, third, fourth, and sixth assignments of error have merit and are sustained. Its fifth assignment has partial merit and is therefore, partially sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Probate Division, of Belmont County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.