

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94126

ROSALIND FRANKLIN

PLAINTIFF-APPELLANT

vs.

EMILY FRANKLIN, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas

Probate Court Division
Case No. 05 ADV 0107892

BEFORE: Cooney, J., Blackmon, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: September 9, 2010

ATTORNEY FOR APPELLANT

John W. Gold
6559 W. 130th St.
Cleveland, Ohio 44130

ATTORNEYS FOR APPELLEES

Adam M. Fried
Brian D. Sullivan
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, Rosalind Franklin (“Rosalind”), appeals the Probate Court’s decision to appoint Emily Franklin (“Emily”) and Jennifer Franklin (“Jennifer”) successor co-trustees of the Irving J. Franklin Trust. We find no merit to the appeal and affirm.

{¶ 2} In November 2005, Rosalind filed a complaint in probate court to remove Emily and Jennifer as intervivos co-trustees of the Irving J. Franklin Trust (“the Trust”). After settlement attempts were unsuccessful, the matter proceeded to trial, at which the following evidence was presented.

{¶ 3} Irving J. Franklin (“Irving”) died testate on October 31, 2000 and was survived by his wife of forty-three years, Emily, and their four adult children, Jennifer, Rosalind, Laurie Collins (“Laurie”), and Irving Jeril Franklin (“Jeril”). In 1983, Irving established an intervivos trust naming Emily as the sole income beneficiary during her lifetime and designating his four children as equal remainder beneficiaries. The Trust also entitles Emily to receive principal distributions from the Trust. The Trust named KeyBank as the trustee upon Irving’s death.

{¶ 4} During his lifetime, Irving accumulated numerous real estate assets. Some of these assets were held in the name of Franklin Realty Company, Inc. (“Franklin Realty”) and others in the name of Regal Arms Housing, Inc. (“Regal Arms”). Upon Irving’s death, his Last Will and Testament included a pourover clause providing that the remainder of his assets not specifically devised through his Will were to flow into the intervivos trust he created in 1983. Emily was appointed Executrix of Irving’s estate in February 2002.

{¶ 5} Emily did not include Irving’s interest in Franklin Realty and Regal Arms in the initial inventory of estate assets filed in July 2002. According to Irving’s attorney, Leonard Lybarger (“Lybarger”), stock certificates were never issued for either of these corporations during his lifetime. Lybarger, who assisted in the preparation of the Trust, testified that Irving intended the properties to go to Emily after his death so that she could receive the rental income generated from them. For this reason, he advised the Franklins in 2002 that Emily should be the

sole shareholder of the two corporations and they were not included in the list of estate assets.

{¶ 6} In March 2003, KeyBank resigned as Trustee because there were insufficient assets to warrant its continued service as Trustee. Lybarger approached several other financial institutions to serve as a corporate trustee, but they all declined, stating they were not interested in administering a trust with less than \$500,000 in cash. The Trust assets at that time were valued at approximately \$233,542 because Franklin Realty and Regal Arms were not included in the Trust. The common stock of both corporations was valued at approximately \$324,000, which, when later added to the Trust, brought the total value of Trust assets to approximately \$557,542.

{¶ 7} Emily and Jennifer testified at trial that after Irving became ill, Jennifer assumed primary responsibility for the management of Irving's real estate holdings. Jennifer further testified that she worked between 10 and 20 hours per week managing the Trust assets without any compensation and that Emily also works hard and had never taken a principal distribution despite being entitled to do so. Emily testified that she lent \$118,000 from her personal funds to the Trust to pay for repairs and improvements to the properties.

{¶ 8} Jeril testified that he is a licensed agent in managing, purchasing, and selling real estate in Atlanta, Georgia. Although he lives out of state, he had numerous conversations with Emily regarding the day-to-day operation of the real

estate business. He had also seen the properties included in the list of Trust assets. He testified that in his opinion, Emily and Jennifer had been managing the properties “effectively.” He observed that they had properly maintained the properties and, in some instances, invested more in them to “get them up to a rentable condition.” He indicated that he preferred that Emily and Jennifer continue to serve as trustees of the Trust. Laurie expressed the same opinions and desire to keep her mother and sister as trustees.

{¶ 9} Finally, Rosalind testified that she did not believe Emily and Jennifer are capable of operating a real estate business. She believed that a hired trustee would manage the properties more effectively and generate more income to the Trust, even after paying trustee fees.

{¶ 10} After the trial, the magistrate issued a decision in which he concluded that Rosalind failed to present clear and convincing evidence that the removal or replacement of Emily and Jennifer as co-trustees was required or would be in the best interest of the Trust. Further, because Emily and Jennifer were never officially appointed successor co-trustees, the magistrate recommended appointing them with the requirement that they post a fiduciary bond in the amount \$1 million to ensure their continued proper management of Trust assets. Rosalind filed timely objections to the magistrate’s decision, and after conducting a hearing on the motion, the probate court adopted the magistrate’s recommended

findings of fact and conclusions of law. Rosalind now appeals, raising three assignments of error.

Removal of Trustees

{¶ 11} In the first assignment of error, Rosalind argues the probate court erred in refusing to remove Emily and Jennifer as co-trustees because their service as co-trustees is against the express intention of the testator. In the second assignment of error, Rosalind argues the probate court erred in refusing to remove Emily and Jennifer as co-trustees because they were never lawfully appointed to act in that capacity. Because both of these assignments of error concern the issue of whether the probate court abused its discretion when it denied Rosalind’s request to remove the co-trustees, we address them together.

{¶ 12} It is undisputed that the Trust never appointed Emily and Jennifer as co-trustees and they were not appointed as successor co-trustees by the probate court when KeyBank resigned. Emily claims that the Trust gives her the right to remove and appoint a successor trustee at her sole discretion. However, the Trust limits her appointment authority to designate “a bank or trust company of her choice, provided, however, that such bank or trust company shall have combined capital and surplus of at least \$10,000,000.00.” Thus, her appointment of herself and Jennifer as successor co-trustees is not consistent with the appointment or selection powers set forth in the original Trust document. Thus, Rosalind argues,

Emily and Jennifer's continued "trusteeship" is a legal nullity and the probate court abused its discretion in refusing to remove them.

{¶ 13} The probate court in Ohio is a court of limited and special jurisdiction and thus has only those powers specifically granted to it by statute. *Corron v. Corron* (1988), 40 Ohio St.3d 75, 77, 531 N.E.2d 708. R.C. 2101.24(B)(1)(b) authorizes the probate court to "hear and determine * * * any action that involves an inter vivos trust."

{¶ 14} R.C. 2101.24(C) confers broad authority to the probate court to address collateral matters, including "plenary power at law and in equity to dispose fully of any matter that is properly before the court." R.C. 2101.24(C); *Reinhart v. Bank One Columbus* (1998), 125 Ohio App.3d 719, 728, citing *Wolfrum v. Wolfrum* (1965), 2 Ohio St.2d 237, 208 N.E.2d 537, paragraph one of the syllabus. This plenary power authorizes the probate court to exercise complete jurisdiction over the subject matter to the fullest extent necessary. *In re Ewanicky*, Cuyahoga App. No. 81742, 2003-Ohio-3351, ¶8, citing *Johnson v. Allen* (1995), 101 Ohio App.3d 181, 185, 655 N.E.2d 240.

{¶ 15} Rosalind filed her complaint seeking removal of Emily and Jennifer as successor co-trustees. She never filed a motion for appointment of successor intervivos trustee, which would have been the proper remedy since Emily and Jennifer were never officially appointed to serve as successor co-trustees. Nevertheless, as the magistrate points out in his decision, the appointment of a

suitable trustee is the ultimate issue, and, being a court of equity with broad equitable powers, we find the probate court had authority to do just that.

{¶ 16} R.C. 5807.04, which governs the appointment of successor trustees, provides, in pertinent part:

- “(C) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
- “(1) By a person designated in the terms of the trust to act as successor trustee;
 - “(2) By a person appointed by someone designated in the terms of the trust to appoint a successor trustee;
 - “(3) By a person appointed by unanimous agreement of the qualified beneficiaries;
 - “(4) By a person appointed by the court.”

{¶ 17} The terms of the Trust require that a bank or trust company with a combined capital and surplus of at least \$10 million serve as successor trustee. However, Lybarger testified that he sought other corporate trustees to serve as successor trustee for the Trust but they were unwilling because the Trust did not have at least \$500,000 in cash. Although the total value of the Trust assets exceeded \$500,000, once the corporate assets held by Regal Arms and Franklin Realty were added to the Trust, these assets were comprised of real estate, not cash. Lybarger also explained that the banks he approached were not interested in serving as trustee because it required management of real estate for a considerable length of time. Therefore, no one designated by the terms of the Trust, i.e. a corporate trustee, was willing to serve as successor trustee.

{¶ 18} Further, because Rosalind would not consent to have Emily and Jennifer serve as co-trustees, there was no unanimous agreement of the

beneficiaries. Although the Trust authorized Emily to appoint a successor trustee, her authority was limited to selecting a corporate trustee, which was unavailable. Therefore, by last resort, the probate court was left to appoint the successor trustee.

{¶ 19} Obviously, the probate court's appointment of a trustee must serve the best interest of the Trust. See, generally, *In re Trust of Bernard*, Summit App. No. 24025, 2008-Ohio-4338. The record establishes that Emily is the primary beneficiary of the Trust and the only individual entitled to income and discretionary principal distributions. Further evidence demonstrates that Emily and Jennifer have successfully managed the Trust assets since before Irving's death and they have never sought payment for their services. To the contrary, Emily contributed approximately \$118,000 of her own money to repair and maintain the real estate holdings.

{¶ 20} Rosalind suggested appointing a third party trustee who is not a corporate trustee who could manage the real estate for a fee of approximately 10% of the profits. However, the cost of appointing an independent third party to serve as trustee would most likely exceed the benefit or value gained to the Trust. All of the beneficiaries, except for Rosalind, testified that they thought Emily and Jennifer were effectively managing the properties and expressed their desire to keep them as trustees. As the sole income beneficiary, Emily is the only one who stands to immediately benefit or suffer from the management of these properties.

It is therefore in her own best interest to maximize the value of the properties. Moreover, there was no evidence to substantiate Rosalind's allegations of mismanagement or theft. The accounts presented a detailed pattern of rent collection and repairs to the properties, all at no cost to the Trust.

{¶ 21} Based on this evidence and under the circumstances, we find that the probate court did not abuse its discretion in overruling Rosalind's request to remove the trustees and in appointing Emily and Jennifer to serve as co-trustees of the Trust.

{¶ 22} Accordingly, the first and second assignments of error are overruled.

Manifest Weight of the Evidence

{¶ 23} In the third assignment of error, Rosalind argues the decision not to remove Emily and Jennifer as co-trustees was against the manifest weight of the evidence. We disagree.

{¶ 24} Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed on appeal as being against the manifest weight of the evidence. *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, 874 N.E.2d 1198, ¶3. The Ohio Supreme Court has explained that when reviewing challenges to the manifest weight of the evidence, a court of appeals must be guided by the presumption that the findings of the trier of fact were indeed correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273. The underlying rationale for giving

deference to the trial court's findings "rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.*

{¶ 25} In the instant case, we have already noted that because Emily is the primary beneficiary, she is the only individual entitled to income and discretionary principal distributions. Yet, although she managed the Trust for over five years as trustee and contributed over \$100,000 of her own funds to improve the Trust assets, she has not taken a single distribution. A potential third party trustee testified at trial that he would charge a fee of 10% of the proceeds collected to manage the assets. He acknowledged that if the current trustees were managing the real estate without charging a management fee, such an arrangement would be better for the Trust than his charging a fee.

{¶ 26} Although Rosalind attempted to show that the trustees engaged in self-dealing, the evidence failed to demonstrate that Jennifer misappropriated any business opportunities from the Trust related to her purchase of an undivided, one-half interest in property located in Geauga County. Emily testified that she and her husband, along with another couple, each owned a one-half undivided interest in the property. However, when her friend, Mrs. Gordon, became ill with cancer, she expressed a desire to sell her one-half share of the property and asked Emily if she would be interested in purchasing her share.

{¶ 27} Rather than selling the share to a stranger or another third party, Emily suggested that Jennifer purchase the share from Mrs. Gordon and thereby keep the property in the family. The testimony established that the Trust did not have sufficient cash to purchase the property, which had a fair market value of \$71,000. If the Trust had cash readily available, Emily could have purchased the share for the Trust. However, because that was not possible, it was reasonable that another family member could purchase it to keep it in the family.

{¶ 28} As previously stated, there was no evidence that Emily and Jennifer mismanaged the Trust. In fact, the evidence showed that not only did they manage the property effectively, Emily improved the value of Trust assets with her own funds. Therefore, we find the probate court's decision declining to remove Emily and Jennifer as co-trustees but rather appointing them because that would serve the best interest of the Trust is supported by competent, credible evidence.

{¶ 29} Accordingly, the third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the probate court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, JUDGE

PATRICIA A. BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR