

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
CARROLL COUNTY

IN THE MATTER OF:

JAY F. ROUDEBUSH AND BEVERLY J. ROUDEBUSH
TRUST

OPINION AND JUDGMENT ENTRY

Case No. 20 CA 0948

Civil Appeal from the
Court of Common Pleas, Probate Division, of Carroll County, Ohio
Case No. 20163002

BEFORE:

Mark A. Hanni, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:

Reversed.

Atty. Sandra K. Cheshire, Cheshire Law Office, LLC, 319 Mississippi St. SE, North Canton, Ohio 44720, for Appellants-Beneficiaries Beverly J. Roudebush and Martin Roudebush and

Atty. Michela Huth, P.O. Box 17, Bolivar, Ohio 44612, for Appellee-Trustee Martin Roudebush and

Atty. R. Scott Heasley, Meyers, Roman, Friedberg & Lewis, 28601 Chagrin Blvd., Suite 500, Cleveland, Ohio 44122, for Appellees-Intervenors, Jeffery Bory and Germaine Lawless.

Dated: June 28, 2023

Hanni, J.

{¶1} Appellants Martin Roudebush (Martin) and Beverly J. Roudebush (Beverly) (collectively Appellants), and Appellee Martin Roudebush (Appellee Martin), as Third Successor Trustee of the Jay F. Roudebush and Beverly J. Roudebush Trust (Trust), appeal a November 13, 2020 Carroll County Common Pleas Probate Court judgment. The probate court approved a settlement agreement (second settlement agreement) between Sean Smith, Second Successor Trustee of the Trust (Second Trustee Smith), and Dr. Jeffery Bory (Bory) and Ms. Germaine Lawless (Lawless) (collectively Appellees).

{¶2} For the following reasons, we find merit to Appellants' Assignment of Error Number 4 and reverse the probate court's decision approving the second settlement agreement. We also find merit to Appellants' Assignment of Error Number 10. We find no merit to Appellants' Assignment of Error Number 9 and decline to address Appellants' remaining Assignments of Error as moot.

{¶3} Jay Roudebush purchased property in 1973. He transferred the real estate to his daughter Beverly. In December 1989, Beverly transferred the property and a family home to the Trust, which was to provide for the "continued beneficial use" for Jay and Beverly. (Trust Agreement). Jay died in 1996 and Beverly remained in the home on the Trust property.

{¶4} Appellees Bory and Lawless purchased property adjoining that of the Trust from Louis Kopocs in 2002. A dispute between Appellees and Appellants arose over the location of part of a driveway that had always been used by Jay and Beverly.

{¶5} In 2015, Appellees Bory and Lawless sued Appellants and the Trust in the Carroll County Court of Common Pleas. They requested a declaratory judgment as to ownership of property boundaries, which included part of the driveway that Jay and Beverly used which they claimed was located on their property. They also asserted claims of trespass, nuisance, and assault. *Bory v. Roudebush*, Carroll County Case No.

2015 CHB 28333. Appellants and the Trust filed answers, and the Trust filed a counterclaim for adverse possession, declaratory judgment, and to quiet title.

{¶6} The common pleas court partially granted Appellees Bory and Lawless' motion for summary judgment, finding that the disputed portion of the driveway was located within the metes and bounds of their property. The court did not decide the adverse possession and trespass claims. In February 2018, Second Trustee Smith and Appellees Bory and Lawless reached a settlement as to these claims, and Second Trustee Smith filed for approval of the settlement agreement in probate court. The probate court approved the settlement.

{¶7} Appellants appealed the settlement to this Court. *In re Roudebush*, 7th Dist. Carroll No. 18-CA-929, 2019-Ohio-3955. We reversed and remanded the case, finding that the settlement “was disproportionate on its face and does not appear to serve to benefit any Trust beneficiary.” *Id.* at ¶ 29. The common pleas court thereafter scheduled a trial on the adverse possession and trespass claims.

{¶8} On January 6, 2020, Second Trustee Smith informed Appellants by letter that a conflict of interest arose for the attorney representing him as Trustee and Appellants as beneficiaries. He stated that the attorney withdrew and he retained Attorney Kathleen Stoneman to represent the Trust. He indicated that the Trust terms allowed him to assess retainer costs to the beneficiaries and he demanded \$3,500 for the retainer. Appellants objected and retained Attorney Cheshire to represent them. Second Trustee Smith filed a motion to compel payment of Attorney Stoneman's attorney fees.

{¶9} Before trial occurred in the common pleas court on our remand, Second Trustee Smith entered into a second settlement agreement with Appellees Bory and Lawless. Appellants again asserted that the agreement did not benefit them. After a hearing, the probate court approved the second settlement agreement. The court also granted the motion to compel payment of Attorney Stoneman's attorney fees, which were over \$4,600 before she withdrew as counsel. The common pleas court stayed its action

pending the outcome of this appeal.¹

{¶10} In the instant appeal, Appellants present ten assignments of error. We will address Appellants’ fourth assignment of error first since it requires reversal and renders some of the other assignments of error moot. In their fourth assignment of error, Appellants assert the following:

¹On December 11, 2020, Second Trustee Smith resigned the trustee position after he was elected as judge of the Carroll County Common Pleas Court Juvenile and Probate Division. He filed a motion to appoint a Third Successor Trustee. Appellants filed a motion to strike this motion because it violated probate law as the beneficiaries had agreed to appoint Martin as Third Successor Trustee. Appellees Bory and Lawless opposed the motion to strike and requested that the court appoint a new trustee. They alleged that Beverly, Martin and the other beneficiaries were on a “crusade to needlessly continue litigating a minor dispute related to a small portion of driveway” and that Beverly and Martin they would appoint a trustee who would execute their wishes without question.

On February 8, 2021, the probate court issued a judgment entry which included appointing Martin as Third Successor Trustee. The probate court ordered the trustee to: represent the Trust’s interest; take the trustee’s position as set forth in the second settlement agreement; make arrangements to pay Attorney Stoneman’s bill; and retain separate counsel for his personal interests.

Appellants and the Trust (with Martin as Trustee) appealed this judgment, challenging the probate court’s authority to hold a hearing and to appoint a successor trustee without giving Appellants notice or an opportunity to be heard. Appellants also appealed the probate court order requiring the Third Successor Trustee to take the same position as the prior Trustee concerning the second settlement and Attorney Stoneman’s bill.

On December 16, 2021, we reversed, vacated, and remanded the probate court’s decision. *In re Roudebush Trust*, 7th Dist. Carroll No. 21 CA 0949, 2021-Ohio-4557, 182 N.E.3d 445. We held that an issue existed relating to notice and holding a hearing in the absence of Appellants. We consequently declined to address assignments of error concerning the substance of the judgment entry. Appellees appealed to the Ohio Supreme Court, but that Court declined jurisdiction.

Since we vacated the February 8, 2021 judgment entry, the probate court judgment entry approving the second settlement agreement between Second Successor Trustee Smith and Appellees remains viable.

Moreover, Appellants have filed a civil lawsuit against Second Trustee Smith in the common pleas court for breach of trust, breach of fiduciary duty, and negligence. See *Roudebush v. Smith*, Carroll County C.P. Case No. 2022 CVC 29932.

Judge Campbell also recused himself after motions to disqualify him were filed. On August 22, 2022, Judge Swift, sitting by assignment, issued a judgment entry stating that a status conference was held with all parties present. The probate court declared the February 8, 2021 judgment entry null and void based upon our decision. The court also stayed the case pending the outcome of the instant appeal.

The Trial Court abused its discretion in entering judgement [P. Tr. 438-441] approving the settlement Agreement when it failed to properly consider if the Settlement Agreement benefited the Trust beneficiaries.

{¶11} Appellants set forth the duties owed by a trustee to a Trust and its beneficiaries under the Ohio Trust Code:

R.C. 5808.01: * * * the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries;

R.C. 5808.02(A): A trustee shall administer the trust solely in the interests of the beneficiaries;

R.C. 5808.04: A trustee shall administer the trust as a prudent person would and shall consider the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution;

R.C. 5808.06: A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise;

R.C. 5808.11: A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

{¶12} Appellants submit that the standard that we applied in reversing the probate court's approval of the first settlement agreement applies to the probate court's approval of the second settlement agreement. Appellants contend that similar to the first settlement agreement, the instant settlement agreement does not benefit the Trust beneficiaries. They compare the outcomes of accepting the second settlement agreement with litigating the adverse possession counterclaim and posit that accepting

the second settlement agreement is worse than litigating and losing the adverse possession counterclaim and it therefore does not benefit the Trust or the beneficiaries.

{¶13} We find merit to Appellants' fourth assignment of error. The proper standard of review for a court's approval of a settlement agreement is abuse of discretion. *In re Roudebush*, 7th Dist. Carroll No. 18 CA 0929, 2019-Ohio-3955, ¶ 16. An abuse of discretion is more than an error in judgment; it requires a finding that the court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶14} In reversing and remanding the probate court's approval of the first settlement agreement, we found that the first settlement agreement was disproportionate on its face and it did not benefit the beneficiaries. *In re Roudebush*, 7th Dist. Carroll No. 18 CA 0929, 2019-Ohio-3955, ¶ 30. We directed the probate court to hold a full evidentiary hearing to determine if the parties could reach an appropriate settlement. Appellants assert that this standard applies to the instant case and the second settlement agreement provides them no benefits as beneficiaries.

{¶15} In approving the second settlement agreement, the probate court stated that "[p]ursuant to the directive from the Court of Appeals, the Probate Court held a hearing on the issue of the authority of the trust to settle a claim against the trust and, is the settlement agreement in the best interest of the trust." However, our directive to the probate court was to hold an evidentiary hearing to determine if an appropriate settlement could be reached because the first settlement agreement did not serve the Trust's purpose and did not appear to benefit the Trust's *beneficiaries*. *In re Roudebush*, 7th Dist. Carroll No. 18 CA 0929, 2019-Ohio-3955, ¶¶ 29, 30.

{¶16} While significant differences exist between the first and second settlement agreements, the second settlement agreement, like the first, does not benefit the beneficiaries. We therefore hold that the probate court abused its discretion in approving the second settlement agreement.

{¶17} The second settlement agreement is between the Trust and Appellees. The first settlement agreement included Appellants as beneficiaries. The main terms of the

second settlement agreement are that the Trust will relocate the last 30 feet of the driveway onto its property and pay \$739.53 of the expense in the relocation from the Trust account. The agreement requires Appellees Bory and Lawless to pay the rest of the relocation expense, but the Trust will reimburse them from its oil and gas royalties. Appellees Bory and Lawless would release the Trust of all claims that they have against it, and the Trust would dismiss its counterclaim and all other claims against Appellees Bory and Lawless.

{¶18} The second settlement agreement provides no benefit to the beneficiaries. They are not parties to the second settlement agreement and they must release any claims that they may have against Appellees Bory and Lawless as heirs to the Trust. Further, the only benefit of the second settlement agreement to the Trust is a stipulation to dismiss the common pleas case where the only remaining claim was the Trust's adverse possession counterclaim against Appellees Bory and Lawless since they had dismissed their claims against Appellants.

{¶19} Despite little to no benefit to the Trust and Appellants, the Trust is burdened by the second settlement agreement for several reasons. First, the Trust must cede any claim to the bottom portion of the driveway. Second, the Trust must relocate the bottom of the driveway. Third, the Trust must pay for the entire relocation. And fourth, the Trust must release its oil and gas royalties to Appellees Bory and Lawless for reimbursement of advanced expenses for the relocation.

{¶20} Even the worst-case scenario of litigating and losing the adverse possession counterclaim provides more benefits to the beneficiaries and to the Trust. While both scenarios require the Trust to relinquish its claim to the disputed property and relocate the disputed portion of the driveway, the second settlement agreement financially binds the Trust to Appellees Bory and Lawless. The agreement requires the Trust to reimburse them for advancing partial payment for the relocation from the Trust's oil and gas royalties. This burdens the Trust and the beneficiaries. It creates a loss of value to the Trust res by relinquishment of oil and gas royalties and financially binds parties who are already financially strained. Further, the agreement contains no cap on expenses for

relocation or details as to its quality or quantity. While an exhibit was presented at the hearing concerning the relocation, it was merely an estimate of the relocation and contained limited information and a price of \$1,500. This estimate was provided by an excavator who negotiated with Appellees Bory and Lawless after Second Trustee Smith testified that he referred them to him. Moreover, under the second settlement agreement, the Trust releases any other claims that it may have against Appellees Bory and Lawless.

{¶21} On the other hand, if the Trust litigates and loses the adverse possession counterclaim, it suffers no financial consequence from the litigation because the beneficiaries would bear those costs as per the Trust agreement. Further, while the Trust would lose the disputed property, its oil and gas royalties would be intact and it would not be financially bound to Appellees Bory and Lawless. Moreover, the Trust would control the relocation and the beneficiaries could provide input as to the costs related thereto. The Trust would also retain other claims that it may have against Appellees Bory and Lawless.

{¶22} Further, if the Trust litigated and won the adverse possession claim, the Trust would not have to relocate the disputed portion of the driveway, the value of the Trust property would remain intact, the Trust could assert additional claims, and the Trust would keep its oil and gas royalties.

{¶23} Accordingly, we see no benefit to the beneficiaries from the second settlement agreement and very little benefit to the Trust itself.

{¶24} At the evidentiary hearing, Second Trustee Smith explained the reasons that the Trust and its beneficiaries benefitted from the second settlement agreement. (Tr. at 21-26). He testified that his main reason was to stop the spending of thousands of dollars to continue to litigate so the Trust would have no financial risk. (Tr. at 23, 24). He testified that the beneficiaries also had insufficient funds to continue litigation and he may have to sell the Trust property to pay for litigation fees and costs. (Tr. at 24-26, 46-47, 134, 162). He testified that the Trust assets were small and if the Trust liability increased and the equity value of the Trust property decreased, he would have to sell the Trust

property and Beverly would have to move from the house that she lived in for a long time. (Tr. at 23).

{¶25} Second Trustee Smith testified that he believed that Appellants lacked sufficient funds to continue to litigate because he recalled that they were once going to have a new property survey completed, but they told the judge that they lacked money to repair their car, so they would rather pay money for car repair than for the survey. (Tr. at 25). Second Trustee Smith testified that the settlement would minimize all financial risks without impacting the Trust property or Beverly's ability to continue to reside on the Trust property. (Tr. at 21).

{¶26} However, it appears that Second Trustee Smith did not speak to Appellants before entering into the second settlement agreement. (Tr. at 290). While Second Trustee Smith had full discretion to control the Trust as trustee of this Trust, Appellant Martin testified that he was never asked about the availability of funds to continue the litigation. (Tr. at 290). He testified that the beneficiaries had sufficient funds, wanted to proceed with litigation, and had never funded the Trust for expenses because the Trust Agreement requires the beneficiaries to bear the Trust expenses. (Tr. at 300).

{¶27} Accordingly, Second Trustee Smith's primary reasons for entering into the second settlement agreement were without merit. The Trust Agreement required the beneficiaries to fund Trust expenses, and the beneficiaries wished to litigate and pay the litigation expenses for the Trust. Further, Second Trustee Smith testified that he would not sell the Trust res while Beverly was still living there. Moreover, contrary to Second Trustee Smith's testimony, all financial risk to the Trust was not eliminated by entering into the second settlement agreement. The agreement would cause the Trust to lose value since it would concede that Appellees Bory and Lawless owned the disputed property and the Trust would have to use its oil and gas royalties to reimburse Appellees Bory and Lawless for relocation expenses.

{¶28} Second Trustee Smith also testified that accepting the second settlement agreement would also put an end to lengthy litigation. (Tr. at 23). He noted the great animosity between the parties and he stated that it had become personal for Appellants

and they could not see the advantage of simply relocating part of the driveway for \$1,500 (Tr. at 25). He also explained that Appellants failed to consider that the court already ruled that the disputed portion of the driveway was within the metes and bounds of Appellees Bory and Lawless' property. Second Trustee Smith explained that he, as an attorney and Trustee, and Attorney Slabaugh, the Trust's former counsel, evaluated the adverse possession counterclaim and believed that the risk was too high to litigate it. (Tr. at 28). He stated that they discussed the possible testimony of Mr. Kopocs and whether it would be consistent with his letter or his deposition testimony, and they concluded that Mr. Kopoc would testify consistent with his letter. (Tr. at 29).

{¶29} Finally, Second Trustee Smith explained that he settled the case for the second time because Appellants would not make good witnesses at trial. (Tr. at 29). He noted that Beverly had difficulties expressing herself and tended to rely on Martin for answers. (Tr. at 29). He testified that Martin was angry and disliked the judge and they feared that Martin would "go off" and be held in contempt. (Tr. at 30).

{¶30} However, the adverse possession claim may have merit. Second Trustee Smith testified that he and Attorney Slabaugh concluded that Mr. Kopoc would testify consistent with his letter stating that he told Jay Roudebush that he could use the part of the driveway located on Mr. Kopoc's property. (Tr. at 28). However, Mr. Kopoc's deposition testimony appears to conflict with his letter and Second Trustee Smith provided no explanation about concluding that Mr. Kopoc would testify consistent with the letter rather than his deposition testimony.

{¶31} Accordingly, we find no benefit to the Trust when the Trust res is the property itself and the Trust is conceding part of the property and its value without receiving any benefit. Further, the beneficiaries are losing a part of the value of the Trust property that they stand to inherit and they are willing to litigate the counterclaim and pay the expenses and costs relating to that litigation.

{¶32} If the Trust did not settle the common pleas case and won the adverse possession claim, the Trust would keep the disputed property and would not have to relocate the bottom portion of the driveway. The beneficiaries would spend money on

litigation costs, but neither the Trust nor the beneficiaries would have to pay to move the driveway. If the Trust lost the adverse possession claim, it would have to relocate the driveway, pay for the relocation, and lose the disputed property.

{¶33} However, if the second settlement agreement is allowed to stand, the Trust and its beneficiaries are in a worse position than litigating the adverse possession counterclaim and losing. With the second settlement agreement, the Trust and the beneficiaries must: cede a claim to the disputed property which reduces the value to the Trust; relocate the disputed portion of the driveway; pay to relocate the driveway; relocate the driveway with no control over the expense or quality of the relocation or the contractor; endure a financial connection with Appellees in an already strained relationship; and lose the ability to bring further claims.

{¶34} In summary, we find that the second settlement agreement does not benefit the Trust or its beneficiaries and the probate court abused its discretion in approving the second settlement agreement. Appellants' fourth assignment of error has merit.

{¶35} Since we find that Appellants' fourth assignment has merit, we decline to address Appellants' other assignments of error as moot relating to the probate court's judgment as to the second settlement agreement. Those assignments of error include Assignments of Error Numbers 1, 2, 3, 5, 6, and 7. They assert the following:

- 1. The Trial Court abused its discretion in entering judgement [P. Tr. 438-441] approving the settlement Agreement when it determined the only relevant issue was "if the trustee has the authority to settle the claims against the Trust."**
- 2. The Trial Court abused its discretion in entering judgement [P. Tr. 438-441] approving the settlement Agreement when it refused to properly consider the relevant facts and circumstances concerning the pending adverse possession claim pending in the General Division.**

3. The Trial Court abused its discretion in entering judgment [P. Tr. 438-441] approving the settlement Agreement based on its determination that continued litigation would risk the Trust being insolvent and being forced to sell the Real Estate.

5. The Trial Court abused its discretion in entering judgement [P. Tr. 438-441] approving the settlement Agreement when it failed to properly evaluate the possible outcomes of future litigation of the Settlement Agreement is [sic] not approved.

6. The Trial Court abused its discretion in entering judgement [P. Tr. 438-441] approving the settlement Agreement when it failed to properly consider the value, both monetarily and intrinsic value of the real estate to which the Trust would no longer have any claim.

7. The Trial Court abused its discretion in entering judgement [P. Tr. 438-441] approving the settlement Agreement when it failed to consider the Trust's claims other than adverse possession claim, which the Settlement Agreement releases the Appellee/Plaintiffs.

8. The trial court abused its discretion in entering judgement approving the Settlement Agreement when it determined that Trustee Smith had acted impartially.

{¶36} These assignments of error are rendered moot based upon our decision finding merit to Appellants' fourth assignment of error and remanding this case to the probate court.

{¶37} In their ninth assignment of error, Appellants assert:

The Trial Court abused its discretion in entering judgement [P. Tr. 140-161] allowing Jeffery Bory and Germaine Lawless, Plaintiffs in the General Division Case to intervene in the Trial Court proceedings in the Probate Division.

{¶38} Appellants contend that the probate court should not have permitted Appellees to intervene in the instant probate case. They cite Civ. R. 24(A)(2), which permits intervention as a right “when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

{¶39} Appellants assert that the only purpose of the probate court hearing was to determine if the second settlement agreement was in the best interest of the beneficiaries and Appellees had no interest in this. They contend that Appellees’ interests are only to have the settlement agreement approved so that the driveway can be relocated. Appellants further assert that even if Appellees can show an interest, the probate court’s decision would not impair or impede their ability to protect their interests. Appellants submit that their interests lie with the general division and resolution of the adverse possession claim, not the probate case. They contend that regardless of the outcome of the probate case, Appellees’ interests in the disputed property are not impaired or impeded.

{¶40} Appellants further conclude that Appellees’ interests were adequately represented in any case, even if they had an interest to protect. They contend that Second Trustee Smith approved the second settlement agreement, which contained the terms that Appellees agreed to, and therefore he represented their interests in the settlement agreement and disputed property.

{¶41} Appellee Trustee Martin agrees with Appellants, and cites Attorney Heasley’s objection when Appellee Bory was about to testify at the hearing. Attorney Heasley objected to Appellee Bory testifying, stating that his testimony was “completely irrelevant to the dispute between the trust and the beneficiaries.” (Tr. at 193). Appellee Trustee Martin also cites the probate court’s response, stating that:

He [Dr. Bory] has an interest only to the extent he is involved in a civil lawsuit upstairs. Which are part of the pleadings we stipulated to today. * * * He has

no interest in this phase, as it relates to the trustee and the beneficiaries, because he does not have a right to that interest. [Id p. 194 line 4-11].

{¶42} He asserts that Appellees Bory and Lawless would be in the same legal position regardless of whether the probate court approved the second settlement agreement. Appellees have no response to this assignment of error.

{¶43} Appellees filed their motion to intervene pursuant to Civ. R. 24(A)(2). That section provides:

(A) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

(2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

{¶44} The Ohio Supreme Court has liberally interpreted this provision to favor intervention. *State ex rel Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, ¶ 41 (citations omitted). The standard of review is “whether the trial court abused its discretion in allowing intervention.” *Id.*

{¶45} The probate court issued an order on April 27, 2020 granting Appellees’ motion to intervene. The court held that they had the right to intervene because they are parties to the settlement agreement which was under review, their interest in the subject property could be impaired if the settlement agreement is not approved, and their interest would not be adequately represented by the existing parties in the case. (Apr. 27, 2020 J.E.).

{¶46} Apparently, the probate court granted the motion prior to receiving Appellants’ objection, so the court allowed Appellants to file a response to the motion to intervene. The probate court thereafter held a telephonic hearing on May 14, 2020.

{¶47} The probate court issued a judgment entry on May 19, 2020 and allowed the granting of the motion to intervene to stand.

{¶48} This assignment of error lacks merit and is overruled. Applying the abuse of discretion standard, the probate court properly addressed the factors for allowing intervention under Civ. R. 24(A)(2). The court held that Appellees Bory and Lawless were parties to the second settlement agreement that was scheduled for review. The probate court further found that their interest as alleged owners of the disputed property could be impaired if it did not approve the second settlement agreement.

{¶49} This is a reasonable finding since Appellees Bory and Lawless participated as parties to the second settlement agreement and could address or discuss any term of that agreement in the probate court hearing for clarification if the court found it necessary. Appellees Bory and Lawless could be impacted by the probate court's decision to reject the second settlement agreement as it would terminate their settlement agreement with the Trust and require them to proceed in the common pleas case over the disputed property. The dispute over the property would be settled if the probate court accepted the second settlement agreement.

{¶50} The probate court further found that Appellees Bory and Lawless' interest would not be adequately represented by the existing parties in the case. (Apr. 27, 2020 J.E.). This is reasonable as well, since Second Trustee Smith represents the Trust and the interests of the beneficiaries, and the beneficiaries and their counsel represent themselves.

{¶51} Accordingly, we find that the probate court did not abuse its discretion in allowing Appellees Bory and Lawless to intervene. Appellants' ninth assignment of error lacks merit and is overruled.

{¶52} In their tenth assignment of error, Appellants assert:

The Trial Court abused its discretion in entering judgement [P.Tr. 237] granting Former Trustee Smith's motion to compel the Appellants to pay Attorney Stoneman's attorney fees.

{¶53} Appellants contend that while R.C. 5810.04 authorizes the court to order a Trust to pay the costs and fees for the Trust’s administration, those fees, including reasonable attorney fees, must be “properly incurred in the administration of the trust.” Appellants assert that Second Trustee Smith’s incurrence of reasonable fees terminated when he attempted to have the first settlement agreement approved when it did not benefit the beneficiaries. They argue that since then, Second Trustee Smith has taken actions solely to eliminate the general division claim and has breached his trustee duties. Appellants submit that Attorney Stoneman’s attorney fees have stemmed solely from negotiating the second settlement agreement, which they opposed. Accordingly, they conclude that the attorney fees were not properly incurred in the administration of the Trust since it was not a benefit to the Trust by giving up property, claims, and money, and it did not benefit the beneficiaries who wanted to proceed in the general division. Appellants cite *Demming v. Smith*, 8th Dist. Cuyahoga No. 94106, 2010-Ohio-4134, where the court denied attorney fees incurred by a trustee for a trust because the actions taken by the attorney did not benefit the trust and were not needed to properly administer the trust.

{¶54} Appellee Trustee Martin agrees, asserting that Second Trustee Smith violated his duties to protect the Trust and protect its assets when he incurred fees to hire Attorney Stoneman to advocate his position to approve the second settlement agreement. Appellant Trustee Martin cites *In re Estate of Winograd*, 65 Ohio App.3d 76, 91, 582 N.E.2d 1047 (8th Dist. 1989), where the appellate court affirmed the trial court’s denial of a trustee’s attorney fees for litigating his removal as trustee, even though the trustee’s breach was not in bad faith, reckless, or sufficient to have the trustee removed.

{¶55} Appellees Bory and Lawless counter that the Trust Agreement clearly provides that the Trustee can request that the beneficiaries pay for his attorney fees. Appellees note that the agreement does not state that the consent of the beneficiaries is required before the Trustee retains counsel.

{¶56} We find that this assignment of error has merit. Neither settlement agreement that Second Trustee Smith entered into on behalf of the Trust appear to benefit

the Trust beneficiaries and we specifically reversed and remanded as to the first settlement agreement partly on that basis. We do so again as to this second settlement agreement.

{¶57} The Trust Agreement specifically states that:

The Trustee shall have authority to:

A. Continue to hold legal title to said property and cause repairs, insurance and such other needs to be attended and assess costs thereof among the beneficiaries named herein or their interest.

{¶58} The language of this document is somewhat vague. However, Appellees Bory and Lawless are correct that it does not require the Trustee to secure the consent of the beneficiaries before taking action for the Trust. The total attorney fees incurred by Attorney Stoneman at the time of the approval hearing were \$4,600.

{¶59} R.C. 5808.16(AA) allows trustees to employ agents, attorneys, accountants and other professionals. R.C. 5808.05 provides that “in administering a trust, a trustee may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.” *Bryan v. Chantil*, 4th Dist. Ross Nos. 20CA3723, 20CA3725, 20CA3726, 20CA3732, 2021-Ohio-4082, ¶ 151.

{¶60} In its March 26, 2020 judgment entry, the probate court indicated that Second Trustee Smith had filed two motions, one of which requested payment for Attorney Stoneman’s attorney fees in representing the Trust in the general division case. The court indicated that a hearing was held on March 24, 2020 and the beneficiaries did not appear at the hearing or file any objection or response to either motion. The court authorized Second Trustee Smith to sign the settlement agreement. The court further found that the Trust needed counsel to represent it, the Trust Agreement required the Trustee to assess costs to the beneficiaries. The court held that the Trustee was authorized to retain legal counsel.

{¶61} Following this entry, Appellants filed a motion to vacate the probate court’s March 26, 2020 judgment entry, citing confusion over the COVID-19 shutdown and word

from the Clerk of Court employees that non-emergency cases were canceled. The probate court vacated its March 26, 2020 judgment entry and scheduled a new hearing date on the motion to approve the second settlement agreement and the motion to compel payment of attorney fees. (Apr. 9, 2020 J.E.).

{¶62} On May 19, 2020, the probate court issued a judgment entry following the telephone hearing it held on May 14, 2020 with all parties represented. The court found that the Trust had a right to be represented by counsel, appointed Attorney Stoneman as counsel to represent the Trust, and approved her requested retainer of \$3,500.00 to be used on an hourly basis. (May 19, 2020 J.E.).

{¶63} In *Demming v. Smith*, 8th Dist. Cuyahoga No. 94106, 2010-Ohio-4134, ¶ 53, cited by Appellants, the plaintiffs sued the trustee of the trust for which they were beneficiaries. They alleged that the trustee breached her fiduciary duty, converted trust assets, and breached the trust agreement. The trial court found merit to some claims and overruled others. In particular, the trial court awarded the trustee attorney fees for successful legal representation in defending her fiduciary actions, but denied the rest of the requested attorney fees under R.C. 5807.09. *Id.* ¶ 16-17.

{¶64} The appellate court disagreed. It cited R.C. 5807.09(A), which is entitled “Reimbursement of expenses” and provides that, “(A) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for expenses that were properly incurred in the administration of the trust and, to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.” The appellate court cited *Goff v. Key Trust Co. of Ohio* (Dec. 18, 1997), Cuyahoga App. No. 71636, where that court held that “in order to warrant attorney fees, the attorney's action must benefit the estate. * * * It is not an abuse of discretion, therefore, to reimburse an executor for successfully defending allegations of misconduct.” *Demming, supra* at ¶ 56, citing *Diemert v. Diemert*, Cuyahoga App. No. 82597, 2003-Ohio-6496. The *Demming* appellate court held that the actions of the trustee’s attorney “did not benefit the trust as her defense was not based on protecting trust assets.”

{¶65} This case is similar. Second Trustee Smith defended his actions as benefiting the Trust when he testified that he sought to limit expenses and keep Beverly in the Trust home. He hired Attorney Stoneman for help him defend his actions for this purpose.

{¶66} Appellee Trustee Martin cites *In re Estate of Winograd*, 65 Ohio App.3d 76, 91, 582 N.E.2d 1047 (8th Dist. 1989). In that case, two beneficiaries sued to remove a trustee after the trustee made distributions to another beneficiary without informing them and without considering their financial need before the distribution.

{¶67} The appellate court held that although the trustee should have assessed the financial needs of the other two beneficiaries and notified them, no evidence supported a finding that the trustee acted in bad faith or recklessly in distributing the income. *Id.* at 80. The appellate court held that the trial court nevertheless had discretion to determine whether to award attorney fees and did not abuse its discretion in denying attorney fees to the trustee. *Id.* at ¶ 5, citing *In re Guardianship of Lloyd* (1964), 8 Ohio App.2d 223, 32 O.O.2d 128, 197 N.E.2d 377.

{¶68} Here, Appellants did not seek to remove Second Trustee Smith during his service. Further, the probate court granted Second Trustee Smith's request to have counsel appointed for the Trust after we ruled that a conflict of interest existed with having Attorney Slabaugh represent both the Trust and Appellants. Second Trustee Smith also testified that he entered into both settlement agreements in order to keep expenses down for the Trust.

{¶69} However, again, we found the first settlement agreement did not benefit the beneficiaries. We find here that the second settlement agreement does not benefit the beneficiaries. Accordingly, we find that the probate court abused its discretion in granting Second Trustee Smith's motion to compel payment of Attorney Stoneman's attorney fees. Accordingly, Appellants' assignment of Error Number 10 has merit.

{¶70} In sum, we find merit to Assignments of Error Numbers 4 and 10. We find Assignments of Error Numbers 1, 2, 3, 5, 6, 7, and 8 moot. Assignment of Error Number 9 is without merit.

Waite, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, Assignments of Error Numbers 4 and 10 are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas, Probate Division, of Carroll County, Ohio, is reversed. Costs to be taxed against the Appellees Bory and Lawless.

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.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.