

[Cite as *Meehan v. Meehan*, 2023-Ohio-2772.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

MARCIA MEEHAN,  
TRUSTEE & BENEFICIARY, ET AL.,

:

Plaintiffs-Appellants,

:

Nos. 111909 and 111910

v.

:

TIMOTHY MEEHAN, ET AL.,

:

Defendants-Appellees.

:

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: AFFIRMED**

**RELEASED AND JOURNALIZED: August 10, 2023**

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Civil Appeal from the Cuyahoga County Court of Common Pleas  
Probate Division  
Case Nos. 2019ADV244617 and 2019ADV245299

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***Appearances:***

Anelli Law, LLC, and Dianna M. Anelli, *for appellant.*

Ulmer & Berne LLP and John M. Alten, *for appellees.*

EMANUELLA D. GROVES, J.:

{¶ 1} In this consolidated appeal, appellant, Marcia Meehan (hereinafter “Marcia”),<sup>1</sup> appeals the August 8, 2022 and September 7, 2022 judgments of the Cuyahoga County Court of Common Pleas, Probate Division, granting counterclaims for breach of fiduciary duty, conversion, and unjust enrichment. The court ordered damages of \$414,724.79 in favor of appellees, Timothy Meehan,<sup>2</sup> trustee of the Donna Meehan Family Trust, Michael W. Meehan, Keagan F. Meehan, Kevin F. Meehan, and Ryan C. Meehan, beneficiaries of the Estate of Donna Meehan under the last will and testament dated April 13, 2018 (collectively “appellees”).

{¶ 2} For the reasons that follow, we affirm.

### **Factual and Procedural Background**

{¶ 3} Thomas (“Tom”)<sup>3</sup> and Donna Meehan (“Donna”) of Brookpark, Ohio were the parents of Marcia, Timothy (“Tim”), Patrick (“Pat”), and Michael (“Mike”) Meehan. In 2010, the retired couple hired Attorney N. Lindsey Smith to update their

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<sup>1</sup> This consolidated appeal involves Marcia Meehan in her capacities of personal representative, manager of TeePee & Petunia LLC, power-of-attorney for Donna Meehan, co-trustee of the Donna Meehan Family Trust, executor of the Estate of Donna M. Meehan under the last will and testament dated December 16, 2010, and trustee of the 2010 Donna Meehan Trust and the Thomas P. Meehan Trust. For ease of discussion, regardless of role, she will be referred to as “Marcia.”

<sup>2</sup> Timothy Meehan was executor of the Estate of Donna Meehan under the last will and testament dated April 13, 2018, co-manager of TeePee & Petunia LLC., beneficiary, co-trustee of the Donna Meehan Family Trust. For ease of discussion, regardless of individual role, he will be referred to as “Tim.”

<sup>3</sup> Since the parties share the same last name, we will refer to the individuals by their first names only.

wills and estate plans. They owned two parcels of real property. The first was their Brookpark home (“Residence”), where they lived, and the second was an 88-acre parcel of rural land (“the Farm”) in Scio, Harrison County, Ohio.

{¶ 4} In December 2010, Donna signed the Donna M. Meehan Trust (“Donna Trust”), last will and testament, and executed a power of attorney. Marcia was named as her agent. In March 2011, Tom signed the Thomas P. Meehan revocable trust (“Tom Trust”) and last will and testament and executed a power of attorney naming Marcia his agent. Mike was estranged from his parents during this time, and both Tom and Donna disinherited him from their estates. Mike’s children would receive, equally, Mike’s share of any remainder of Donna and Tom’s estates, after the death of the surviving spouse.

{¶ 5} In 2011, Tom and Donna learned that oil and gas developers were interested in mining resources from the Farm. Pat assisted Donna in negotiating a lease with the developers, whereby she and Tom would receive substantial royalty income for allowing resource extractions on the Farm. On July 14, 2011, Tom and Donna formed a company, TeePee & Petunia LLC (“T&P”) to hold title to the Farm. T&P issued 100 shares, distributed equally between Tom and Donna’s Trusts. Marcia was named manager of T&P and was responsible for carrying out functions consistent with the operating agreement. The Farm generated royalties of over \$1.6 million between 2011 and 2018. T&P investment accounts were opened at Baird Brokerage (“Baird”) to receive the income generated from the Farm lease.

{¶ 6} As the sole manager of T&P, Marcia controlled all disbursements from the T&P accounts and was the only person with access to the T&P bank accounts at Baird. Tom died on August 7, 2012, shortly after the first payment under the lease agreement. After Tom's death, Donna became the trustee of the 2011 Tom Trust; the trust was divided into Trusts A and B and became irrevocable. All trust assets that qualified for the federal marital estate tax deduction were to be allocated to Trust A and remaining trust assets to Trust B.<sup>4</sup> Marcia opened several credit card accounts in her own name and a new joint personal checking account in both her and Donna's names at Fifth Third Bank. Donna's social security checks and distribution checks from the Baird accounts went into the Fifth Third checking account. Marcia used the Fifth Third account to pay her and Donna's expenses. Mortgage payments for the Brookpark home were also withdrawn from there. The estate planning firm that prepared the 2010 trust and will for Donna and the 2011 trust and will for Tom also provided other services and referrals over the following years. Marcia rented her home to her nephew after she moved into Donna's home.

{¶ 7} Testimony at trial revealed that over the next five years, significant expenditures and gifts were made from the gas royalties. There were numerous trips, shopping, and cash gifts made to several relatives. There had been an IRA established in Marcia's name with a balance of approximately \$31,000 as well as payments for Marcia's personal expenses. Despite royalties totaling over \$1.6

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<sup>4</sup> All estate assets were eligible for the federal tax marital deduction at the time of Tom's death, so all assets were allocated to Trust A of the 2011 Tom Trust.

million between 2011 and 2017, the balances in the T&P accounts totaled approximately \$65,000. In 2017, Donna's health deteriorated to the point where she needed nursing home care. The parties testified that they were all concerned about whether Donna had sufficient funds to pay for her nursing home care. Marcia, Tim, and Pat met with Attorney Bartimole to review Donna's financial situation. The documentation Marcia brought to the meeting did not exactly detail what happened to the royalty payments. Attorney Bartimole met with Donna five or six times, usually alone, but sometimes with Marcia present. Attorney Bartimole testified that he discussed with Donna her estate plan goals and options and evaluated her capacity to amend her estate plans.

{¶ 8} Attorney Bartimole testified that Donna had mended her relationship with Mike and now wished to include him in her will. However, she expressed her intention to honor Tom's wishes by not allowing Mike to inherit the portion of her estate that she originally inherited from Tom. Attorney Bartimole drafted a new will and a new trust for Donna. He testified that the main purposes of the Donna Meehan Family trust and estate plan amendments, executed in April 2018, were to provide for Donna's nursing home costs, add Mike as a beneficiary of Donna's estate while excluding those assets she received from Tom's trust, protect trust assets from potential Medicaid claims, and attempt to keep the Farm in the family.

{¶ 9} Ultimately, Donna named Tim and Marcia as co-trustees of the new trust and managers of T&P. Additionally, Tim was named trust advisor and managing trustee, giving him final decision-making authority in the event of a

disagreement. Donna died shortly after the new estate documents were executed. In March 2019, Marcia filed a complaint for declaratory judgment in Harrison County Probate Court seeking to invalidate the 2018 trust and to be named trustee. She filed a motion for a restraining order to prohibit the disbursement of trust assets, and to prohibit the sale or rental of the Brookpark home. Marcia also filed a will contest seeking to invalidate Donna's 2018 will. Tim, as trustee of the 2018 Donna Meehan Family Trust, filed counterclaims, alleging breach of fiduciary duties, conversion, unjust enrichment, and interference with expected inheritance. The cases were transferred to Cuyahoga County Probate Court and proceeded to trial on June 13, 2022, upon the complaint for declaratory judgment, will contest, and counterclaims.

{¶ 10} The trial court granted the appellees' counterclaims for breach of fiduciary duty, conversion, and unjust enrichment and ordered Marcia to pay damages of \$414,724.79. The damages included lost rent at \$2,200 per month for 24 months, totaling \$52,800; \$31,500 transferred to an IRA account in Marcia's name; \$39,811.65 in self dealing; and \$290,613.14 in unaccounted-for expenditures. Marcia appealed the trial court's order and raises the following assignments of error:

**Assignment of Error No. 1**

The trial court erred as a matter of law when it ruled that Donna was required to segregate T&P's income into trust shares and limit her use of 2011 Tom Trust funds for her own care and maintenance.

### **Assignment of Error No. 2**

The trial court erred as a matter of law when it ruled that the 2011 Tom Trust allowed Donna Meehan to assign 50 shares of Teepee and Petunia, LLC to the Donna Trust 2018.

### **Assignment of Error No. 3**

The trial court erred as a matter of law when it ruled that after Tom Meehan's death, Donna Meehan was the sole member of Teepee and Petunia, LLC following.

### **Assignment of Error No. 4**

The trial court erred when it held Marcia responsible for Donna's gift-giving.

### **Assignment of Error No. 5**

The trial court erred as a matter of law when it ruled that it could reform the Donna Trust 2018 due to a mistake of fact or law.

### **Assignment of Error No. 6**

The trial court erred when it ruled that Marcia engaged in careless use of another's funds, self-dealing, conversion, breach of trust, and unjust enrichment.

### **Assignment of Error No. 7**

The trial court erred when it ruled that Donna acknowledged and intended the Donna will, 2018 to be her last will and testament and that she signed it free from undue influence.

### **Assignment of Error No. 8**

The trial court erred in excluding the medical records from the Villa Camillus and in denying Marcia's motion to compel medical records.

### **Assignment of Error No. 9**

The trial court erred when it awarded \$414,724.79 in damages to appellees in the declaratory judgment action.

### **Assignment of Error No. 10**

The trial court erred when it ordered Appellee's misfiled counterclaim filed without a motion to amend the pleading.

#### **Declaratory Judgment**

{¶ 11} An appellate court reviews a trial court's determination of matters of law in a declaratory judgment action under a de novo standard of review. *Brown v. Brown*, 2017-Ohio-8938, 102 N.E.3d 72, ¶ 20 (3d Dist.). The trial court, as the trier of fact, has the advantage of observing witnesses at trial and assessing their credibility. Thus, an appellate court will defer to any findings relative thereto. *Id.*

{¶ 12} "One of the important functions of the court of equity is to assist in the enforcement and administration of trusts, and hence to make such orders and decrees as will secure the carrying out of the creators' expressed intent, as to the dispositive provisions, as to the directions, as to the methods to be used, and as to the details of administration to be followed by the trustee." *Sessions v. Skelton*, 163 Ohio St. 409, 416, 127 N.E.2d 378 (1955). "Equity has jurisdiction over all matters relating to the trust property, and in the execution and administration of the trust, in all cases of doubt as to their rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court." *Id.* A court has the wide authority to reform a trust under R.C. 5804.15; *Holdren v. Garrett*, 10th Dist. Franklin No. 09AP-1153, 2011-Ohio-1095, ¶ 28.

The court may reform the terms of a trust, even if they are unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent



and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

R.C. 5804.15

**{¶ 13}** Additionally, R.C. 5804.11 outlines the requirements when a court may terminate or modify an irrevocable noncharitable trust with and without, the consent of the settlor and all beneficiaries. Moreover, the court is required to terminate or modify a noncharitable irrevocable trust when the settlor and all beneficiaries, being competent, consent to the changes, regardless of the material purpose of the trust under R.C. 5804.11(A).

(A) If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, that all consents, including any given by representatives under Chapter 5803 of the Revised Code, are valid, and that all parties giving consent are competent to do so, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. An agent under a power-of-attorney may exercise a settlor's power to consent to a trust's modification or termination only to the extent expressly authorized by both the power of attorney and the terms of the trust. The settlor's guardian of the estate may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized. The guardian of the settlor's person may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized and a guardian of the estate has not been appointed. This division does not apply to a noncharitable irrevocable trust described in 42 U.S.C. 1396p(d)(4).

R.C. 5804.11(A)

**{¶ 14}** R.C. 5804.11(B) requires the court to consider the material purpose of the trust before it may terminate or modify a trust when all of the beneficiaries consent to the changes.

(B) A noncharitable irrevocable trust may be terminated upon the consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. \* \* \*, upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. A spendthrift provision in the terms of the trust may but is not presumed to, constitute a material purpose of the trust. In determining what constitutes a material purpose of a trust, a court may but is not required to consider extrinsic evidence indicating a settlor's intent at the time the instrument was executed.

R.C. 5804.11(B)

**{¶ 15}** Finally, when all the beneficiaries do not consent, R.C. 5804.11(D) explains the additional steps a court must take to modify or terminate a noncharitable irrevocable trust.

(D) If not all of the beneficiaries, consent to a proposed modification or termination of the trust under division (A) or (B) of this section, the court may approve the modification or termination if the court is satisfied of both of the following:

- (1) That if all of the beneficiaries had consented, the trust could have been modified or terminated under this section;
- (2) That the interests of a beneficiary who does not consent will be adequately protected.

R.C. 5804.11(D)

**{¶ 16}** This case involves both the reformation of Donna's Family Trust, executed in 2018, pursuant to R.C. 5804.15, the termination of the 2011 Tom Trust and 2010 Donna Trust, pursuant to R.C. 5804.11(D), breach of fiduciary duty, undue

influence, and misfiled pleadings. For ease of analysis, the assignments of error will be addressed out of order and jointly when appropriate.

### **Reforming 2018 Donna Meehan Family Trust**

{¶ 17} Marcia alleges in her fifth assignment of error that the trial court erred, as a matter of law, when it ruled that it could reform errors in trust documents relating to the date and signature to conform to Donna's intent in the 2018 Donna Meehan Family Trust, due to a mistake of fact or law. R.C. 5804.15 gives the court authority to correct errors in a trust when a mistake of law or fact affects the terms of the trust. R.C. 5804.15 requires clear and convincing proof of both the settlor's intent and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. *Baillis v. Ross*, 8th Dist. Cuyahoga No. 97259, 2012-Ohio-705, ¶ 22.

{¶ 18} Here, Marcia challenges the trial court's authority to reform the 2018 Trust documents, which were erroneously dated, and signed by Donna in her individual capacity, rather than as trustee. In a trust, the legal title to the corpus is held by the trustee (and not the beneficiary). *Bd. of Edn. of the Columbus City School Dist. v. Wilkins*, 106 Ohio St.3d 200, 2005-Ohio-4556, 833 N.E.2d 726, ¶ 11. *Zipkin v. FirstMerit Bank, N.A.*, 2021-Ohio-2583, 176 N.E.3d 86, ¶ 44 (8th Dist.), fn. 3. The reformation allowed for the funding of the 2018 Donna Family Trust by the transfer of T&P shares owned by Donna, the trustee of the 2011 Tom Trust. Otherwise, the 2018 Donna Family Trust would be invalid due to the lack of funding. In essence, acceptance of Marcia's objection to the reformation would frustrate

Donna's intent due to some technicalities despite the court's authority to resolve them.

### **Clear and Convincing Evidence of Intent**

{¶ 19} However, the trial court must rely upon clear and convincing evidence before a reformation of a trust can occur. Clear and convincing evidence has been defined as “that measure or degree of proof that is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *In re B.K.*, 8th Dist. Cuyahoga No. 112366, 2023-Ohio-1820, ¶ 22. In determining whether evidence is clear and convincing, an appellate court may not as a matter of law substitute its judgment as to what facts are shown in the trial court record. *In re Estate of Zoltanski v. Zoltanski*, 6th Dist. Wood Nos. WD-19-054, WD-19-055, WD-19-056, 2020-Ohio-3908 ¶23. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even when it contradicts an apparent plain meaning of the text. *Id.* With the grantor's intent in mind, the court must determine whether a modification of the trust provisions is justified. *Evans v. Evans*, 2014-Ohio-4450, 20 N.E.3d 1139, ¶ 95 (4th Dist.).

{¶ 20} Marcia claims Donna's intent is evidenced in the memorandum fee agreement. However, a review of the record clearly and convincingly demonstrates the memorandum fee agreement does not capture Donna's intent. The agreement

merely evidenced Donna's intention to secure an attorney to change her estate plan. Consequently, Marcia's proof of Donna's intent must be rejected.

**{¶ 21}** The evidence clearly and convincingly shows that Donna intended to add Mike as a beneficiary. Attorney Bartimole, Mike, Pat, Marcia, and Tim all testified that Donna and Mike had reconciled and she intended to name Mike a beneficiary. The only difference between the beneficiary designations in Donna's amended estate plan and the 2010 plan is Mike would inherit half of his children's share. Marcia, Tim, and Pat's interests were unchanged. Although the memorandum mentions naming Marcia and the grandchildren as the only beneficiaries, the record does not support Marcia's claim that Donna ultimately decided to disinherit her sons and name Marcia and the grandchildren beneficiaries. The thought of giving to the grandchildren was considered but was rejected after further consideration because she felt leaving money to young adults was not a good idea. Further, we find clear and convincing evidence that Donna intended to amend her estate plan to include Mike as a beneficiary while honoring Tom's wish to exclude him from assets originally part of Tom's estate. Ultimately, Donna executed the 2018 Donna Trust consistent with her and Tom's intentions.

**{¶ 22}** Additionally, Donna intended to keep the Farm in the family, even if she needed Medicaid benefits to pay for her long-term care. Marcia testified that she approached Tim to inform him that Donna's assets had been depleted and asked for his help. Attorney Bartimole testified that he was brought into a meeting by Donna's original estate planning attorneys, to help Donna plan for long-term care

expenses because of concerns that the remaining account balance, of around \$65,000, may be insufficient to pay Donna's long-term nursing home care. During his meetings with Donna, Attorney Bartimole evaluated her capacity and understanding and determined whether Donna was being unduly influenced to make changes to her estate plan. We find the record clearly and convincingly supports Donna's intention to amend her estate plan to preserve the Farm in the family and protect assets from future Medicaid claims.

{¶ 23} Donna also wished to address the issue of depleted assets and spending by naming Tim and Marcia co-trustees. The record reflects clear and convincing evidence that Marcia irresponsibly handled Baird funds and refused to cooperate with Tim as co-trustee. Marcia approached appellees for help in planning for Donna's long-term care and expressed a willingness to sell the Farm, despite Donna's insistence that the Farm remain in the family. Marcia testified that Donna intended to give her the Brookpark home; however, Attorney Bartimole testified that Donna was upset about Marcia living in that home rent free once she moved into a nursing home. Marcia paid off the mortgage and refused to pay rent, even after she realized that Donna's account balances may be insufficient to cover long-term nursing home costs. Marcia suggested that the siblings consider splitting Donna's nursing home costs, once the Baird funds were exhausted. Attorney Bartimole testified that he discussed with Donna the need to ensure there was oversight of her finances. We find, by clear and convincing evidence, Donna intended to make Marcia and Tim co-trustees, with Tim having final authority over decision-making.

{¶ 24} Now that Donna’s intent has been established by clear and convincing evidence, we must determine whether a mistake of law or fact frustrates Donna’s intent. If so, the court may reform the trust to correct the mistakes. However, Marcia claims the court cannot make corrections to the trust documents to comply with Donna’s intent. “A mistake of expression occurs when the terms of the trust misstate the settlor’s intention, fail to include a term that was intended to be included or include a term that was not intended to be included; and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.” *Baillis*, 2012-Ohio-705, ¶ 22. R.C. 5804.15 is not concerned with whether the decedent changed her mind later and failed to properly follow through with that change, but whether a mistake occurred with respect to the settlor’s original intent. *Zoltanski*, 2020-Ohio-3908, ¶ 23.

{¶ 25} Marcia argues that Donna signed the transfer documents in her capacity as beneficiary when she failed to use the trustee designation, thus no transfer of property occurred. The creation of an inter vivos trust requires a declaration of a trust, the intention to create a trust, and an actual conveyance or transfer of property to the trust. *First Natl. Bank of Middletown v. Gregory*, 13 Ohio App.3d 161, 468 N.E.2d 739 (12th Dist. 1983). Undeniably, Donna signed the transfer documents without including her “Trustee” designation. The owner of the T&P shares was the trustee, not the beneficiary. *Wilkins*, 2005-Ohio-4556, ¶ 11. *Zipkin*, 2021-Ohio-2583, ¶ 44, fn. 3. Marcia argues that Donna did not create an inter vivos trust in 2018 because no transfer of property occurred. Attorney

Bartimole testified that he made scrivener's errors in the preparation of the trust documents.<sup>5</sup>

{¶ 26} These errors should not frustrate Donna's intent. There is clear and convincing evidence that Donna intended to create an inter vivos trust and convey all 50 T&P shares owned by the trustee of the 2011 Tom Trust, and all 50 shares owned by the trustee of the 2010 Donna Trust, into the 2018 Donna Family Trust. Accordingly, we find that the record contains clear and convincing evidence of Donna's intent when she amended her estate plan and facts indicating there was a mistake of fact or law that affected the terms of the 2018 Donna Family Trust. The trial court properly reformed the trust documents in accordance with R.C. 5804.15 to conform the 2018 Donna Family trust to Donna and Tom's intent. Marcia's fifth assignment of error is without merit and is overruled.

### **Modification or Termination**

{¶ 27} The probate court plays a crucial role in ensuring the fulfillment of a trust's purpose and directives by exercising its statutory and common law authority consistent with the intent of the trust's creator. *Papiernik v. Papiernik*, 45 Ohio St.3d 337, 344, 544 N.E.2d 664 (1989). While the 2018 Donna Trust required reformation due to errors in the creation of the trust, the court terminated the 2011 Tom Trust and 2010 Donna Trust. R.C. 5804.11(D) governs the termination of

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<sup>5</sup> The documents at issue include the T&P amended operating agreement, T&P membership certificate No. 3 (III. Jt. Exh. 9), the first trust modification of the Donna M. Meehan Trust agreement dated December 16, 2010 ("First Trust Mod.") (III. Jt. Exh. 13), and the action by written consent of sole member (III. Jt. Exh. 16).



modification an irrevocable noncharitable trust when the beneficiaries do not consent to changes. Marcia alleges in her second assignment of error that the trial court erred as a matter of law when it ruled that the 2011 Tom Trust allowed Donna Meehan to assign 50 shares of T&P to the 2018 Donna Trust. The trial court terminated the 2010 Donna Trust and 2011 Tom Trust to affect the transfers. This case presents a case of first impression of the application of R.C. 5804.11(D), which authorizes a court to modify or terminate a noncharitable irrevocable trust when all beneficiaries do not consent. When beneficiaries do not agree, termination or modification is only permissible if:

- 1) the court is satisfied that if all of the beneficiaries had consented, the trust could have been modified or terminated under this section and;
- 2) the interests of a beneficiary who does not consent will be adequately protected.

R.C. 5804.11(D)

**{¶ 28}** Marcia disagreed with the termination of the 2011 Tom Trust and 2010 Donna Trust and asked the court to adopt the old trusts in her declaratory action. It is undisputed that Donna attempted to transfer all of the T&P shares from the 2011 Tom Trust and 2010 Donna Trust into the new 2018 Donna Family Trust.

**{¶ 29}** The trial court invoked its authority to terminate the 2011 Tom Trust and 2010 Donna Trust under R.C. 5804.11. Since all of the beneficiaries did not agree to the changes, the court may only proceed and allow distribution of the T&P shares to Donna's new trust: 1) if it could have done so had Marcia consented and

2) if Marcia's interests are adequately protected, pursuant to R.C. 5804.11(D). Our analysis of R.C. 5804.11(D)(1) requires a determination of whether the 2011 Tom Trust could have been modified, had all beneficiaries consented. For this analysis, we must consider R.C. 5804.11(B), which governs the modification or termination of an irrevocable trust when all beneficiaries consent.

(B) A noncharitable irrevocable trust may be terminated upon the consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified, but not to remove or replace the trustee, upon the consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust \* \* \*.

**{¶ 30}** The initial issue presented is the determination of the material purpose of the 2011 Tom Trust. A finding of such purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as a concern with regard to the beneficiary's management skills, judgment, or level of maturity. *Vaughn v. Huntington Natl. Bank*, 5th Dist. Tuscarawas No. 2008 AP 03 0023, 2009-Ohio-598, ¶ 24.

**{¶ 31}** Here, the trial court heard testimony concerning Tom's original intent. The material purpose of creating the 2011 Tom Trust was to ensure support for Donna's health and maintenance, protect assets from potential claims, and leave the remainder after Donna's death to Pat, Marcia, and Tim, with Mike's children receiving his share of any remainder. Donna suffered from deteriorating health. Pat testified that Tom was crying and worried about ensuring Donna's care after his

death. (III Tr. 808-809.) Pat assured Tom that Donna would have sufficient income available to provide for her support from the oil and gas contracts.

**{¶ 32}** Moreover, the terms of the 2011 Tom Trust are consistent with Tom's intent to ensure Donna was cared for after his death and protect assets from potential Medicaid claims or liens. The 2011 Tom Trust explicitly identified asset protection as a material purpose of the trust:

A material purpose of this trust is to protect the assets of the trust from claims and prevent interference with the administration of the trust. (Joint Exh. 1 ¶ 11.)

**{¶ 33}** Upon review, we find the record supports that the material purposes of the 2011 Tom Trust included ensuring Donna's health and maintenance were provided; protecting trust assets from claims or liens and dividing any remaining assets; and after Donna's death, dividing any remaining assets according to Donna and Tom's wishes. The R.C. 5804.11(B) requirements for termination are met because the 2018 Donna Trust achieves the material purpose of Tom's original trust. Additionally, the continuation of the 2011 Tom Trust is not necessary to achieve its material purpose, nor does it expressly prohibit termination.

**{¶ 34}** When Tom died, the 2011 Tom Trust became irrevocable, and all 50 T&P shares were distributed to Trust A of the 2011 Tom Trust. Donna became the successor trustee and beneficiary, and Pat, Tim, Marcia, and Mike's children became successor beneficiaries. We find that Donna intended to transfer the 50 shares that represented all of the assets owned by the trustee of the 2011 Tom Trust, and the 50

shares owned by the trustee of the 2010 Donna Trust into the new 2018 Donna Family Trust.

{¶ 35} The record indicates that a provision of 2011 Tom Trust allowed for the appointment of a trust protector and the trust protector could make changes that would allow the transfer of T&P shares into the 2018 Donna Family Trust; therefore, the express terms of the trust did not prohibit modification or termination of the trust.

{¶ 36} Next, the trial court was required to determine whether Marcia's interests are adequately protected pursuant to R.C. 5804.11(D)(2). It is clear that Marcia's 25 percent of the remaining estate under Tom and Donna's old trusts and Marcia's beneficiary interests under the 2018 Donna Family Trust are unchanged. Accordingly, we find that the trial court had the authority to terminate the Tom and Donna Trusts had all beneficiaries consented and Marcia's interests are adequately protected pursuant to R.C. 5804.11(D). Accordingly, Marcia's second assignment of error is overruled.

### **Undue Influence**

{¶ 37} The elements necessary to establish an undue-influence claim are: (1) a susceptible testator, (2) another's opportunity to exert it, (3) the fact of improper influence exerted or attempted, and (4) the result showing the effect of such influence. *Black v. Watson*, 8th Dist. Cuyahoga No. 103600, 2016-Ohio-1470, ¶ 11. R.C. 5804.06 specifically adopts the undue influence standards from will-contest actions for the purposes of determining the validity of a trust. *Kinchen v. Mays*, 8th

Dist. Cuyahoga No. 100672, 2014-Ohio-3325, ¶ 12. The burden of proof for the purposes of determining the lack of testamentary capacity or undue influence is on the party contesting the will or testamentary instrument. *Id.* Marcia argues in the seventh assignment of error that the trial court erred when it ruled that Donna acknowledged and intended the 2018 Donna will to be her last will and testament and that she signed it free from undue influence.

**{¶ 38}** When reviewing a civil appeal from a bench trial, an appellate court applies a manifest weight standard of review. A verdict supported by some competent, credible evidence going to all the essential elements of the case must not be reversed as being against the manifest weight of the evidence. *Gerston v. Parma VTA, L.L.C.*, 8th Dist. Cuyahoga No. 105572, 2018-Ohio-2185, ¶ 57. In assessing whether a verdict is against the manifest weight of the evidence, an appellate court examines the entire record, weighs the evidence and all reasonable inferences, considers the witnesses' credibility, and determines whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered. *Id.* ¶ 58. Marcia alleges that Donna did not know she was signing a new will and that she did not execute her new estate documents free from undue influence. The Ohio Supreme Court held that previous declarations are always admissible for the purpose of illustrating the mental capacity of the testator and his susceptibility to extraneous influence, and also to show his feelings, intentions, and relations to his kindred and friends. *Haddad v. Maalouf-Masek*, 2022-Ohio-4085,

200 N.E.3d 1276, ¶ 45 (8th Dist.). Donna was described as feisty and stubborn by Marcia and other witnesses.

{¶ 39} The court considered testimony that Donna and Mike had reconciled and that Donna was clear about her intention to add Mike as a beneficiary. Marcia also testified that Donna was adamant about keeping the Farm in the family. Donna met with Attorney Bartimole privately multiple times before executing the new documents and asked questions. The court also considered a letter Marcia sent to appellees acknowledging Donna's capacity to execute new estate documents. The trial court found that Donna was not a susceptible testator and she understood that she was executing a new last will and testament, and trust documents. Furthermore, the court found that the new estate plan was consistent with Donna's expressed wishes as evidenced by the record. The record supports those findings. As a matter of fact, there is nothing in the record to support the contrary. Marcia failed to offer credible evidence of the result of undue influence. The court found that the new estate plan was similar to her old one and the changes conformed to Donna's expressed wishes, as evidenced by the record.

{¶ 40} As for Marcia's claim that improper influence was exerted or attempted on Donna, the trial court was unpersuaded. The trial court found that Marcia attempted to influence Donna into disinheriting her sons and leaving her entire estate to Marcia and her grandchildren. Despite Marcia's efforts, Donna changed her mind after considering whether it was a good idea to leave money to

young adults. In the end, the trial court found that Donna willingly amended her estate plan consistent with her and Tom's intent, without any undue influence.

{¶ 41} After careful review of the record and relevant law, we find competent and credible evidence that Donna was not subject to undue influence and the trial court did not lose its way when it determined that Marcia failed to establish the necessary elements of incapacity or undue influence. Accordingly, Marcia's seventh assignment of error is overruled.

### **Fiduciary Duties**

{¶ 42} Marcia's fourth, sixth, and ninth assignments of error relate to the award of damages resulting from a breach of fiduciary duties, conversion, and unjust enrichment, so we will address them together for ease of analysis. Accounting issues and the award of damages fall within the sound discretion of the trial court. As a result, the appellate court's review is abuse of discretion. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 43} Marcia alleges the trial court erred when it held her responsible for Donna's gift giving. Appellees argue that Marcia breached her fiduciary duty as power of attorney for Donna and as manager of T&P. In order to prove a breach of fiduciary duty claim, the plaintiff must establish: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. "A 'fiduciary' has been 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.” *Gracetech Inc. v. Perez*, 8th Dist. Cuyahoga No. 96913, 2012-Ohio-700, ¶ 11. Marica assumed the duty of Donna’s fiduciary when she undertook the responsibility of writing checks on Donna’s behalf from the joint Fifth Third Bank checking account. It is undeniable that the account was opened primarily for Donna’s benefit to receive both Donna’s social security and distribution checks. Additionally, the joint account was used by Marcia to pay Donna’s expenses. Marcia argues that there is no evidence that she ever acted as Donna’s power of attorney. Moreover, on February 27, 2019, Marcia notarized an affidavit that stated in part:

17. Until she died, my mom was to receive all of the money from T&P according to the Trusts. The funds were placed into three Baird accounts and she withdrew funds from those accounts. Because she suffered from debilitating arthritis, *she had me sign the checks and withdraw monies that she desired pursuant to a Durable General Power of Attorney.*

\* \* \*

(Emphasis added.) (Def. Exh. 14-19)

**{¶ 44}** A power of attorney is a written instrument that authorizes an agent to undertake specific acts on behalf of the principal. *Testa v. Roberts*, 44 Ohio App.3d 161, 164, 542 N.E.2d 654 (6th Dist.1988), citing *Trenouth v. Mulroney*, 124 Mont. 499, 227 P.2d 590 (1951). The evidence contradicts Marcia’s argument that she had no fiduciary duty. The record contains substantial evidence that Marcia was Donna’s fiduciary. An argument to the contrary is baseless. Marcia was aware that



Donna executed a power of attorney naming her attorney in fact, and she used it. Marcia wrote checks as a joint checking account holder, rather than as Donna's power of attorney. Nevertheless, as Donna's agent, she was still bound by the fiduciary duties of the power of attorney. A person holding a power of attorney has a fiduciary relationship with his or her principal and is not required to have used the power of attorney for a confidential or fiduciary relationship to arise. *Young* at ¶ 57; *Thomas v. Delgado*, 2022-Ohio-4235, 201 N.E.3d 1021 (3d Dist.). Agent is a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise, and includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated. R.C. 1337.22. Marcia opened joint deposit accounts with Donna, opened credit cards in her name, and wrote checks from the joint account to pay for both her and Donna's personal bills. Marcia admitted that she was the only person who handled Donna's finances. Accordingly, we find that the record supports the trial court's decision that a fiduciary relationship existed between Donna and Marcia and she had a fiduciary duty in acting on Donna's behalf.

{¶ 45} Appellees argue that Marcia failed to observe her fiduciary duty as Donna's power of attorney duty when she deposited T&P distribution checks into checking accounts Marcia opened in her and Donna's names. Additionally, appellees argue Marcia breached her duty when she transferred Donna's fund for her benefit. A fiduciary may not make gratuitous transfers of the principal's assets unless the power of attorney from which the authority is derived expressly and

unambiguously grants the authority to do so. *Temple v. Temple*, 2015-Ohio-2311, 38 N.E.3d 342, ¶ 29 (3d Dist.), citing *MacEwen v. Jordan*, 1st Dist. Hamilton No. C-020431, 2003-Ohio-1547, ¶ 12, *Montefiore Home v. Fields*, 8th Dist. Cuyahoga No. 110183, 2021-Ohio-3734, ¶ 36. In this case, the power of attorney expressly limited Marcia's authority to make gratuitous transfers. (Def. Exh. 15-6). We agree with the trial court that Marcia breached her fiduciary duty as power of attorney, and as a result, the trustee and beneficiaries were harmed.

{¶ 46} Appellees claim that Marcia also breached her fiduciary duty as manager of T&P. The legal standard for breach of fiduciary duty of a manager of a limited liability company ("LLC") is based on the fiduciary duties owed by a manager to the LLC and its members. A manager's fiduciary duties are defined in the operating agreement and R.C. Chapter 1705. *N. Hill Holdings, L.L.C. v. Concheck*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, ¶ 15. Under R.C. 1705.40, a manager of an LLC has a statutory duty of loyalty and a duty of care to the LLC and its members. The duty of loyalty requires the manager to act in the best interests of the LLC and its members, avoiding conflicts of interest and self dealing. *Rees v. Trust Co.*, 8th Dist. Cuyahoga No. 20864, 1949 Ohio App. LEXIS 913 (Jan. 7, 1949). The duty of care requires the manager to exercise reasonable care, skill, and diligence in managing the affairs of the LLC. R.C. 1706.311.

{¶ 47} Upon reviewing the evidence and applicable law, it is evident that Marcia breached her fiduciary duty as manager of T&P. The facts here gave rise to claims of self dealing. Marcia took advantage of her position as manager for T&P to

engage in transactions for her benefit. Marcia failed to exercise reasonable care, skill, and diligence in managing the LLC's finances. The record shows that Marcia made significant expenditures from the T&P accounts without proper documentation or accounting. She paid for her personal expenses from the T&P accounts and failed to provide a clear and accurate record of the LLC's financial transactions.

{¶ 48} More concerning, Marcia never opened a trust checking account, instead she deposited the income distribution checks into an account that she jointly owned with Donna. Her actions demonstrate a lack of reasonable care, skill, and diligence in managing the LLC's finances, as well as a disregard for the best interests of the LLC and its members. Therefore, the trial court's finding of breach of fiduciary duty by Marcia is supported by both the law and the facts of the case. Appellees offered clear and convincing evidence that Marcia breached her fiduciary duty as a manager of T&P LLC, it is evident that Marcia's failure to exercise reasonable care, skill, and diligence in managing the LLC's finances, as well as her actions that conflicted with the best interests of the LLC and its members, support the trial court's finding.

{¶ 49} Here, the trial court determined that there were \$290,613.14 in unaccounted-for funds withdrawn from the T&P accounts in addition to \$70,636 in gifts and IRA deposits Marcia made to herself. (Ex. KK). Marcia was the sole manager of T&P and power-of-attorney fiduciary since 2010. The T&P operating

agreement required her to exercise reasonable diligence in carrying out her management responsibilities. Marcia is personally liable as follows:

2. Personal Liability of Each Manager

A manager shall be personally liable to the LLC for money damages and other relief only if, in exercising their management responsibilities:

a. They fail to exercise the skill, care and diligence that an ordinarily prudent person would exercise under similar circumstances; and

b. They are unable to rely on the defenses to liability set forth in Sections 9, paragraphs 3-4 of the T&P operating agreement.

{¶ 50} Marcia argues that Donna authorized every expenditure, including substantial gifts to Marcia. A review of the power of attorney contradicts her argument. The power of attorney specifically authorized Marcia to make gifts to herself within limits. Paragraph 26 permitted Marcia to make self gifts as follows:

To make transfers of any of my assets to any one or more of my children or other issue of mine, to any one or more of my family members or friends, \* \* \*. Gifts to my attorney-in-fact are limited to the greater of the amount given to persons of the same generational level or to the total sum of the federal gift tax annual exclusion amount under IRC sec 2503. (b) in any one calendar year. (Def. Ex. 15-4)

{¶ 51} Although the existence of a family relationship ordinarily gives rise to the presumption of a gift, where a confidential or fiduciary relationship exists between the donor and the donee, there is a suspicion that the donee may have exerted undue influence on the donor, *Vogel v. Campanaro*, 2021-Ohio-4245, 180 N.E.3d 584, ¶71 (12th Dist.). Nevertheless, the ultimate burden of proving undue influence by clear and convincing evidence is with the party contesting the gift. *Id.* Even if a power of attorney gives an express grant of authority to an attorney in fact to make gifts to third persons, including the attorney in fact, it

does not remove all obligations owed to the principal. *Miller v. Shreve (In re Miller)*, 2014-Ohio-4612, 21 N.E.3d 666, ¶ 22 (5th Dist.). Here, Marcia argues that Donna gave gifts to all of her children and grandchildren without restriction and that it would have been unfair to prohibit Marcia from receiving inter vivos gifts while other family members received gifts, especially since Marcia provided day-to-day care for Donna. The trial court did not find every gift made to Marcia improper. It specifically awarded appellees damages for only a portion of the gifts where Marcia offered insufficient evidence that Donna was aware of and approved the gift. “When a presumption of undue influence arises, the donee has the burden going forward of producing sufficient evidence to prove that his conduct was free of undue influence or fraud and that the donor acted voluntarily and with a full understanding of his actions and their consequences.” *Cartwright v. Batner*, 2014-Ohio-2995, 15 N.E.3d 401, ¶ 68 (2d Dist.). The donee may rebut the presumption of undue influence by a preponderance of the evidence. *Id.* Since Marcia failed to meet her burden, the trial court did not abuse its discretion when it found certain gifts Marcia made to herself improper.

{¶ 52} Marcia contends in her ninth assignment of error that the trial court erred when it awarded \$414,724.79 in damages to appellees in the declaratory judgment action. Marcia relies on her self-serving testimony that every gift made while Donna was alive was explicitly directed by Donna and she simply wrote checks and followed Donna’s instructions. appellees do not dispute that Donna was generous and gave substantial gifts to family members, nor did the trial court impute

every inter vivos gift Donna made to Marcia. The award of damages included the following expenditures for Marcia's benefit: an IRA account, a new vehicle, cash, personal expenses, credit card payments, trips, mortgage payments, and utility payments. Marcia alleges that Donna directed every expenditure. We do not find Marcia's argument persuasive. Marcia was the only manager of T&P and the only person with the authority to write checks or disburse payments to the owners of T&P shares. Income payments were never transferred to the trustee of the Tom Trust nor the trustee of the Donna Trust. Marcia testified that she never opened a trust checking account for either trust nor did she ever segregate trust funds. T&P checks were written to Donna, individually, and deposited into accounts owned jointly by Marcia and Donna.

{¶ 53} “Appellate review of the trial court’s decision on this issue is guided by a presumption that the findings of the trier of fact are correct.” *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). Since the weight of the evidence and the credibility of the witnesses are primarily the prerogatives of the factfinder, finding an error in law is a legitimate ground for reversal, but a difference of opinion on the credibility of witnesses and evidence is not. *Prodan v. Hemeyer*, 80 Ohio App.3d 735, 741, 610 N.E.2d 600 (8th Dist.1992).

{¶ 54} The trial court awarded appellees four categories of damages. An agent that violates Sections 1337.21 to 1337.64 of the Revised Code is liable to the principal or the principal’s successors in interest for the amount required to restore the value of the principal’s property to what it would have been had the violation not

occurred and the amount required to reimburse the principal or the principal's successors in interest for the attorney fees and costs paid on the agent's behalf. R.C. Chapter 1337. The first category of damages was lost rent totaling \$52,800. The second category of damages was reimbursement of the IRA account transfers, totaling \$31,500. The third category of damages represented \$39,811.65 in self dealing for certain expenditures including Marcia's personal housing expenses, braces, and a trip Marcia took with her nephew. Although the trial court did not award damages for every gift Marcia claimed, it determined that there was insufficient evidence that Donna was aware of and approved of these expenditures. The remaining damages represented \$290,613.14 in unaccounted-for expenditures from the T&P accounts at Baird. An action seeking monetary damages is within the probate court's plenary power at law and affects the court's direction and control of the fiduciaries' conduct and affects the court's settlement of the fiduciaries' accounts. *Johnson v. Allen*, 101 Ohio App.3d 181, 185, 655 N.E.2d 240 (8th Dist.1995). The plenary power of the probate court allows it to exercise complete jurisdiction over its subject matter to the fullest extent required in a given case. *Id.*

{¶ 55} Marcia argues in her sixth assignment of error that the trial court erred when it ruled that she engaged in the careless use of Donna's funds, self dealing, conversion, breach of trust, and unjust enrichment. Marcia testified that all expenditures were explicitly directed by Donna and she wrote all the checks consistent with Donna's instructions. We find that Marcia had a fiduciary relationship with Donna when she handled Donna's financial matters. As previously

stated, any transfer of property from a principal to his attorney in fact is viewed with some suspicion. *Id.* at ¶ 29. An agent may not make gratuitous transfers of the principal's assets unless the applicable power of attorney expressly and unambiguously grants the authority to do so. *Temple v. Temple*, 2015-Ohio-2311, ¶ 29.

{¶ 56} Marcia argues that appellees lacked standing to sue. Whether appellees have established standing is a question of law, which we review de novo. *Ohioans for Concealed Carry, Inc v. Columbus*, 164 Ohio St.3d 291, 2020-Ohio-6724, 172 N.E.3d 935, ¶ 12. It is well established that prior to an Ohio court considering the merits of a legal claim, “the person or entity seeking relief must establish standing to sue.” *Id.* The doctrine of standing requires a litigant to be in the proper position to assert a claim, and the party's inquiry must be within the zone of interest intended to be protected or regulated by the statute. *Taylor v. Academy Iron & Metal Co.*, 36 Ohio St.3d 149, 152, 522 N.E.2d 464 (1988).

{¶ 57} The trial court found that multiple expenditures were made from T&P accounts for the benefit of Marcia. Marcia points to *Gerston*, in support of her argument that appellees are not entitled to an accounting of the T&P account distributions because Tim and the other beneficiaries lack standing as third parties. *Gerston v. Parma VTA, LLC*, 8th Dist. Cuyahoga No. 105572, 2018-Ohio-2185, ¶ 24. Donna was the sole trustee of both Tom and Donna's original trusts, and the trusts held all of the T&P shares. Marcia claims Donna was the sole beneficiary of the T&P bank accounts and Tim was only a potential beneficiary until Donna's death.



{¶ 58} We find that *Gerston* actually supports appellees' argument. In *Gerston*, the court held that the trust was a beneficiary of the estate, not a potential beneficiary, and had a vested interest in the outcome; therefore, the trust had standing. Marcia argues that she had no responsibility to account for the monies spent from the T&P accounts before Donna died.

{¶ 59} However, the claims for concealment under R.C. 2109.50 and 2109.52 could be used to recover assets wrongfully concealed, embezzled, or conveyed away before the creation of the estate. (Emphasis sic.) *State ex rel. Abraitis v. Gallagher*, 8th Dist. Cuyahoga Nos. 101855 and 102246, 2015-Ohio-1646, ¶ 18. Claims for wrongful conveyance, self dealing, or concealing property of an estate inter vivos, pursuant to R.C. 2109.50, are within the probate court's jurisdiction where the property at issue will revert to the estate if the transfers are declared invalid. *Castro v. Castro*, 2013-Ohio-1347, 988 N.E.2d 58, ¶ 17 (8th Dist.). Under the 2010 and 2011 trusts and the 2018 amended trust, the assets remaining after expenditures for Donna's care and maintenance at the time of her death would revert to Donna's estate. There were no restrictions on how Donna could spend the T&P funds; however, the T&P operating agreement did restrict Marcia in her role as treasurer, secretary, and manager of T&P. It is undisputed that Marcia, in her role as manager, and the only person with access to the T&P accounts, had a fiduciary duty and a duty of loyalty pursuant to the T&P operating agreement. The trial court found that Marcia failed to account for \$290,613.14 in expenditures from the T&P accounts.

{¶ 60} Those assets included T&P shares; therefore, the trial court properly exercised jurisdiction over appellee’s claims. Furthermore, appellees have standing to protect the assets that revert to the estate from conversion, breach of duty, self dealing and unjust enrichment. The trial court’s order granting the appellees’ counterclaims for breach of fiduciary duties, conversion, self dealing, and unjust enrichment are affirmed. Marcia’s fourth, sixth, and ninth assignments of error are without merit and are overruled.

{¶ 61} Marcia argues in her eighth assignment of error that the trial court erred when it excluded the Villa Camillus medical records. Villa Camillus Nursing Home was closed at the time of trial, and Marcia attempted to authenticate the records as a business record under Evid.R. 803(6). Out-of-court medical opinions or diagnoses contained within an otherwise authenticated medical report or record that satisfies the foundational requirements of Evid.R. 803(6) comes within the ambit of the business record hearsay exception contained in that rule and is admissible unless the opinions or diagnoses violate other evidentiary rules. *Smith v. Dillard’s Dept. Stores*, 8th Dist. Cuyahoga No. 75787, 2000 Ohio App. LEXIS 2689 (Dec. 14, 2000). The standard of review on the exclusion of this evidence is abuse of discretion.

{¶ 62} A medical diagnosis in a hospital record is permissible where “such a diagnosis would be admissible if testified to in open court by the person who made the record,” and the record is “that of the physician making the diagnosis and [has] been made in the regular course of business.” *Gallagher v. Firelands Regional Med.*

*Ctr.*, 2017-Ohio-483, 75 N.E.3d 1293, ¶ 30 (6th Dist.). Marcia called Dr. Valji Munjapara as a witness to authenticate the records. Dr. Munjapara testified that he did not make the records. Therefore, the trial court properly excluded them. Marcia's eighth assignment of error is without merit and is overruled.

### **Misfiled Answer**

{¶ 63} Marcia argues in her tenth assignment of error that the trial court erred by ordering the correction of appellees' misfiled counterclaim without a motion to amend the pleading. Questions of law are reviewed de novo. However, we review a trial court's decision to grant or deny a Civ.R. 60(A) motion under an abuse of discretion. Civ.R. 60(A) is the procedural device that governs the trial court's authority to correct its judgments, orders, or other parts of the record for clerical mistakes caused by oversight or omission. "This is a power the courts have always had." *State ex. Rel. Henry v. Britt*, 67 Ohio St. 2d. 71, 74, 424 N.E.2d. 297 (1981). Civ.R. 60(A) states:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

{¶ 64} On August 8, 2022, the trial court discovered the misfilings of appellees' answers and counterclaims and, on its own initiative, ordered the correction. As a result, the answers and counterclaims filed in Case No.

2019ADV254299 were directed to be filed in declaratory judgment Case No. 2019ADV244617, and the answer filed in declaratory judgment Case No. 2019ADV244617 was ordered to be filed in will contest Case No. 2019ADV254299. The trial court determined that Marcia was not prejudiced by this correction.

{¶ 65} Marcia argues that the probate court judge exceeded her authority by ordering the correction without a motion pursuant to R.C. 2101.11, which states,

The probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate court. *The probate judge is authorized to perform the duties of clerk of the judge's court.* The probate judge may appoint deputy clerks, court reporters, a bailiff, and any other necessary employees, each of whom shall take an oath of office before entering upon the duties of the employee's appointment and, when so qualified, may perform the duties appertaining to the office of the clerk of court. R.C. 2101.11.

(Emphasis added.)

{¶ 66} Marcia relies on *State ex rel. Bey v. Byrd*, 160 Ohio St.3d 141, 2020-Ohio-2766, 154 N.E.3d 57, in support of her argument that a probate court judge is without authority to issue orders to correct a record without a motion. Marcia claims that a probate judge acts as a clerk of courts, therefore she is without discretion to disregard the statutory mandates and cannot issue correction orders without a motion. There is a clear distinction “between the clerk of the court and the probate judge with the powers and office of the clerk of the probate court as provided by the Ohio statute.” *State v. Metzger*, 10 Ohio N.P. (n.s.) 97 (C.P. 1910). The clerk of court is a ministerial, nonjudicial role, but the probate judge occupies “a dual position and undertakes dual functions.” *Id.* The probate judge “performs

duties as a clerk which are ministerial and which do not pertain to his judicial functions.” *Id.* at ¶ 19. While R.C. 2101.11 authorizes the probate court judge to perform the duties of clerk of probate court, it does not strip the probate court judge of her judicial authority. *In re Johnson, Morgan v. Fid. & Cas. Co.*, 66 Ohio App. 433, 435, 34 N.E.2d 1017 (8th Dist.1941). Marcia’s argument that the misfiled counterclaims were solely a filing error made by appellees, rather than a docketing error, is inconsequential. The probate court judge stated that she had previously ordered the correction, which had not been made. The court determined that there was no prejudice against Marcia, because both answers and the counterclaim were received, and the misfilings were not raised as an issue until the trial.

{¶ 67} Marcia’s argument that the trial court erred by making the correction to the record absent a motion is unfounded. Civ.R. 60 authorizes a court to correct the record on its own initiative. Accepting Marcia’s proposition would lead to an unduly harsh consequence. Fairness and justice are best served when cases are decided on their merits rather than technicalities.

{¶ 68} We find the trial court did not abuse its discretion in correcting the misfilings. Marcia’s tenth assignment of error is overruled.

{¶ 69} Marcia’s first assignment of error is disregarded because it is unsupported. An appellant bears the burden of affirmatively demonstrating error on appeal. *Saha v. Research Inst. at Nationwide Children’s Hosp.*, 10th Dist. Franklin No. 18AP-661, 2019-Ohio-1792, ¶ 41. “This court rules on assignments of error, not mere arguments.” *Huntington Natl. Bank v. Burda*, 10th Dist. Franklin

No. 08AP-658, 2009-Ohio-1752, ¶ 21, quoting App.R. 12(A)(1)(b) (stating “a court of appeals shall \* \* \* [d]etermine the appeal on its merits on the assignments of error set forth in the briefs”), *Williams v. Barrick*, 10th Dist. Franklin No. 08AP-133, 2008-Ohio-4592, ¶ 8 (holding appellate courts “rule on assignments of error only and will not address mere arguments”).

{¶ 70} Marcia argues in her first assignment of error that the court erred as a matter of law when it ruled that Donna was required to segregate T&P’s income into trust shares and limit her use of Tom Trust funds for her own care and maintenance. Marcia failed to set forth the legal basis for her assigned error. It is not the duty of an appellate court to create an argument on an appellant’s behalf. *McKahan v. CSX Transp., Inc.*, 10th Dist. Franklin No. 09AP-376, 2009-Ohio-5359, ¶ 10. Accordingly, Marcia’s first assignment of error is overruled.

{¶ 71} Marcia argues, in her third assignment of error, the trial court erred as a matter of law when it ruled that after Tom Meehan’s death, Donna Meehan was the sole member of Teepee and Petunia, LLC. Having overruled Marcia’s second and fifth assignments of error, we find Marcia’s third assignment of error moot.

{¶ 72} Judgment of the trial court is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

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EMANUELLA D. GROVES, JUDGE

ANITA LASTER MAYS, A.J., and  
KATHLEEN ANN KEOUGH, J., CONCUR