[Cite as *Bryan v. Chytil*, 2021-Ohio-4082.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

GENE BRYAN, ET AL.,	:	
Plaintiffs-Appellees,	:	CASE NOS. 20CA3723 20CA3725 20CA3726
v.	:	20CA3732
SCOTT CHYTIL, ET AL.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

James R. Kingsley, Circleville, Ohio, for appellant Eric Thompson.

Mark C. Eppley and Andrew W. Green, Cincinnati, Ohio, for appellant Jeffrey Thompson.

Clifford N. Bugg, Chillicothe, Ohio, and James K. Cutright, Chillicothe, Ohio, for appellees.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:11-10-21
ABELE, J.

{¶1} This is a consolidated appeal from Ross County Common Pleas Court, Probate Division, judgments that (1) determined Gene Bryan and Carolyn Bryan, plaintiffs below and appellees herein (trustees), did not breach any fiduciary duties while acting as trustees of the Dyer Family Trust dated July 11, 2011, also known as the Charles Dyer Revocable Living Trust dated July

11, 2011; (2) dismissed the counterclaims, except the counterclaim for an accounting, filed by Eric Thompson and Jeffrey Thompson, defendants below and appellants herein; (3) granted attorney Phillip King's motion for attorney's fees; and (4) overruled Eric's exceptions to the trustees' final accounting.

{¶2} For ease of reference, we set forth the assignments of error under the discussion of each case.

I

BACKGROUND

{¶3} This appeal arises from a dispute concerning the administration, distribution, and termination of the Dyer Family Trust. Charles (Pete) Dyer and his wife, Lela, accumulated a sizable estate during their lifetimes. Among other assets, Pete and Lela owned a unique parcel of real estate located at 729 Adena Road in Chillicothe. The Adena Road property abuts Adena Mansion State Park and totals approximately 29 acres that contains a single-family residence, a five-acre lake, and acres of uninhabited land.

{¶4} In early June 2011, Pete visited attorney James K. Cutright. Pete informed Cutright that Pete, who was in his mid-90s, had been diagnosed with a fatal aortic aneurysm. Pete

wanted to create a trust to provide for Lela upon Pete's death. Pete indicated that Lela had begun to show signs of dementia, and Pete "wanted to make sure that she was taken [care] of for the rest of her life and basically be able to stay on the Adena Road property."

{¶5} Pete also advised Cutright that Pete's and Lela's estates were valued between $6 and $7 million. The largest assets, according to Pete, were a Janney Montgomery account and the Adena Road property. Pete informed Cutright that the Adena Road property was worth approximately $2 million.

A

THE TRUST AGREEMENT

{¶6} Cutright prepared Pete's trust and, on July 11, 2011, Pete executed the trust agreement. The trust named Pete as the trustee and Gene Bryan (Pete's nephew) and Carolyn Bryan (Gene's wife) as successor trustees.

{¶7} The trust directed that after Pete's death, the trustees "may * * * pay to or expend for the benefit of [Lela] such part or all of the principal of [the trust funds] as she, in her sole discretion, shall deem necessary or desirable for

the comfortable maintenance, care and support of my wife in accordance with her customary manner of living * * *."[1]

{¶8} Pete's trust further stated that, upon Lela's death, the trustees "shall distribute all remaining trust assets after the payment of taxes and administrative fees * * * to my grandchildren, Scott Chytil, Julia Chytil, Brett Chytil, Randy Thompson, Eric Thompson, and Jeffrey Thompson, in equal shares."

{¶9} The trust also specified that the trustees would be entitled to compensation. The trust recited that the trustees "shall be entitled to receive compensation for ordinary services hereunder equal to one percent (1%) of corpus and income held in trust per year." The trust continued to state that "in the event that the trust is terminated within a fiscal year, the compensation shall not be prorated or abated, and the full amount shall be payable as such compensation." The trust additionally indicated that the trustee "shall also be entitled to receive reasonable compensation for any extraordinary services requested or required." The trust directed that the trustee's "compensation shall be charged to and deducted from

[1] We observe that at trial, Cutright explained that Pete initially intended to designate Carolyn as the sole successor trustee, but that Pete later decided to name both Carolyn and Gene as successor trustees. Cutright stated that given the haste, the trust contains a few incorrectly used pronouns such as "she" and "her."

income and/or principal as the Trustee may deem appropriate and shall be payable at such times as she may determine."

{¶10} Pete died five days after he executed the trust.

B

TRUST ADMINISTRATION

{¶11} Shortly after Pete's death, the trustees consulted with Cutright regarding the trust administration. Upon Cutright's advice, the trustees hired Henry Stanley to appraise the real property and Stanley appraised 729 Adena Road at $1.7 million.

{¶12} After Stanley's appraisals, Cutright and the trustees listed all of the trust assets that included (1) eleven parcels of real estate with a total value of $2,025,000, (2) personal property valued at $165,200, (3) various bank accounts and certificates of deposit valued at $1,352,068.01, and (4) a Janney Montgomery account valued at $2,312,490.02. Of the eleven parcels of real estate, the Adena Road property had the highest value–$1.7 million. In total, Cutright and the trustees determined a trust value of $5,854,758.03.

{¶13} One of the properties, valued at $45,000 and located at 3693 State Route 207, was erroneously included because Pete and Lela had not transferred that property to the trust. Instead, they intended to give the property to their son, Larry.

On August 16, 2011, after Pete's death, Lela deeded the property to Larry. Thus, the trust's real-estate assets should have consisted of ten properties with a total value of $1,980,000.

{¶14} Nevertheless, neither Cutright nor the trustees apparently recognized the error. Thus, they used the total figure of $5,854,758.03 to calculate the trustees' 1% fee–$58,547.

{¶15} The trustees paid their fee within the first month of assuming their trusteeship and, due to the mistaken inclusion of property, the trustees paid themselves $450 more than they should have been paid.

{¶16} Cutright also used the total value of the trust assets to calculate his attorney's fee. The trustees paid Cutright $58,547 on the same date that the trustees paid themselves.

{¶17} Over the next five years, the trustees administered the trust for Lela's benefit, and sought Cutright's counsel as needed. The trustees continued to pay their 1% trustee fee at the rate of $58,547 each year. When Lela died in 2016, the trust's value was listed at $5,441,499.98.

C

TRUST DISTRIBUTION

{¶18} Shortly after Lela's death in July 2016, the trustees consulted with Cutright and the beneficiaries to discuss

distributing the trust assets. The trustees initially gave each beneficiary $20,000. The trustees also asked Stanley to reappraise the Adena Road property, and Stanley again appraised it at $1.7 million.

{¶19} In October 2016, the Dyers' personal property was sold at auction. After the auction, the trustees distributed additional trust assets to the beneficiaries. Some beneficiaries received personal property from the auction. The trustees also issued checks to the beneficiaries. In total, the trustees distributed $182,715.81 to each beneficiary.

{¶20} At the end of the trust's 2017 fiscal year, $4,474,080.10 remained in trust assets. Most of the value was held in the Janney Montgomery account and the Adena Road property.

{¶21} Apparently, the trustees did not immediately place the Adena Road property on the market for a couple of reasons. First, the property contained the Dyers' residence, and the Dyers had collected valuable personal property that the trustees did not want to risk being stolen or damaged while being shown to potential purchasers. The trustees thus decided to auction the personal property before they placed the property on the market.

{¶22} Additionally, liquidating the Adena Road property became an issue. In March 2017, the trustees listed the property with a local realtor, Lisa Diehl, for $1.3 million. Diehl informed the trustees that she did not believe they would find a buyer willing to pay $1.3 million for the property. Diehl, instead suggested that the trustees list the property at $500,000. Later, Diehl reduced the price to $1.1 million and the property still did not sell. Because the beneficiaries did not want to sell the property for less than $1 million, Diehl de-listed the property.

{¶23} Cutright and the trustees did suggest that the trustees transfer the Adena Road property to the six beneficiaries by deed. The beneficiaries, however, did not agree to this proposal. Cutright and the trustees then suggested that the beneficiaries form a limited liability company to hold title to the property, but the beneficiaries did not agree with this alternative proposal either. Shortly thereafter, the relationship between the trustees and the beneficiaries deteriorated and discussions ended in September 2017.

{¶24} In October 2017, Diehl re-listed the Adena Road property for sale with an $800,000 asking price. Diehl continued the listing through January 2019 and, at that point,

the trustees decided to auction the property. The property later sold at auction for $500,000.

D

TRUST LITIGATION

{¶25} On March 7, 2018, the trustees filed a complaint against the six beneficiaries and sought a declaratory judgment that they did not violate any fiduciary duties to the beneficiaries and a declaration to authorize them to distribute trust assets to the beneficiaries. The trustees specifically requested the court to authorize them to execute a fiduciary's deed to the beneficiaries for all remaining real property held in the trust.

{¶26} Eric and Jeffrey filed a combined answer through attorney James R. Kingsley and filed counterclaims for an accounting, a proposed distribution, and overcompensation of the trustee fees. Scott Chytil, Julia Chytil, and Randy Thompson also answered and filed counterclaims.

{¶27} Brett Chytil did not enter an appearance in the proceedings, and the court entered a default judgment against him. The parties later discovered that Brett had died while the lawsuit was pending.

{¶28} In September 2018, the beneficiaries requested the

court to direct the trustees to distribute the Janney Montgomery funds. Shortly thereafter, the trustees distributed the Janney Montgomery account to the six beneficiaries. Scott, Julia, and Randy then settled with the trustees.

{¶29} On April 8, 2019, Jeffrey requested the court to order the trustees to distribute the 110 Delano Road parcel of real estate to him. On August 9, 2019, attorney Phillip King filed a notice of substitution of counsel on Jeffrey's behalf. Shortly thereafter, Jeffrey filed a motion to stay the auctions of Adena Road and 110 Delano Road that were scheduled to be held on September 4, 2019.

{¶30} The trial court issued an order that denied the motion to stay the Adena Road auction. The court noted that because the trustees agreed to sell 110 Delano Road to Jeffrey, the court granted Jeffrey's motion to stay the auction of Delano Road. The court later scheduled the remaining issues for a trial in January 2020. Before the trial, however, the parties filed a joint motion to ask the court to continue the trial. Eric and Jeffrey stated they did not have sufficient time to review the certified public accountant's accounting. Consequently, the trial court granted the motion and re-scheduled the trial for June 2020.

E

TRIAL

{¶31} On June 3, 2020, the trial court held a trial. At the start, the court noted that Jeffrey had not appeared, that his previous counsel had withdrawn, and that new counsel had not entered a notice of appearance. The following represents the testimony presented at trial.

1

Susan Ott

{¶32} Susan Ott, a certified public accountant, prepared annual financial statements for the trust from July 2, 2011 through October 2019. Ott also prepared a trustee fee reconciliation using a declining balance of the trust corpus. Because Ott's calculation showed that the trustees should have been paid $446,173.47 rather than $468,376, the trustees received a $22,202.53 overpayment through July 16, 2019. Ott also calculated the amount that the trustees earned from July 16, 2019 through October 31, 2019. Because the corpus at that time was $1,818,837.33, the 1% trustee fee equaled $18,592.33.

2

Attorney Cutright

{¶33} After Pete's death, Cutright asked Henry Stanley to appraise the Adena Road property. Stanley gave Cutright an oral appraisal in the amount of $1.7 million.

{¶34} Shortly after Pete's death, the trustees contacted Cutright to discuss the next steps to ensure that Lela's needs were met. Over the next five years, the trustees administered the trust for Lela's benefit and continued to contact Cutright for guidance when needed.

{¶35} In July 2016, Lela died. The trustees decided to start liquidating the assets to distribute to the beneficiaries. The trustees chose to sell the personal property contained in the Adena Road residence in order to prevent theft or loss, and they listed the remaining properties for sale. Cutright again requested Stanley to appraise the Adena Road property, and Stanley's appraisal remained the same.

{¶36} After Lela's death, Cutright met with the beneficiaries and told them the approximate value of the trust and the nature of the assets held in the trust. Cutright additionally advised the beneficiaries that selling the Adena Road property could "prove * * * problematic." The beneficiaries discussed Stanley's $1.7 million appraisal and agreed "it would take a unique buyer to come in and pay that price for it." Although the trustees did not want to sell the property "for less than what it was worth," at the same time the trustees "did not want the trust to remain indefinitely." The decision was made to list the property at $1.3 million.

{¶37} Cutright also stated that the parties had considered the transfer of the Adena Road property to the six beneficiaries by deed, but the beneficiaries apparently could not agree. Cutright additionally suggested that the beneficiaries form a limited liability company to hold title to the Adena Road property. Again, however, the beneficiaries did not agree.

{¶38} Cutright explained that around September 2017, the relationship between the trustees and the beneficiaries deteriorated. Cutright formed the impression that the beneficiaries did not believe that the trustees were fulfilling their fiduciary duties. Thus, in March 2018, the trustees filed a complaint for a declaratory judgment.

{¶39} According to Cutright, the trustees did not terminate the trust sooner because they waited for the Adena Road property to sell. Additionally, the trustees had to maintain the trust to have income to pay operating expenses. Cutright indicated that further delays occurred once discussions broke down with the beneficiaries in September 2017. The trustees then filed their declaratory judgment action, which further delayed distribution of the trust.

{¶40} Cutright also discussed his fee with the trustees. Cutright explained that his fee covered preparing the trust and estate-planning documents, meeting with the trustees,

ascertaining trust assets, troubleshooting, and answering questions from the trustees. Cutright charged a flat fee of $58,547 for Pete's trust and related duties from trust inception through Lela's death.

{¶41} Cutright charged an additional fee, $58,547, after Lela's death. Cutright stated that the duties under the trust changed upon Lela's death. He explained that during Lela's lifetime, the focus of the trust was to ensure that Lela's needs were met. After Lela's death, additional steps needed to be taken to terminate the trust. Cutright further pointed out that the guidelines contained in a local rule indicated that an attorney fee based upon 1% of non-probate assets may be a reasonable fee.

{¶42} Cutright also explained that he believed the trustees could pay themselves for providing personal care to Lela. Cutright indicated that "[a] trustee doing work outside of the responsibility as trustee would be entitled to reasonable compensation of those services." Cutright stated that the 1% trustee fee was to ensure "that there were people there to take care of [Lela], to ensure that Lela "had round the clock care," and to ensure "that the money was handled responsibly."

{¶43} Cutright did agree that the trust owed Jeffrey and Eric $26,194.67 each, but that the trustees continued to hold

the funds in the trust to cover litigation expenses.

3

Tom Tootle

{¶44} Attorney Tom Tootle testified on Eric's behalf. He thought that the trustees' receipt of their fee in advance was "very unusual." Tootle believes that a reasonable amount of time to distribute the Janney Montgomery funds would have been three months, and two years seemed too long. Tootle agreed, however, that situations may exist when two years would not be unreasonable.

{¶45} Tootle also did not believe that Cutright should have charged a flat fee for legal services provided to the Dyers and to the trustees. Instead, Tootle thought that Cutright should have charged an hourly rate. Tootle stated that he has never heard about an attorney charging a percentage of the trust corpus as a fee. Tootle acknowledged, however, that the parties could reach an agreement as to the appropriate fee.

{¶46} Tootle indicated that he believed a reasonable fee to create a trust would range from $1,500 to $5,000, and that a reasonable fee to create the Dyer trust would have been $4,000 to $5,000, with another $1,000 for the two pour-over wills and the power of attorney.

Carolyn Bryan

{¶47} Carolyn had known the Dyers for 58 years. Pete showed Carolyn the trust agreement before Pete's death. Carolyn understood that the purpose of the trust was to provide care for Lela so she would not need to go to a nursing home. Carolyn explained that the trustees hired individuals at the rate of $11 or $12 per hour to ensure that Lela had round-the-clock care. However, when the trustees could not find someone to stay with Lela, Carolyn or Gene stayed with Lela. Carolyn and Gene paid themselves $10 per hour when they provided personal care to Lela. Carolyn indicated that she had asked Cutright if the trustees could pay themselves for providing personal care to Lela, and Cutright advised them that they could. Carolyn also explained that, throughout their trusteeship, Cutright "was on call whenever we needed him." Additionally, Cutright handled all of the paper work involved in the trust and estate administration. Carolyn believed that Cutright's fees were reasonable.

{¶48} Carolyn also stated that she had no reason to question Stanley's $1.7 million appraisal for the Adena Road property. Instead, she relied on Stanley as "a state licensed appraiser." Shortly after Lela's death, she and Gene spoke with the beneficiaries about selling the Adena Road property, and the

beneficiaries wanted to attempt to sell it for $1 million. Carolyn also indicated that the trustees did not distribute the Janney Montgomery account sooner because they needed income for property upkeep.

{¶49} Carolyn was also challenged about using trust funds to feed the ducks on the Adena Road property. Carolyn stated that she did use trust funds to feed the ducks because "[t]hey were Lela's pets, she would go throw bread to them, she would open her window and throw [it] out to them[. T]hey were her pets, and once she died I couldn't let them starve[;] they were hers."

{¶50} Carolyn also recognized damage to the garage at the 110 Delano Road property. Carolyn explained that she thought that it had been insured, but when she filed a claim, the insurance company told her that it was not insured. Carolyn explained that she thought she had properly requested the insurance on the property, and she did not know that it was not insured until she made the claim. Carolyn stated that she paid for the repairs, but does not recall the repair cost.

5

Gene Bryan

{¶51} Gene Bryan testified that Pete told him that the Adena Road property was worth $2 million. Thus, Gene had no reason to question Stanley's $1.7 million appraisal. Gene also believes

that he fulfilled the terms and intent of the trust – to care for Lela.

6

Richard Horner

{¶52} Richard Horner, a real estate appraiser, testified that the State of Ohio held a right of first refusal on the property. In 2017, the Ohio Historical Society hired him to appraise 729 Adena Road and he appraised the property at $500,000.

{¶53} In 2020, Kingsley asked Horner to perform a retrospective appraisal to determine the value of the property as of 2011. Horner estimated the 2011 value to be $330,000.

7

Lisa Diehl Deposition

{¶54} Diehl stated that Gene established the listing price for the Adena Road property at $1.3 million. Diehl, however, did not believe that the property would sell for more than $500,000. She explained that Gene advised Diehl that another realtor, Steve Madru, told Gene that the property was worth $2 million. When Diehl contacted Madru to discuss Madru's valuation, Madru "valued [the property] at that price because he felt like the hillside could be developed into lots."

Eric's Post-Trial Brief

{¶55} Eric's post-trial brief asserted that the trustees are guilty of defalcation because the trustees: (1) overpaid Cutright; (2) overpaid themselves through overvaluing Adena Road; (3) overpaid themselves by failing to timely terminate the trust; (4) incurred needless expenses by not selling the Adena Road property sooner; (5) refused to distribute the remaining trust funds to Eric without requiring a release; (6) demanded a release; (7) failed to keep 110 Delano Road insured; (8) refused to transfer Delano Road to Jeff; (9) fed the ducks; and (10) paid self-dealing wages for providing care to Lela.

{¶56} Eric also asserted the following damages: (1) $4,050 for including 3693 State Route 207; (2) $58,547 for the "Day One" payment; (3) $80,341.76 for a declining balance violation; (4) $33.41 for feeding the ducks; (5) an unknown amount for failing to insure 110 Delano Road; (6) $72,000 for overvaluing the Adena Road property; (7) $219,168.94 for failing to terminate the trust by July 2017; (8) $112,094 for excessive attorney fees; (9) $30,000 for Kingsley's attorney's fees; (10) $2,290.53 for trial costs; and (11) unknown amounts for Tootle's and Horner's witness fees.

ATTORNEY FEE ISSUES

{¶57} Attorney Kingsley initially represented Jeffrey in the trust litigation, but on August 2019 Attorney Phillip King entered an appearance and filed a notice of substitution of counsel.

{¶58} On September 19, 2019, Attorney Kingsley filed a notice of charging lien and stated he "claims a lien for services rendered against Jeffrey Thompson * * * on any judgment rendered in this case for Jeffrey Thompson." Kingsley asserted that the "lien arose in connection with [his] representation of Jeffrey Thompson in trust accounting, subject of the within suit." Kingsley stated $5,116.68 is the amount of his lien and he attached an itemized statement listing legal services that Kingsley provided.

{¶59} On March 6, 2020, Attorney King filed a motion to withdraw as counsel for Jeffrey and a motion for the payment of attorney's fees. The trial court granted King's request to withdraw and scheduled an April 16, 2020 hearing to consider his motion for attorney's fees.

{¶60} Eric then requested the court to reschedule the hearing to consider King's motion. Eric asserted that Kingsley, Jeffrey's former counsel, "generated all of the evidence to prove a claw-back from the trustees." Eric claimed that King

"generated no new evidence favorable to the beneficiaries of the trust who claim against the common fund." Eric argued that "King's remedy is to file a proper attorney's lien in this case and to get in line for distribution of money to Jeffrey Thompson." He thus requested the court first "to determine the amount of clawback," then "hold an accounting hearing on all claims against the fund." Eric asserted that the accounting hearing is the appropriate time to determine the validity of Kingsley's and King's charging liens, along with the order of distribution to the attorneys.

{¶61} On March 23, 2020, the trial court rescheduled the April 16, 2020 hearing due to the COVID-19 pandemic and the state of emergency. The court set a new hearing date for July 16, 2020.

{¶62} On June 19, 2020, attorneys Andrew W. Green and Mark C. Eppley entered their appearance on behalf of Jeffrey.

{¶63} On July 1, 2020, Jeffrey, through new counsel, filed a motion to continue the July 16, 2020 hearing to consider King's motion for attorney's fees. Jeffrey's new counsel indicated that Jeffrey had recently retained them and that counsel needed additional time to familiarize themselves with the matter. Counsel further asserted that they had a conflict with another hearing in a Kentucky court.

{¶64} The trial court denied the request to continue the hearing. The court noted that the case has been pending since March 2018 and that the July 16, 2020 hearing had been scheduled since March 2020.

{¶65} On July 16, 2020, the trial court held a hearing to consider King's request for attorney fees. The court noted that appellees and appellees' counsel were present, along with King, but no other parties appeared for the hearing. King stated that Jeffrey owes King $3,781.

{¶66} At the conclusion of the hearing, the court granted King's motion on the condition that sufficient funds remained in the amount distributed to Jeffrey to pay King. Later, the court changed its ruling to order that the trustees pay King from Jeffrey's share of the trust funds.

{¶67} On July 17, 2020, the court entered its decision to grant King's motion for payment of attorney fees and to authorize the trustees to pay King $3,781. The court noted that neither Eric nor Jeffrey or their counsel appeared for the hearing.

G

TRIAL COURT'S DECISION

{¶68} On September 1, 2020, the trial court issued its judgment regarding the trustees' complaint and Eric's and

Jeffrey's counterclaims. The court determined that the trustees did not breach any of their fiduciary duties.

{¶69} The court first found that the trustees had a reasonable belief that the Adena Road property had a value of $1.7 million. The court noted that Pete had estimated the property to be worth $2 million and Stanley appraised the property at $1.7 million. The court also agreed that the trust mistakenly listed 3693 State Route 207 as a trust asset.

{¶70} The trial court also determined that the trustees were not primarily responsible for the delay in distributing the trust assets. Instead, the court found that the beneficiaries did not initially agree upon how to distribute the Adena Road property. The court observed that the beneficiaries did not want to jointly own the property and that they did not want to establish a limited liability company to own the property. Rather, the court found that the beneficiaries wanted the property listed for sale and did not want to accept less than $1 million for the purchase of the property.

{¶71} The trial court also determined that Cutright's fees were reasonable. The court noted that Cutright "provided a variety of legal services (without additional compensation) to Pete prior to his death and to the trustees over their years of service." The court referenced its attorney fee calculation

worksheet to indicate that 1% of non-probate assets might be a reasonable attorney fee for estate administration.

{¶72} The trial court also found that Ott prepared an accounting, as requested in Eric's and Jeffrey's counterclaims, and that Ott's "accountings demonstrate that all trust transactions were properly accounted for." The court thus concluded "that the trustees acted in good faith throughout their service. They provided excellent care for Lela at her home for the remainder of her life after Pete's death. They attempted to distribute the remaining trust assets to the beneficiaries in a manner consistent with the wishes of and in the best interests of the trust beneficiaries." The court determined, however, that the trustees overcompensated themselves by $22,202.53 through July 16, 2019. Nevertheless, the court found that the trustees acted in good faith and did not breach any fiduciary duties.

{¶73} The trial court determined that, other than the demand for an accounting, Eric and Jeffrey's counterclaims are without merit. The court ordered the trustees to pay Eric and Jeffrey $26,940.67 to equalize the distribution.

{¶74} The trial court further ordered that the trustees receive no further compensation because the trustees failed to

timely provide an accounting and mistakenly listed 3693 State Route 207 as a trust asset. The court determined that incorrectly including the property as a trust asset caused the trustees to receive a higher fee than they otherwise would have received. The court also directed that the remaining trust proceeds be equally distributed to the six beneficiaries. The court thus dismissed Eric's and Jeffrey's counterclaims and ordered Eric and Jeffrey to pay their own attorney's fees and litigation expenses.

H

FINAL ACCOUNTING

{¶75} On September 10, 2020, the trustees notified the court that they had "distributed the remaining assets in the Dyer Family Trust pursuant to the Court's journal entry" and provided "the beneficiaries with a final accounting which is attached hereto." The trustees further indicated that "[t]he final distributions to the remaining Defendants have been sent to their respective counsel." The final accounting showed that the trustees paid $3,781 from Jeffrey's share to Attorney King.

{¶76} Eric filed exceptions to the final accounting, but, for unexplained reasons, the record on appeal does not contain the exceptions that Eric filed or the trial court's decision that overruled Eric's exceptions. Nevertheless, Eric attached a

copy of the trial court's decision to his notice of appeal.[2]

{¶77} In the trial court's October 29, 2020 decision that overruled Eric's exception to the final account, the court noted that on September 19, 2019, Kingsley filed a "Notice of Charging Lien." The court pointed out that Kingsley's notice of charging lien did not contain any citation to authority and did not request a hearing. The court further observed that Kingsley did not present any evidence to support his charging lien. The court also noted that, after the trial, it held a hearing to consider King's motion for attorney's fees. The court pointed out that neither Kingsley nor Eric attended the hearing.

{¶78} Ultimately, the trial court determined that Kingsley failed to establish a valid charging lien. The court reasoned that Kingsley did not recover a fund on Jeffrey's behalf and did not raise the issue during the trial. The court thus determined that the trustees "properly distributed the Trust assets without paying the 'charging lien' amount to Mr. Kingsley."

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[2] The docket transcript that the clerk submitted in Eric's November 16, 2020 appeal from the trial court's decision overruling his exceptions to the final accounting (Case Number 20CA3732) inexplicably ends on August 14, 2020. The docket transcript in Jeffrey's appeal from the trial court's decision that granted King's motion for attorney's fees likewise ends on August 14, 2020.

The docket transcripts in the two other consolidated cases (Case Numbers 20CA3725 and 20CA3726) list documents filed through September 16, 2020. The last filing in the record

II

APPEALS

{¶79} Jeffrey appeals (1) the court's July 17, 2020 decision to grant King's motion for payment of attorney fees (Case Number 20CA3723), and (2) the trial court's September 1, 2020 decision (Case Number 20CA3725).

{¶80} Eric appeals (1) the trial court's September 1, 2020 decision (Case Number 20CA3726), and (2) the court's October 29, 2020 decision to overrule his exception to the final accounting (Case Number 20CA3732).

{¶81} For ease of discussion, we first consider Eric's appeals in Case Numbers 20CA3726 and 20CA3732.

III

CASE NUMBER 20CA3726

{¶82} Eric raises the following assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO SURCHARGE THE TRUSTEES FOR ALL OF THEIR DEFALCATIONS IN CALCULATING FEES."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO SURCHARGE THE TRUSTEES THE

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transmitted on appeal is dated September 16, 2020.

EXCESSIVE ATTORNEY'S FEES PAID."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO SURCHARGE THE TRUST AND OR THE TRUSTEES FOR APPELLANT'S ATTORNEY'S FEES."

A

CLARIFICATION OF ASSIGNMENTS OF ERROR

{¶83} As a preliminary matter, we point out that because Eric's brief is not a model of clarity, we have distilled the arguments to their essence and address them accordingly.

{¶84} In his first assignment of error, Eric asserts that the trial court erred by failing to "surcharge the trustees for all of their defalcations in calculating fees." In his second assignment of error, Eric asserts that the trial court erred by failing "to surcharge the trustees for the excessive attorney's fees [that the trustees] paid."

{¶85} We note, however, that Eric's first and second assignments of error presume elements at issue. Contrary to Eric's assertions, the trial court did not find that the trustees committed "defalcations in calculating fees." Moreover, the trial court did not find that the trustees paid excessive attorney's fees. Instead, one issue we must resolve before we consider Eric's arguments that the trial court erred

by failing to surcharge the trustees is whether the trustees committed any acts that warrant imposing a surcharge. Eric's assignments of error thus rest upon the premise that the trustees committed an act that warrants a surcharge. Additionally, although Eric's first assignment of error uses the term "defalcation," that term does not appear within the trial court's judgment entry, and nor does it appear within the statutes contained in the Ohio Trust Code, R.C. Chapter 5801 to 5811. Instead, the Ohio Trust Code refers to a breach of trust. R.C. 5810.01(A). Moreover, modern courts have interpreted the term "defalcation," at least as that term is used in the bankruptcy code, to require "an intentional wrong." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273–74, 133 S.Ct. 1754, 185 L.Ed.2d 922 (2013); *In re Hyman*, 502 F.3d 61, 68 (2d Cir.2007) ("defalcation under § 523(a)(4) requires a showing of conscious misbehavior or extreme recklessness"); *In re Baylis*, 313 F.3d 9, 18–19 (1st Cir.2002) ("we find that a defalcation requires some degree of fault, closer to fraud, without the necessity of meeting a strict specific intent requirement.").

{¶86} In the case sub judice, we note that the trial court did not find that the trustees committed an intentional wrong – or even that they were reckless. In fact, the court found that the trustees violated no fiduciary duties. Thus, although

Eric's brief asserts that the trustees committed "defalcation," the trial court made no such finding.

{¶87} With the foregoing understanding, we believe that Eric's first and second assignments of error raise, in essence, two separate issues: (1) the trial court incorrectly determined the trustees did not commit a breach of trust; and (2) the trial court erred by failing to surcharge the trustees for their alleged breach of trust.[3] For ease of discussion, we begin our

[3] In his complaint, Eric alleged he is entitled to an accounting and a distribution, and that the trustees overpaid themselves by inflating the value of the trust property. Eric's complaint did not, however, specifically allege that the trustees violated their fiduciary duties or committed a breach of trust. Nevertheless, through subsequent filings, Eric asserted that the trustees breached their fiduciary duties. Moreover, the trustees did not assert that Eric failed to properly allege in his complaint any claims actually litigated during the trial.

Civ.R. 15(B) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." "The purpose of the rule is to ensure that cases are 'decided on the issues actually litigated at trial,' and the rule therefore applies only when the unpleaded issue was "tried by either the 'express or implied consent of the parties.'" *Disciplinary Counsel v. Reinheimer*, 162 Ohio St.3d 219, 2020-Ohio-3941, 165 N.E.3d 235, ¶ 14, quoting *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41, 44, 448 N.E.2d 1159 (1983), quoting Civ.R. 15(B).

In the case sub judice, the parties actually litigated at trial whether the trustees breached their fiduciary duties/committed a breach of trust. None of the parties asserted that the issue was not properly before the court. We therefore believe that the parties tried the issue by implied consent. Thus, we treat Eric's breach-of-fiduciary-duty/breach-of-trust claim as if it had been raised in the pleadings.

review by setting forth the legal principles that guide our disposition of Eric's first and second assignments of error.

B

LEGAL PRINCIPLES

1

Breach of Trust

{¶88} R.C. 5810.01(A) states the general rule that "[a] violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust." Thus, a party claiming a breach of trust under R.C. 5810.01(A) must establish that (1) the trustee owes a duty to a beneficiary, and (2) the trustee breached that duty.

{¶89} At common law, a trustee owes the following duties to trust beneficiaries: (1) the duty to be loyal; (2) the duty to keep and render clear and accurate accounts with respect to the administration of the trust; (3) the duty to keep trust property separate and not commingle it with the trustee's personal property; (4) the duty to make the trust property productive; (5) the duty to pay income to the trust beneficiaries at reasonable intervals; and (6) the duty to account and pay over the corpus on termination of the trust. *Homer v. Wullenweber*, 89 Ohio App. 255, 259, 101 N.E.2d 229 (1st Dist.1951); *see In re Trust of Bernard*, 9th Dist. Summit No. 24025, 2008-Ohio-4338,

2008 WL 3918058, ¶ 20, quoting *Black's Law Dictionary* 545 (8 Ed.Rev.2004) (stating that a trustee's duties generally include "'[a] duty of utmost good faith, trust, confidence, and candor * * *; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person'").

{¶90} We note, however, that the enactment of the Ohio Trust Code codified and clarified the common law duties that a trustee owes to trust beneficiaries. Alan Newman, *Report on HB 416: The Ohio Trust Code as Enacted*, pg. 4.2 (2006) (stating that the Ohio Trust Code "is a broad codification of the law of trusts"). R.C. 5801.04(A) states that "[e]xcept as otherwise provided in the terms of the trust, Chapters 5801. to 5811. of the Revised Code govern the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary." Thus, the Code now "clearly articulates the list of responsibilities incumbent upon every trustee when accepting a fiduciary assignment." Daniel R. Griffith, *Directed Trusts and Administrative Trustees: Not Your Grandfather's Fiduciary*, 23 No. 6 Ohio Prob. L.J. NL 5 (July/August 2013). R.C. Chapter 5808, in particular, codifies "the long and ancient basic common law of fiduciary duty." *Id.*; *accord* Coleman, *Arpadi Dilemma Not Revived, but New Ethics Rules May Mean New Duties*

for Lawyers, 17 Ohio Prob. L.J. 45A (2006) (stating that R.C. 5808 "codifies the common law duties of loyalty, impartiality and prudent administration").

{¶91} R.C. Chapter 5808 specifies the duties that trustees owe to beneficiaries. *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, 95 N.E.3d 1032, ¶ 75 (8th Dist.). Some of those duties include: (1) the duty to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with Chapters 5801. to 5811. of the Revised Code," R.C. 5808.01; (2) the duty of loyalty and to avoid conflicts of interest, R.C. 5808.02; (3) the duty to act impartially when a trust involves two or more beneficiaries, R.C. 5808.03; (4) the duty to "administer the trust as a prudent person would" and to "exercise reasonable care, skill, and caution," R.C. 5808.04; (5) the "duty not to incur unreasonable costs," Official Comment to R.C. 5808.05; (6) the duty to "take reasonable steps to take control of and protect the trust property," R.C. 5808.09; (7) the "duty to keep adequate records" and to "keep trust property separate from the trustee's own property," R.C. 5808.10; and (8) the "duty to keep the beneficiaries reasonably informed of the administration of the trust," Official Comment to R.C. 5808.13.

{¶92} A party who seeks to establish a breach of trust need

not demonstrate that the trustee acted willfully or fraudulently. Instead, "breach of trust" "'has * * * a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.'" *Shuster v. N. Am. Mortg. Loan Co.*, 139 Ohio St. 315, 343, 40 N.E.2d 130 (1942), quoting 4 Pomeroy, Equity Jurisprudence, 5th Ed., 227, Section 1079; *accord Moeller v. Poland*, 80 Ohio St. 418, 443, 89 N.E. 100 (1909) (stating that "'the mere presence of good intention and absence of bad motive will not be sufficient to prevent him from being held guilty of breach of trust'"); *Keybank Natl. Assn. v. Thalman*, 8th Dist. Cuyahoga No. 102624, 2016-Ohio-2832, 2016 WL 2587143, ¶ 15. A breach of trust thus "'includes every omission or commission which violates in any manner'" the duties specified. *Shuster*, 139 Ohio St. at 343, quoting 4 Pomeroy, Equity Jurisprudence, 5th Ed., 227, Section 1079.

{¶93} To the extent a trustee's duty requires the trustee to act reasonably or as a prudent person, we note that reasonableness, and "whether a party has exercised reasonable diligence," ordinarily depends "on the facts and circumstances of each case." *Gerrity v. Chervenak*, 162 Ohio St.3d 694, 2020-

Ohio-6705, 166 N.E.3d 1230, ¶ 31, citing *Sharp v. Miller*, 2018-Ohio-4740, 114 N.E.3d 1285, ¶ 17 (7th Dist.); *see generally Dejaiffe v. KeyBank USA Natl. Assn.*, 6th Dist. Lucas No. L-05-1191, 2006-Ohio-2919, 2006 WL 1580053, ¶ 17 ("standard of care and skill required of a trustee in administering the trust and in preserving the trust property is the objective standard of a reasonable person"). Moreover, the reasonableness of a trustee's action "'"is not to be judged on the basis of hindsight * * * otherwise there would be few, if any, who would undertake to act as trustees."'" *In re Testamentary Trust of Hamm*, 124 Ohio App.3d 683, 689–90, 707 N.E.2d 524 (11th Dist.1997), quoting *Stevens v. Natl. City Bank*, 45 Ohio St.3d 276, 282, 544 N.E.2d 612 (1989), quoting *Attorney General v. Olson*, 346 Mass. 190, 191 N.E.2d 132 (1963); *accord In re Dimond*, 46 N.E.2d 788, 801 (2d Dist. 1942); *see also* R.C. 5809.05 (stating that "[c]ompliance with the Ohio Uniform Prudent Investor Act shall be determined in light of the facts and circumstances existing at the time of the trustee's decision or action and not by hindsight"). Likewise, "[w]hether a party acts in good faith is generally a question left to the trier of fact." *Straus v. Doe*, 11th Dist. Lake No. 2003-L-082, 2004-Ohio-5316, 2004 WL 2803254, ¶ 32.

{¶94} Appellate courts review a trial court's finding

regarding a breach of trust under the Ohio Trust Code using the manifest-weight-of-the-evidence standard. *Weygandt v. Ward*, 9th Dist. Wayne No. 12CA0004, 2013-Ohio-1937, 2013 WL 1946396, ¶ 16, quoting *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989) ("'Whether a defendant properly discharged his duty of care is normally a question for the [trier of fact].'"), and citing *Rudy v. Bodenmiller*, 2d Dist. No. 89 CA 54, 1990 WL 205109, *11 (Dec. 11, 1990) (indicating that whether defendant breached fiduciary duties is a question of fact). Thus, reviewing courts will uphold a trial court's finding regarding a breach of trust if the manifest weight of the evidence supports it. *State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶ 63; *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984); *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus ("Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.").

{¶95} When an appellate court reviews whether a trial court's decision is against the manifest weight of the evidence, the court "'"weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in

resolving conflicts in the evidence, the [fact-finder] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed * * *."'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20 (clarifying that the same manifest-weight standard applies in civil and criminal cases), quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001), quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reviewing court may find a trial court's decision against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the [decision].'" *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *accord State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000). Moreover, when reviewing evidence under the manifest-weight-of-the-evidence standard, an appellate court generally must defer to the fact-finder's credibility determinations. *Eastley* at ¶ 21. As the *Eastley* court explained:

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"

Id., quoting *Seasons Coal Co.*, 10 Ohio St.3d at 80, 461 N.E.2d 1273, fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶96} Consequently, "we should not reverse a judgment merely because the record contains evidence that could reasonably support a different conclusion." *Bugg v. Fancher*, 4th Dist. Highland No. 06CA12, 2007-Ohio-2019, 2007 WL 1225734, ¶ 9. We additionally note that "'[a] finding of an error in law is a legitimate ground for reversal.'" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24, quoting *Seasons Coal* at 81, 461 N.E.2d 1273. Therefore, appellate courts will generally defer to the fact finder's credibility determinations, but not defer on matters that involve questions of law.

2

Remedies for Breach of Trust

{¶97} All of Eric's assignments of error contend that the trial court erred by failing to "surcharge" the trustees. The statutes contained in the Ohio Trust Code do not, however, use the term "surcharge." Instead, the Ohio Trust Code gives trial courts discretion to choose among various remedies when a court finds that a trustee committed a breach of trust.

{¶98} R.C. 5810.01(B) lists some of the remedies that a court may impose for a breach of trust:

> (1) Compel the trustee to perform the trustee's duties;
> (2) Enjoin the trustee from committing a breach of trust;
> (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
> (4) Order a trustee to account;
> (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
> (6) Suspend the trustee;
> (7) Remove the trustee as provided in section 5807.06 of the Revised Code;
> (8) Reduce or deny compensation to the trustee;
> (9) Subject to section 5810.12 of the Revised Code, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds;
> (10) Order any other appropriate relief.

{¶99} The Official Comments to R.C. 5810.01 explain that "[t]he reference to payment of money in subsection [B](3) includes liability that might be characterized as damages, restitution, or surcharge." "If a trial court chooses to remedy a breach of trust by compelling the trustee to pay money, then the court must look to R.C. 5810.02, 'damages for breach of trust,' to calculate the damages." *Wills v. Kolis*, 8th Dist. Cuyahoga No. 93900, 2010-Ohio-4351, 2010 WL 3584065, ¶ 31.

{¶100} R.C. 5810.02(A) sets forth the damages that a court

may award to the beneficiaries for a breach of trust:

> (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred;
> (2) The profit the trustee made by reason of the breach.

{¶101} We also note that a trial court possesses discretion to determine whether to impose one of the remedies listed in R.C. 5810.01. *Wills* at ¶ 20 and ¶ 31 (emphasizing that R.C. 5810.01 states that a court "may" choose among the listed remedies). Thus, reviewing courts will not disturb a trial court's decision regarding the R.C. 5810.01 remedies unless the court abused its discretion. *In re Testamentary Trust of Hamm*, 124 Ohio App.3d at 689, citing *Whitaker v. Estate of Whitaker*, 105 Ohio App.3d 46, 55, 663 N.E.2d 681 (4th Dist.1995) ("a probate court's imposition of [damages] and its calculations regarding the correct amount due the trust will not be disturbed absent a showing of abuse of discretion"); *accord Zarlenga v. Zarlenga*, 7th Dist. Mahoning No. 2019 MA 89, 2020-Ohio-6947, 2020 WL 7753954, ¶ 45, quoting *In re Estate of Pizzoferrato*, 190 Ohio App.3d 123, 2010-Ohio-4848, ¶ 37 (7th Dist.) ("[a] probate court's decision 'relative to an assessment of damages' is a discretionary one that a reviewing court will uphold absent an abuse of discretion."); *Wills* at ¶ 16 (trial court decision regarding damages under R.C. 5810.01 remedies, including

damages, subject to abuse-of-discretion review).

> "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 15 OBR 311, 361, 473 N.E.2d 264, 313, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384–385, 94 N.W.2d 810, 811–812. In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.

Nakoff v. Fairview Gen. Hosp., 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

3

Summary

{¶102} In accordance with the foregoing, we therefore will review whether the trial court's findings regarding Eric's breach-of-trust allegations are against the manifest weight of the evidence. We will review the trial court's decision to decline to surcharge the trustees for an abuse of discretion.

C

FIRST ASSIGNMENT OF ERROR

{¶103} In his first assignment of error, Eric asserts that the trial court erred by failing to "surcharge the trustees for all of their defalcations in calculating fees." Eric claims that the trustees committed the following breaches of trust

("defalcations") and that these breaches required the trial court to surcharge the trustees: (1) the trustees mistakenly included a $45,000 piece of real estate in the trust assets that resulted in the trustees receiving an overpayment of $4,050; (2) the trustees paid themselves $10,002 in self-dealing wages for providing care to Lela; (3) the trustees improperly calculated their annual fee based upon the value of the trust at inception rather than calculating their fee by valuing the trust each year; (4) the trustees overvalued the Adena Road property and their overvaluation resulted in an overpayment of trustee fees; (5) the trustees failed to timely distribute the trust; and (6) the trustees incorrectly paid themselves when they became trustees after Pete's death rather than paying the fee on the one-year anniversary date of their trusteeship. Eric also asks this court to adopt several "bright line rules" regarding a trustee's duties.

1

BRIGHT-LINE RULES

{¶104} First, we reject Eric's invitation to adopt any bright-line rule that he proposes. Among the bright-line rules that Eric proposes are: (1) trustees "have a duty of due diligence to do a title search"; (2) "court approval is necessary before one pays oneself which establishes what is a

reasonable compensation and how it is to be documented"; (3) "when confronted with actual facts of devaluation, the reduced value cannot be ignored but mut [sic] be the basis for the fee computation"; (4) "a trustee cannot churn fees on a dormant asset[; h]e must timely dispose of the asset and if the price is disputed, then a timely directive declaratory judgment must be filed"; (5) "when a trustee fee is based upon the value of a very valuable asset, it must be properly appraised in writing[; f]or real estate, that means comparable sales"; and (6) "a trustee fee upon the language used is earned on the anniversary date."

{¶105} None of the provisions in the Ohio Trust Code support recognizing Eric's proposed bright-line rules. Instead, under the Code, a trustee must "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with Chapters 5801. to 5811. of the Revised Code." R.C. 5808.01. Moreover, a trustee has a duty to "administer the trust as a prudent person would and shall consider the purposes, terms, distributional requirements, and other circumstances of the trust." R.C. 5808.04. When administering a trust, "the trustee shall exercise reasonable care, skill, and caution." R.C. 5808.04. *Id.*

{¶106} Clearly, each of the above provisions sets forth a

standard of reasonableness. As we indicated earlier, reasonableness, and "whether a party has exercised reasonable diligence," ordinarily depends "on the facts and circumstances of each case." *Gerrity, supra,* at ¶ 31, citing *Sharp* at ¶ 17. We do not believe the bright-line rules, as Eric suggests, comports with the standard of reasonableness. Determining the reasonableness of a trustee's actions necessarily depends upon the facts and circumstances of each case. Therefore, we decline Eric's invitation to adopt any of his proposed bright-line rules.

2

$45,000 REAL PROPERTY (ISSUE PRESENTED FOR REVIEW A)

{¶107} Eric asserts that the trustees committed a breach of trust by incorrectly including a $45,000 piece of real estate in the listing of trust assets and then using the value of that real estate to calculate the 1% trustee fee. Eric states that by including the $45,000 property in the trust, the trustees overpaid themselves in the amount of $450 each year, for a total of $4,050. Eric recognizes that the trial court denied trustee fees for 2019 and thereafter, but contends that the trial court should have ordered "a disgorgement/surcharge."

{¶108} We again note that R.C. 5810.01(B)(3) permits a trial court to require a trustee who commits a breach of trust to

redress that breach "by paying money, restoring property, or other means." Additionally, R.C. 5810.01(B)(8) allows a court to reduce or deny a trustee's compensation.

> In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See* Restatement (Second) of Trusts § 243 cmt. c (1959).

Official Comment to R.C. 5810.01.

{¶109} In the case sub judice, assuming, arguendo, that the trustees committed a breach of trust by mistakenly including the property in the listing of trust assets, R.C. 5810.01 gave the trial court discretion to impose a remedy for the trustees' mistake. However, the trial court's determination that the property was mistakenly included in the trust did not require the trial court to surcharge the trustees or to order a disgorgement. Instead, as we noted earlier, a trial court has discretion to choose among remedies set forth in R.C. 5810.01(B).

{¶110} In the case at bar, the trial court disallowed the trustees compensation for 2019 and 2020. R.C. 5810.01(B)(8) permits a trial court to reduce or deny compensation to a trustee who commits a breach of trust. Here, we are unable to

conclude that the trial court's decision to choose the remedy that R.C. 5810.01(B)(8) permits constitutes an unreasonable, arbitrary, or unconscionable decision. Nothing in the record indicates that the trustees acted intentionally or in bad faith by including the property in the listing of trust assets at inception. Instead, including the property appears to have been an oversight. Consequently, we do not believe that the trial court abused its discretion by rejecting Eric's request for a surcharge or disgorgement.

3

SELF-DEALING (ISSUE PRESENTED FOR REVIEW B)

{¶111} Eric next asserts that the trial court should have awarded damages as a result of the trustees paying themselves to provide personal care to Lela. Eric contends that trustees paying themselves to provide personal care to Lela, constitutes self-dealing in violation of R.C. 5808.02.

{¶112} R.C. 5808.02 imposes a duty of loyalty upon a trustee and prohibits conflicts of interest. The statute reads, in part:

> (A) A trustee shall administer the trust solely in the interests of the beneficiaries.
>
> (B) Subject to the rights of persons dealing with or assisting the trustee as provided in section 5810.12 of the Revised Code, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the

> trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless one of the following applies:
>
> (1) The transaction was authorized by the terms of the trust or by other provisions of the Revised Code.
>
> (2) The transaction was approved by the court.
>
> (3) The beneficiary did not commence a judicial proceeding within the time allowed by section 5810.05 of the Revised Code.
>
> (4) The beneficiary or the beneficiary's representative consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 5810.09 of the Revised Code.
>
> (5) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

{¶113} In *Hosford v. Hosford*, 8th Dist. Cuyahoga No. 44403, 1982 WL 5930, *5 (Sept. 30, 1982), the court discussed the rule against self-dealing as follows:

> [A] trustee must avoid self-dealing or be liable to the beneficiary for a breach of his fiduciary duty. As the court said in *In Re Estate of Binder* (1940), 137 Ohio St. 26, at 37-38:
>
> The law is jealous to see that a trustee shall not engage in double dealing to his own advantage and profit. The reason is not difficult to discover when it is remembered that a trusteeship is primarily and of necessity a position of trust and confidence, and that it offers an opportunity, if not a temptation, to disloyalty and selfaggrandizement. The connotation of the word and name "trustee" carried the idea of a confidential relationship calling for scrupulous integrity and fair dealing. *Ulmer v. Fulton, Supt. of Banks*, 129 Ohio St., 323, 334, 195 N.E., 557.
>
> The court, in the case of *First Natl. Bank of Birmingham v. Basham*, [(Ala.) 191 So. 873] said:
>
> "Basically, self-dealing relates to transactions wherein a trustee, acting for himself and also as

> trustee, a relation which demands strict fidelity to others, seeks to consummate a deal wherein self-interest is opposed to duty. Typical cases are sales of individual properties to the trust estate, or purchases of trust property for his own benefit. Equity, in such cases, pauses not to inquire, whether the trust estate has sustained a loss. As a matter of public policy, and because of the temptation to wrong-doing, equity arms the cestui que trust with an election to affirm or disaffirm, unless contervailing equities have intervened."

See also In re Minch's Will, 71 N.E.2d 144, 146, 47 Ohio Law Abs. 146, 149-50 (8th Dist.1946) ("Self-dealing with the assets of the trust by a trustee or any personal gain or profit (except such compensation as is earned because of the services rendered) either directly or indirectly, accomplished or any attempt to gain a personal advantage in carrying out his duties, is universally held to be in conflict with the fidelity with which a trustee must be motivated in the administration of the trust.").

{¶114} In the case sub judice, we do not agree with Eric that the trustees engaged in self-dealing or otherwise violated R.C. 5808.02. Instead, as we explain below, the terms of the trust authorized the trustees to pay themselves for providing care to Lela. See R.C. 5808.02(B)(1).

{¶115} Initially, we note that the construction of a trust is a matter of law that appellate courts review de novo. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶

14. Thus, appellate courts independently review the language of the trust to ascertain whether the trial court reached the correct conclusion. *Id.*

{¶116} The specific terms of the trust, as well as any applicable statutes, generally control a trustee's authority. *In re Trust U/W of Brooke*, 82 Ohio St.3d 553, 557, 697 N.E.2d 191 (1998); R.C. 5801.04, Official Comment (noting that terms of the trust, with limited exceptions, controls trustee's authority); R.C. 5808.15 (stating that trustee "may exercise powers conferred by the trust"). A court that reviews the specific terms of a trust must "ascertain and give effect to the intent of the [settlor]." *Arnott* at ¶ 14. The settlor's intent "is presumed to reside in the language" that the settlor chose to use in the trust. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987); *accord Zahn v. Nelson*, 170 Ohio App.3d 111, 2007-Ohio-667, 866 N.E.2d 58, ¶ 26 (4th Dist.).

{¶117} When reviewing language that a settlor chose to use in a trust, courts must apply unambiguous language as written. *Zahn* at ¶ 26. Moreover, courts presume that a settlor "used the words in the trust according to their common, ordinary meaning." *Id.* at ¶ 26. Only when the language is ambiguous may a court "resort to principles of interpretation." *Wyper v. DuFour*, 6th Dist. Wood No. WD-18-050, 2019-Ohio-1035, 2019 WL 1313377, ¶ 15.

Furthermore, "[u]nless the terms of a trust are found to be ambiguous, no extrinsic evidence will be admitted to interpret the trust provisions." *Robinson v. Beck*, 9th Dist. Summit No. 21094, 2003-Ohio-1286, 2003 WL 1339007, ¶ 6. "'[A]mbiguity' "is defined as 'the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time.'" *Boulger v. Evans*, 54 Ohio St.2d 371, 378, 377 N.E.2d 753 (1978), quoting Webster's Third New International Dictionary, quoted in *Robinson v. Beck*, 9th Dist. Summit No. 21094, 2003-Ohio-1286, 2003 WL 1339007, ¶ 25.

{¶118} In the case at bar, we believe that the unambiguous language of the trust authorized the trustees to receive compensation for providing personal care to Lela. First, the trust stated that the trustees are "entitled to receive compensation for ordinary services hereunder equal to one percent (1%) of corpus and income held in trust per year." Eric argues that "the huge 1% trustee fee was intended to include personal services for maintenance of property and for Lela's care who had dementia [sic]." Eric thus alleges that providing personal care to Lela was an "ordinary" service under the trust.

{¶119} We, however, observe that one Ohio court has considered the meaning of "ordinary" versus "extraordinary" services in the context of estate administration and

testamentary trusts. *In re Haggerty's Estate*, 128 N.E.2d 680, 70 Ohio Law Abs. 463 (P.C.1955). In *Haggerty's Estate*, the court outlined some of the ordinary services that a fiduciary may perform when administering an estate to include the following:

> investigation in such capacity as to the identity of the beneficiaries; the nature and extent of the assets; the arrangements for appraisals leading to the preparation and filing of the inventory and appraisement; the determination and payment of inheritance and other taxes; the filing of schedule of debts; and the determination and allowance of claims against the estate. Further and at an appropriate time he must attend to the matters of transfers of real estate, sale of personal property or its distribution in kind. He is of course required in connection with the administration of the estate to set up and maintain accounts showing the receipt of moneys and assets and payment of bills, expenses and distributions. From the very nature of things his duties include the matter of numerous conferences with parties interested in the estate either as creditors or beneficiaries. He is further required to file in Court from time to time an accounting of his administration.

Id. at 685.

{¶120} The *Haggerty's Estate* court defined "extraordinary services" to be those services that do not fall within the list of "ordinary services." *Id.* at 686. The court explained that extraordinary services might "include various forms of litigation if necessary, such as the filing of an action to construe a will, or services in the defense of a will; action

for declaratory judgment; prosecution or defense of litigation necessary to protect the estate; actions to sell real estate." *Id.*

{¶121} In the case sub judice, providing personal care to a trust beneficiary is not an "ordinary service" commonly associated with trust administration. Instead, *Haggerty's Estate* indicates that "ordinary services" generally encompass ministerial acts associated with administering the trust or other acts that the trust defines as "ordinary services." Furthermore, the trust language does not indicate that the trustees' 1% compensation for "ordinary services" included compensation for care that the trustees personally provided to Lela. The trust directs the trustees to use the trust funds for Lela's benefit and for her "comfortable maintenance, care and support." Nothing in the trust states that the trustees shall personally provide care and support to Lela.

{¶122} Additionally, the trust recites that the trustees are "entitled to receive reasonable compensation for any extraordinary services requested or required." At trial, the trustees testified that they paid around $11 or $12 per hour to third parties to care for Lela. When third parties were unavailable to care for Lela, the trustees provided care at a rate of $10 per hour. Nothing suggests that the $10 hourly rate

that the trustees paid themselves is unreasonable, especially considering that they paid third parties more per hour.

{¶123} Moreover, we note that Eric did not cite any authority to show that providing personal care services to a trust beneficiary constitutes an "ordinary" service. The case Eric cites, *Acosta v. City National Corp.*, 922 F.3d 880 (9th Cir.2019), is inapposite. *Acosta* involved a specific provision contained within the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1106, that prohibits a welfare benefit plan sponsor from using the assets of a welfare benefit plan to compensate the sponsor for services rendered. *See also Barboza v. California Ass'n of Professional Firefighters*, 799 F.3d 1257, 1269 (9th Cir.2015) ("while a plan may pay a fiduciary 'reasonable compensation for services rendered' under 29 U.S.C. § 1108, the fiduciary may not engage in self-dealing under 29 U.S.C. § 1106(b) by paying itself from plan funds").

{¶124} We point out that the case at bar does not involve ERISA. Instead, it involves a trust created under the Ohio Trust Code. Eric has not cited any authority to prohibit a trustee from using the assets of a trust to compensate the trustee for personal-care services rendered to a beneficiary when the trust does not include personal-care services in the definition of "ordinary services."

{¶125} Therefore, we disagree with Eric that the trustees committed a breach of trust by paying themselves $10 per hour to provide personal care to Lela. Without a breach of trust, the trial court had no basis to impose any remedy listed in R.C. 5810.10. Consequently, Eric's argument to the contrary is without merit.

4

TRUSTEE FEE (ISSUE PRESENTED FOR REVIEW C AND F)

{¶126} Eric next asserts that the trustees overcompensated themselves by using the same trust valuation each year to calculate the 1% fee.

{¶127} R.C. 5807.08 governs compensation of trustees and provides:

> (A) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.
>
> (B) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if the duties of the trustee are substantially different from those contemplated when the trust was created or the compensation specified by the terms of the trust would be unreasonable low or high.

{¶128} In the case at bar, the terms of the trust specify the trustee's compensation:

> At any time during the continuation of the trust, whether before or after my death, whether or not the

> trust estate includes property other than insurance policies or assets of nominal value, the Trustees shall be entitled to receive compensation for ordinary services hereunder equal to one percent (1%) of corpus and income held in trust per year * * *.

{¶129} The trial court appears to have agreed with Eric that the trustees should not have used the same valuation year after year, but instead, should have calculated the 1% fee based upon an annual valuation. The trial court referred to Ott's trustee fee reconciliation and noted that Ott's reconciliation used an annual valuation. Because Ott's reconciliation showed that the trustees received $22,202.38 in excess fees as a result of using the same valuation year after year, the court noted in its decision that the trustees received excess compensation and denied additional compensation as a result. Thus, we disagree with any argument that the trial court erred by failing to recognize the miscalculation or by failing to impose a remedy for the miscalculation.

{¶130} Eric also asserts that the trial court erred by failing to conclude that the trustees improperly paid their trustee fee shortly after becoming trustees, rather than waiting one year. Eric does not recognize, however, that the trust allows the trustees' compensation to "be payable at such times as [they] may determine." Moreover, the trust states that "in the event that the trust is terminated within a fiscal year, the

compensation shall not be prorated or abated, and the full amount shall be payable as compensation." Consequently, the terms of the trust specifically allowed the trustees to pay themselves when they deemed it appropriate. Nothing in the trust required the trustees to wait one year before they could receive their 1% trustee fee or to pay the 1% fee on each anniversary date of their trusteeship.

{¶131} Therefore, we disagree with Eric's argument that the trial court erred by failing to conclude that the trustees improperly paid themselves $58,547 shortly after assuming their duties as trustees.

{¶132} Within this section of his argument, Eric also contends that the trustees overvalued the Adena Road property and that this overvaluation caused the trustees' fee to be higher than it would have been if the trustees had properly valued the Adena Road property. Eric argues that the trial court "ignored" the evidence that the property actually was worth far less. Eric thus asserts that the trial court should have used one of the reduced property values and then redetermined the trustees' 1% fee using a lower property value.

{¶133} We observe, however, that the trial court determined that the trustees acted reasonably by valuing the property at $1.7 million. Therefore, the record does not support Eric's

argument that the trial court ignored evidence that the property was worth less than $1.7 million. Instead, the court considered the evidence and found that the trustees reasonably relied upon an appraisal that valued the property at $1.7 million. Moreover, simply because the trial court did not mention Eric's expert's property appraisal, the real-estate listing prices, or the sale price in its judgment entry does not mean that the court ignored the evidence.

{¶134} As we recently noted in *Marietta v. Verhovec*, 4th Dist. Washington No. 19CA24, 2020-Ohio-7020, 2020 WL 8093523, reviewing courts "must afford a presumption of regularity to the trial court's proceedings." *Id.* at ¶ 17 (citations omitted). We explained:

> Indeed, "it is our duty to assume that such court acted in accordance with law unless the record shows the contrary." *Jaffrin v. Di Egidio*, 152 Ohio St. 359, 366, 89 N.E.2d 459, (1949); *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 35, quoting *State v. Phillips*, 74 Ohio St.3d 72, 92, 656 N.E.2d 643 (1995) (explaining that appellate courts ordinarily presume the regularity of trial court proceedings "'unless the record demonstrates otherwise'").
>
> "No rule with relation to Ohio appellate courts is better settled than the fundamental principle that in appeals on questions of law, all reasonable presumptions consistent with the record will be indulged in favor of the validity of the judgment or decision under review, and of the regularity and legality of the proceedings below. This is in accordance with the old maxim * * * (all things are presumed correctly and with due formality to have been

> done until it is proved to the contrary)." *Jaffrin, supra*, 152 Ohio St. at 366, 89 N.E.2d 459, quoting 2 Ohio Jurisprudence (App. Rev., Pt. 2), 1015, Section 565.

Id.

{¶135} In the case before us, nothing in the record suggests that the presumption of regularity should not apply. Here, the trial court questioned Eric's real-estate appraiser, Horner. The court asked Horner whether the property's location within the city of Chillicothe rendered the property more valuable than property outside of the city limits. Horner indicated that the presence of "water and sewer obviously make[s] it more developable [sic]." Additionally, the court noted in its judgment entry that the property is "very unique." We believe that the record shows that the trial court was aware of, and considered, the various values placed upon the Adena Road property. We therefore disagree with Eric that the trial court ignored evidence.

5

TRUST TERMINATION (ISSUES PRESENTED FOR REVIEW D AND G)

{¶136} Eric asserts that the trial court erred by failing to find that the trustees did not expeditiously terminate the trust upon Lela's death. He contends that the trustees needlessly prolonged the trust's existence to continue to be paid 1% of the

trust assets each year. Eric further claims that the failure to expeditiously terminate the trust caused the trustees to incur needless expenses.

{¶137} R.C. 5808.17(B) requires a trustee who is terminating a trust to "proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes."

{¶138} In the case at bar, the trial court considered, and rejected, Eric's argument that the trustees did not expeditiously distribute the trust property. The court determined that the trustees acted reasonably when they attempted to distribute the trust assets upon Lela's death. The court found that the beneficiaries' inability to agree upon the disposition of assets, and the subsequent legal proceedings, delayed the trustees from terminating the trust in a more expeditious manner. The court explained its reasoning:

> The trustees were not primarily responsible for the delay in distributing the trust assets. The trust beneficiaries did not want the trust real estate transferred directly to them. The trust beneficiaries could not agree on how to maintain the trust real estate and specifically stated that they did not want to own the real estate jointly. The trust beneficiaries did not want to auction the trust real estate including but not limited to the real estate at 729 Adena Road. In fact, defendant Jeffrey A. Thompson filed a motion to stop the auction at 729

> Adena Road on August 29, 2019. Rather, the trust beneficiaries directed the trustees to sell the real estate through a realtor. The trust beneficiaries clearly expressed their desire to sell 729 Adena Road through a realtor and they made it clear to the trustees and the realtor that they would not accept any offer from a qualified buyer in an amount less than one (1) million dollars for the subject real estate.

{¶139} Here, nothing in the record indicates that the trial court's findings are against the manifest weight of the evidence. Although the trustees did not distribute the trust assets as expeditiously as Eric would have liked, the beneficiaries' inability to agree upon the liquidation of the Adena Road property and the ensuing litigation contributed to the delay. Under these circumstances, we agree with the trial court's conclusion that the trustees acted reasonably. As such, we do not believe that the trial court should have ordered the trustees to reimburse the trust for the 1% trustee fees earned, or the expenses incurred, after July 16, 2017.

6

VALUATION OF ADENA ROAD (ISSUE PRESENTED FOR REVIEW E)

{¶140} Eric again asserts that the trustees overvalued the Adena Road property, and that this overvaluation resulted in excess trustee fees. Eric contends that the trustees should have considered the tax value of the property ($236,740) to ascertain the property's value. Eric thus argues that the

trustees did not act reasonably by relying upon an unwritten appraisal that valued the property at $1.7 million.

{¶141} Once again, we point out that the trial court considered Eric's argument and rejected it. The trial court found that the trustees reasonably relied upon Stanley's $1.7 million appraisal. We believe that the evidence supports the court's finding.

{¶142} Around the time of Pete's death, Stanley, an auctioneer, appraised the property. At a deposition, Stanley stated that at the time of the 2011 appraisal, he had a file that contained research and comparable sales for the property. Stanley, however, related that he no longer has the file. Nonetheless, Stanley recalled that his appraisal was $1.7 million.

{¶143} Here, we have no basis to substitute our judgment for that of the trial court or to judge, in hindsight, the reasonableness of the trustees' reliance on Stanley's appraisal. *See Trust of Hamm*, *supra* ("'"[t]he action of the trustee is not to be judged on the basis of hindsight * * * otherwise there would be few, if any, who would undertake to act as trustees"'"). Instead, we believe that the evidence supports the trial court's finding that the trustees acted reasonably, at the time, by relying upon Stanley's appraisal. Even though

facts later arose to indicate that Stanley's appraisal did not accurately represent what a willing buyer would pay for the property, the trustees had no basis to question Stanley's appraisals when he made them in 2011 and in 2016.

{¶144} Moreover, the case that Eric cites to support his assertion that the trustees incorrectly valued the property is not on point. *Wills v. Kolis*, 8th Dist. Cuyahoga No. 93900, 2010-Ohio-4351, 2010 WL 3584065. In *Wills*, the settlor transferred her real property into a trust. When the settlor died, her son, Raymond, became the successor trustee, with Raymond and his sister, Joan, named as the trust beneficiaries. The trust provided that the property should be sold at fair market value and gave the two beneficiaries a right of first refusal. If neither beneficiary purchased the property, then the proceeds of the sale were to be equally distributed to them.

{¶145} Raymond later sold the property to his wife for $190,000. Raymond, however, did not tell Joan. Instead, Raymond's attorney sent a letter to Joan to advise her that the property had been sold. The letter further stated that to receive her share of the proceeds, Joan needed to execute a quitclaim deed. Joan, however, refused to sign the quitclaim deed.

{¶146} Later, Joan filed a complaint against Raymond and his

wife that alleged, in part, that Raymond committed a breach of trust. Joan asked the court to, inter alia, rescind the transfer, order the property be sold, and award her compensatory damages. After a bench trial, the court rescinded the sale of the property, ordered that title to the property be returned to the trust, and ordered a special fiduciary be appointed to sell the property at fair market value. Joan appealed the trial court's judgment and asserted that the trial court erred by failing to award her compensatory damages using a property value of $680,000. The appellate court found that Joan "ma[de] a good argument." *Id.* at ¶ 19. It noted, however, that the Ohio Trust Code does not require a trial court to award compensatory damages for a breach of trust. Instead, the appellate court appropriately recognized that the Ohio Trust Code gives trial courts discretion to choose among the various remedies. The court thus determined that the trial court had discretion to rescind the sale and order that the property be returned to the trust. Furthermore, the appellate court noted that the parties presented conflicting evidence regarding the fair market value of the property. Joan's expert appraised the property at $680,000, while Raymond testified that two realtors appraised the property at $189,000 and $190,000, respectively. The reviewing court pointed out that the trial court stated that it

was "'not convinced' that [Joan's expert's] appraisal of the property was 'a best estimate' of the fair market value of the home." *Id.* at ¶ 36. For this reason, the court explained, "[t]he trial court determined that it would be more equitable to rescind the sale, restore the right of first refusal, and sell the property through a special fiduciary." *Id.*

{¶147} Here, *Wills* does not help Eric show that the trustees failed to act reasonably by relying upon the $1.7 million appraisal, and then using that value to determine the overall trust assets to calculate their 1% fee. Instead, *Wills* shows that trial courts have discretion to determine the appropriate remedies for a breach of trust.

{¶148} Consequently, we disagree with Eric that the trial court should have reduced the trustees' fee using a lower value for the Adena Road property.

7

CONCLUSION TO FIRST ASSIGNMENT OF ERROR

{¶149} Accordingly, based upon the foregoing reasons, we overrule Eric's first assignment of error.

D

SECOND ASSIGNMENT OF ERROR

{¶150} In his second assignment of error, Eric asserts that the trial court erred by failing to surcharge the trustees for

what he claims are excessive attorney's fees. Once again, Eric raises multiple issues in support of this assignment of error. In particular, Eric argues that (1) an attorney who represents a trust must charge an hourly rate and cannot rely upon a fee schedule to justify the fees charged; (2) the trustees did not act reasonably by accepting Cutright's billing practices without any inquiry; and (3) Cutright's attorney's fees are excessive and unreasonable. Eric additionally asserts that trust funds could not be used to pay Attorney Bugg's legal fees incurred while representing the trustees in the litigation with the trust beneficiaries. Eric claims that the trustees could not use the trust funds to pay litigation expenses because the trustees are "guilty of misconduct."

{¶151} We first note that R.C. 5808.16(AA) expressly 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." Here, Eric appears to argue that the trustees committed a breach of trust by incurring unreasonable attorney's fees.

{¶152} Once again, we note that we review a trial court's decision regarding a breach-of-trust using the manifest-weight-

of-the evidence standard. We also observe that the reasonableness of attorney's fees generally lies within a trial court's sound discretion. *State ex rel. Sawyer v. Cendroski*, 118 Ohio St.3d 50, 2008-Ohio-1771, 885 N.E.2d 938, ¶ 11; *Clark v. Enchanted Hills Community Assn.*, 4th Dist. Highland No. 19CA4, 2020-Ohio-553, 2020 WL 807069, ¶ 26, citing *Motorist Ins. Companies v. Shields*, 4th Dist. Athens No. 00CA26, 2001-Ohio-2387, *8 (Jan. 29, 2001).

{¶153} In determining whether an attorney's fee is reasonable, courts should consider the factors set forth in Rule 1.5(a) of the Ohio Rules of Professional Conduct. The rule states, in relevant part:

> (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional

relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

1

Cutright's Fees

{¶154} We first observe that the trial court did not conclude that Cutright's attorney's fees are excessive or unreasonable. Rather, the court expressly determined that Cutright's attorney's fees are reasonable. The court explained:

> Pete Dyer hired attorney James K. Cutright to handle his affairs. It is reasonable to believe that Pete intended Mr. Cutright to be fairly compensated for his legal services rendered. It was reasonable for the trustees to hire Mr. Cutright to represent them. Attorney James K. Cutright apparently charged a fee for legal services rendered pursuant to Ross County Probate Court Local Rule 71.1 * * * which permits the payment of 1% of the value of all non-probate assets as an attorney fee. Although the attorney fees were paid in lump sums at the time of Pete's death and at the time of Lela's death, attorney Cutright provided a variety of legal services (without additional compensation) to Pete prior to his death and to the trustees over their years of service, including but not limited to the preparation of the trust document, the preparation of estate pleadings for both Pete and Lela, the preparation of an Ohio Estate Tax Return, and the preparation of various deeds. The trustees believed that the legal fees were reasonable and agreed to pay them. Much like contingent fees in personal injury/wrongful death cases the determination of reasonable attorney fees cannot solely be based upon a multiplication of hours spent against an hourly rate. The determination also required consideration of the expertise required, the experience of the attorney and the result achieved. The Court finds, under the circumstances outlined above, that the

attorney fees were reasonable.

{¶155} Thus, the trial court did not conclude that the trustees incurred unreasonable fees or otherwise committed a breach of trust by paying Cutright's fees. We find nothing in the record to indicate that the trial court's finding is against the manifest weight of the evidence. *See Ivancic v. Enos*, 11th Dist. Lake No. 2011-L-050, 2012-Ohio-3639, 978 N.E.2d 927, 2012 WL 3264290, ¶ 79, as corrected (Dec. 7, 2012), citing *Kern v. Heilker & Heilker*, 56 Ohio App. 371, 10 N.E.2d 1005 (1st Dist.1937) (probate court's determination of reasonable fees is a question of fact that reviewing court will not disturb unless against the manifest weight of the evidence).

{¶156} Moreover, Cutright testified that he considered Prof.Cond.R. 1.5 when assessing his fee for preparing the Dyers' estate planning documents, for assisting the trustees through the first five years of administering the trust, and for assisting the trustees in fulfilling their duties to distribute the trust assets after Lela's death. Cutright believed that the fees that he charged were reasonable, and he also used the Ross County Probate Court's local rule as a guideline to determine a reasonable fee.

{¶157} Moreover, while Eric claims that Cutright's fees were excessive, Eric did not present any authority to suggest that

$117,094 for approximately seven years of legal representation to the trustees, as well as preparation of the Dyers' estate planning documents, is an excessive fee.

{¶158} Therefore, because the trial court did not find that the trustees committed a breach of trust by paying Cutright's attorney's fees, imposing a remedy for paying Cutright's fees is unwarranted. Thus, we are unable to conclude that the trial court abused its discretion by declining to impose a surcharge upon the trustees for Cutright's attorney's fees.

2

Bugg's Fees

{¶159} Eric next asserts that the trial court should have found that the trustees could not use the trust funds to pay for Bugg's representation throughout the litigation "since they were guilty of misconduct." However, as we have already noted, the trial court did not find the trustees guilty of misconduct.

{¶160} Furthermore, Eric does not present any other reason that the trustees would have been prevented from using the trust funds to pay for litigation expenses. In fact, "Ohio courts specifically allow a trustee to recover attorney fees from the trust after the trustee successfully defends allegations of a breach of fiduciary duty." *Diemert v. Diemert*, 8th Dist. Cuyahoga No. 82597, 2003-Ohio-6496, 2003 WL 22862810, ¶ 26,

citing *Goff v. Key Trust Co.*, 8th Dist. Cuyahoga No. 71636, 1997 WL 781793 (Dec. 18, 1997). In the case at bar, the trial court specifically found "that the trustees did not breach any of their fiduciary duties."

{¶161} Additionally, as we note later in our discussion of Eric's third assignment of error, R.C. 5810.04 gives trial courts discretion to award "reasonable attorney's fees to any party." Eric's argument regarding Bugg's attorney's fees is, therefore, meritless.

3

CONCLUSION TO SECOND ASSIGNMENT OF ERROR

{¶162} Accordingly, based upon the foregoing reasons, we overrule Eric's second assignment of error.

E

THIRD ASSIGNMENT OF ERROR

{¶163} In his third assignment of error, Eric asserts that the trial court erred by failing to surcharge the trust or the trustees for the attorney's fees that Eric incurred. In support of this assignment of error, Eric presents two issues: (1) "[i]t was prejudicial error for a trial court not to award attorney's fees against the trustees when defalcation was found due to refusal to disburse $26,960.67 each to Jeffrey and Eric Thompson"; and (2) "[i]t was prejudicial error for the trial

court to dismiss the counterclaim and not to award attorney's fees against the common fund when defalcation was found * * *." Eric, in essence, asserts that his counsel's efforts created a "common fund" as follows: (1) $29,960.67 each for Jeffrey and Eric; (2) $4,050 for the improperly assessed trustee fee due to mistakenly including 3693 State Route 207 in the trust; (3) $117,094 for the court's decision to deny the trustees' fee for 2019 and 2020; (4) "[s]ale of 110 Delano to Jeff; and (5) "[d]isbursement of the Janney account."

{¶164} Initially, we observe that Ohio follows the "American Rule," under which a prevailing party in a civil action ordinarily may not recover attorney fees. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009–Ohio–306, 906 N.E.2d 396, ¶ 7; accord *Clark v. Enchanted Hills Community Assn.*, 4th Dist. Highland No. 19CA4, 2020-Ohio-553, 2020 WL 807069, ¶ 20; *Jones v. McAlarney Pools, Spas & Billiards, Inc.*, 4th Dist. Washington No. 07CA34, 2008-Ohio-1365, 2008 WL 757522, ¶ 11. Courts may, however, award attorney fees when a statute or an enforceable contract specifically provides for an award of attorney fees, or when the prevailing party shows that the other party acted in bad faith. *Wilborn* at ¶ 7.

{¶165} In the case at bar, R.C. 5810.04 permits a court to award reasonable attorney fees in judicial proceedings that

involve the administration of a trust. The statute provides:

> In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court, as justice and equity may require, may award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy.

The Official Comments to R.C. 5810.04 state that "[t]he court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust."

{¶166} Under the common law, litigation has been deemed beneficial to a trust when the litigation caused the beneficiaries to receive a greater sum than the amount they would have received without the attorney's services. *In re Estate of Brown*, 83 Ohio App.3d 540, 542-43, 615 N.E.2d 319 (12th Dist.1992). Other courts have applied a similar theory, the "common fund" theory. Under the common fund theory, courts "allow a beneficiary to recover his attorney fees if the attorney's services benefited the [trust] as a whole or increased a common fund in which others might share." *In re Estate of Zonas*, 42 Ohio St.3d 8, 12, 536 N.E.2d 642 (1989) (recognizing that other states have applied the common fund theory to estate litigation but declining to adopt the rule as applied to Ohio estate beneficiaries when statute, R.C. 2107.75,

only provided recovery of attorney's fees for fiduciaries).[4] Another court explained the common fund theory as follows:

> "[W]here one initiates litigation that causes the recovery or preservation of a 'common fund' for the benefit of himself and others similarly situated or facilitates its availability and/or distribution through such efforts, he should be entitled to compensation of the payment of attorney fees from the fund on the theory that those benefitted by the fund would otherwise be unjustly enriched.

In re Trust of Papuk, 8th Dist. Cuyahoga No. 80078, 2002 WL 366519, *2 (Mar. 7, 2002), quoting *Wills v. Union Savings and Trust*, 11th Dist. Trumbull No. 3155, 1983 WL 6167, *3 (June 24, 1983).

{¶167} Generally, an appellate court will review an attorney-fee award under R.C. 5810.04 for an abuse of discretion. *See Wills v. Kolis,* 8th Dist. Cuyahoga No. 93900, 2010-Ohio-4351, ¶ 52; *In re Estate of Winograd*, 65 Ohio App.3d 76, 82, 582 N.E.2d 1047 (8th Dist.1989). As we noted earlier, an abuse of

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[4] The statute at issue in *Zonas*, R.C. 2107.75, reads as follows:

> When the jury or the court finds that the writing produced is not the will or codicil of the testator, the trial court shall allow as part of the costs of administration the amounts to the fiduciary and to the attorneys defending the purported will or purported codicil that the trial court finds to be reasonable compensation for the services rendered in the will contest action. The court shall order the amounts allowed to be paid out of the estate of the decedent.

discretion implies that a trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶168} In the case sub judice, we do not believe that the trial court's decision to decline to award Eric attorney's fees pursuant to R.C. 5810.04 constitutes an abuse of discretion. The trial court's decision does not provide a reason for rejecting Eric's request for attorney's fees, but after our review of the entire record, we are unable to conclude that the trial court's decision is unreasonable, arbitrary, or unconscionable.

{¶169} Once again, we point out that the trial court did not conclude that the trustees engaged in any intentional wrongdoing. Once again, we reject Eric's assertion that the trial court found the trustees guilty of "defalcation." In fact, the court found the opposite:

> the trustees acted in good faith throughout their service. They provided excellent care for Lela at her home for the remainder of her life after Pete's death. They attempted to distribute the remaining trust assets to the beneficiaries in a manner consistent with the wishes of and in the best interests of the trust beneficiaries.

{¶170} Moreover, the trial court found that, other than Eric's and Jeffrey's demand for an accounting, their

counterclaims are without merit. The court ultimately concluded that the accounting "supports a finding that the trustees did not breach any of their fiduciary duties." Thus, Eric's contention that the trial court should have required the trust or the trustees to pay his attorney's fees due to the trustees' purported "defalcation" is meritless.

{¶171} Furthermore, the trial court's order that the trustees pay Eric his share of the funds remaining in the trust did not benefit the trust. Instead, the order benefited Eric. *See generally Natl. City Bank, NE v. Depew*, 9th Dist. Summit No. 18372, 1997 WL 823968, *6–7 (Dec. 31, 1997) (concluding that trial court did not abuse its discretion by denying beneficiary's request for attorney's fees when beneficiary benefited from litigation but trust did not; and noting that litigation served "only to deplete trust assets and cause further bitterness among family members"). Moreover, the court apparently did not agree with Eric's assessment of the benefits that Eric's counsel's litigation efforts provided to the trust. Nowhere in the court's judgment entry does the court agree with Eric's assessment of the benefit provided to the trust. At most, the court found that the trustees overcompensated themselves in the amount of $4,050 by including the $45,000 property when valuing the trust at inception. As a result, the

court denied the trustees further compensation.

{¶172} In sum, after our review we do not believe that the trial court acted unreasonably by determining that Eric should bear the costs of his litigation expenses. Instead, the trial court possessed discretion to decline Eric's request for attorney's fees.

{¶173} Accordingly, based upon the foregoing reasons, we overrule Eric's third assignment of error.

F

CONCLUSION

{¶174} We overrule Eric's three assignments of error.

IV

CASE NUMBER 20CA3732

{¶175} This appeal involves the trial court's decision that overruled Eric's exception to the final account.[5] Eric raises the following assignments of error for review:

---

[5] None of the parties address whether the Ohio Trust Code permits a beneficiary to object to a trustee's final distribution made pursuant to a court's final judgment. For this reason, we presume the procedural propriety of Eric's exceptions to the final accounting, but do so with reservations. *See generally Vaughan v. Unger*, 3rd Dist. Allen No. 1-92-71, 1992 WL 389989 (Dec. 28, 1992) (rejecting attorney's attempt to reopen case to enforce charging lien when attorney not a party to the proceedings and when trial court had entered final judgment).

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT APPROVED A FINAL DISTRIBUTION WITHOUT FIRST HOLDING A HEARING."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT OVERRULED ERIC THOMPSON'S EXCEPTION TO THE FINAL ACCOUNT."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL [COURT] COMMITTED PREJUDICIAL ERROR WHEN IT ORDERED THE LIEN OF ATTORNEY KING TO BE PAID FROM THE DISTRIBUTION TO JEFFREY THOMPSON."

{¶176} Eric's three assignments of error challenge the trial court's decision that overruled his exceptions to the final account. In particular, Eric contends that the trial court should have ordered the trustees to pay Attorney Kingsley (Jeffrey's former, and Eric's current, counsel) the legal fees that Jeffrey incurred in the trust litigation.

{¶177} Before we consider the merits of Eric's three assignments of error, however, we first must determine whether Eric has standing to appeal the trial court's judgment that overruled his exceptions to the final account. "Standing is a threshold question for the court to decide in order for it to adjudicate the action." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998). Thus, a person "who

attempts to appeal a judgment must meet standing requirements to invoke the jurisdiction of the appellate court." *In re S.G.D.F.*, 10th Dist. Franklin No. 16AP-123, 2016-Ohio-7134, 2016 WL 5720391, ¶ 11, citing *Ohio Contract Carriers Assn. v. Public Util. Comm. of Ohio*, 140 Ohio St. 160, 161, 42 N.E.2d 758 (1942). "[L]ack of standing vitiates the party's ability to invoke the jurisdiction of a court" to hear an action. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 22.

{¶178} As a general matter, an "'[a]ppeal lies only on behalf of a party aggrieved by the final order appealed from.'" *State ex rel. Gabriel v. Youngstown*, 75 Ohio St.3d 618, 619, 665 N.E.2d 209 (1996), quoting *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942), syllabus. "Aggrieved means deprived of legal rights or claims." *Snodgrass v. Testa*, 145 Ohio St.3d 418, 2015-Ohio-5364, 50 N.E.3d 475, 2015 WL 9312554, ¶ 27, quoting *Cononi v. Mikhail*, 2d Dist. Montgomery No. 8161, 1984 WL 5419, *6 (Jan. 10, 1984), citing *In re Annexation in Mad River Twp., Montgomery Cty.*, 25 Ohio Misc. 175, 176, 266 N.E.2d 864 (C.P.1970); *see also Black's Law Dictionary* 80 (10th Ed.2014) (defining "aggrieved" as "having legal rights that are adversely affected"); *accord Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning*

Appeals, 91 Ohio St.3d 174, 177, 743 N.E.2d 894 (2001). In order to have standing to appeal, a person must be "'able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced'" by the judgment appealed from. *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 743 N.E.2d 894 (2001), quoting *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 591 N.E.2d 1203 (1992). Consequently, "a party [ordinarily] does not have standing to prosecute an appeal in order to protect the rights of a third party." *USB Financial Services, Inc. v. Lacava*, 8th Dist. Cuyahoga No. 106256, 2018-Ohio-3165, 2018 WL 38176754, ¶ 42 (citation omitted). Instead, to have standing to appeal, a party must "assert [his] own rights, not the [rights] of third parties." *North Canton v. Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, 871 N.E.2d 586, ¶ 14. Thus, "[a]ppeals are * * * allowed * * * only to correct errors injuriously affecting the appellant.'" *State ex rel. Gabriel v. Youngstown*, 75 Ohio St.3d 618, 619, 665 N.E.2d 209 (1996), quoting *Ohio Contract Carriers Assn.* At syllabus.

{¶179} In the case at bar, as a general matter Eric has a present interest in the subject matter of the trust litigation. Eric does not, however, have a present interest in the subject matter of the appeal that concerns the exceptions to the

trustees' final accounting. Instead, Eric's arguments on appeal regarding the trial court's decision that overrule his exceptions all concern Kingsley's demand for attorney's fees for providing legal services to Jeffrey. None of the assignments of error concern Eric's interest in the final distribution of the trust fund. Eric has not shown that the trial court's decision that overruled the exceptions to the final account adversely affected Eric's rights. Rather, Eric's attorney, Kingsley, contends that the trial court's ruling adversely affected Kingsley's interest in being paid for legal services provided to Jeffrey. Therefore, under these circumstances, we do not believe that Eric has standing to challenge the trial court's decision that overruled the exceptions to the final account.

{¶180} Furthermore, even if Eric had standing to appeal the trial court's decision, an appeal would be moot. See discussion, *infra*, in Case Number 20CA3723 (Jeffrey's appeal from the trial court's decision granting King's motion for attorney's fees).

{¶181} Accordingly, based upon the foregoing reasons, we dismiss Case Number 20CA3732.

V

Case Number 20CA3723

{¶182} In this appeal, Jeffrey challenges the trial court's

decision that granted King's motion for attorney's fees.

Jeffrey assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION OVER THE DISPUTED LEGAL FEES ATTORNEY PHILLIP KING SUBMITTED TO THE ALLEGED TRUST FOR PAYMENT AS THIS WAS A PRIVATE AGREEMENT/MATTER TO WHICH APPELLANT, JEFFREY THOMPSON, WAS REQUIRED TO ENTER IN ORDER TO RESPOND TO THE TRUSTEE'S DECLARATORY JUDGMENT ACTION."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT'S SUMMARY REJECTION OF APPELLANT, JEFFREY THOMPSON'S, MOTION TO CONTINUE THE HEARING ON ATTORNEY PHILLIP KING'S MOTION FOR ATTORNEY'S FEES WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT RESULTING IN THE DENIAL OF DUE PROCESS TO WHICH APPELLANT IS ENTITLED UNDER OHIO, FEDERAL AND CONSTITUTIONAL LAW."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN IT REVERSED ITS DECISION AND ORDERED THE TRUSTEES TO PAY THE FULL AMOUNT OF THE DISPUTED LEGAL FEES CLAIMED TO BE OWED TO ATTORNEY KING BY APPELLANT, JEFFREY THOMPSON, PRIOR TO RESOLUTION OF THE NUMEROUS ISSUES REMAINING IN THE UNDERLYING DECLARATORY JUDGMENT ACTION."
>
> FOURTH ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN IT PERMITTED THE TRUSTEES TO BREACH THEIR FIDUCIARY DUTIES TO APPELLANT AS A BENEFICIARY OF THE ALLEGED TRUST AT ISSUE WHEN THE TRUSTEES STIPULATED TO THE REASONABLENESS OF ATTORNEY PHILLIP KING'S LEGAL FEES WITHOUT MAKING ANY INQUIRY

> OF APPELLANT, JEFFREY THOMPSON, REGARDING THE REASONABLENESS THEREOF AND DISPUTES RELATING THERETO AS WELL AS BY FURTHER AGREEING TO MAKE A DISTRIBUTION FROM APPELLANT, JEFFREY THOMPSON'S, INTEREST IN THE ALLEGED TRUST TO PAY FOR THE AFORESAID DISPUTED LEGAL FEES."
>
> FIFTH ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN REACHING ITS DECISION BECAUSE THE MANIFEST WEIGHT OF EVIDENCE CLEARLY FAVORS THE APPELLANT, JEFFREY THOMPSON, PER OHIO APPELLATE RULE 12."

{¶183} Before we review the merits of Jeffrey's assignments of error, we first consider the trustees' assertion that Jeffrey's appeal from the trial court's decision that granted King's motion for attorney fees is moot.

{¶184} "The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint." *James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 791, 600 N.E.2d 736 (10th Dist.1991), citing 1 Rotunda, Novak & Young, Treatise on Constitutional Law: Substance and Procedure, 97, Section 2.13 (1986). "Ohio courts have long exercised judicial restraint in cases which are not actual controversies. No actual controversy exists where a case has been rendered moot by an outside event" *Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991). Thus, absent an

exception, courts ordinarily may not consider an appeal that has become moot. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm. of Ohio*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 15 (stating that "an appellate court need not consider an issue, and will dismiss the appeal, when the court becomes aware of an event that has rendered the issue moot"); *State v. Berndt*, 29 Ohio St.3d 3, 4, 504 N.E.2d 712 (1987) (reversing appellate court decision that considered moot appeal); *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912, ¶ 10 (1st Dist.) ("The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect").

{¶185} In general, a "'case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Moreover, a case is moot when an event occurs that "renders it impossible for the court to grant any relief." *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21, syllabus (1910). "Conversely, if an actual controversy exists because it is possible for a court to grant the requested relief, the case is not moot, and a consideration of the merits is warranted."

State ex rel. Gaylor v. Goodenow, 125 Ohio St.3d 407, 2010-Ohio-1844, 928 N.E.2d 728, ¶ 11; *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 7.

{¶186} Generally, the voluntary satisfaction of a judgment will render an appeal from that judgment moot. *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245, 551 N.E.2d 1249 (1990). "'Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment."' *Rauch v. Noble* (1959), 169 Ohio St. 314, 316, 159 N.E.2d 451, quoting *Lynch v. Lakewood City School Dist. Bd. of Edn.*, 116 Ohio St. 361, 156 N.E. 188 (1927), paragraph three of the syllabus; *accord DeMeter v. Castle Bail Bonds, Inc.*, 10th Dist. Franklin No. 14AP-918, 2015-Ohio-2540, 2015 WL 3934005, ¶ 7-8 (concluding that judgment was satisfied in full rendering appeal moot after trial court disbursed garnished funds to appellee); *Ohio Power Co. v. Ogle*, 4th Dist. Hocking No. 12CA14, 2013-Ohio-1745, 2013 WL 1803895, ¶¶ 13-14 (determining that appeal regarding distribution of damages moot when clerk already had distributed damage award to appellants); *Slovak v. University Off-Campus*

Housing, 4th Dist. No. 99CA50, 2000 WL 680479, *1 (May 19, 2000) (declining to address the merits of appellant's claim when record indicated court's judgment had been satisfied); *Atlantic Veneer Corp. v. Robbins*, 4th Dist. No. 03CA719, 2004-Ohio-3710, 2004 WL 1563389, ¶ 8 and 17 (concluding that appeal moot when party satisfied judgment and did not seek a stay of execution pending appeal).

{¶187} "A judgment is voluntarily satisfied 'where the party fails to seek a stay prior to the satisfaction of [the] judgment.'" *Summit Servicing Agency, L.L.C. v. Hunt*, 9th Dist. Summit No. 28699, 2018-Ohio-2494, 2018 WL 3187749, ¶ 13, quoting *CommuniCare Health Servs., Inc. v. Murvine*, 9th Dist. Summit No. 23557, 2007-Ohio-4651, 2007-Ohio-2609729, ¶ 20. A party may avoid a voluntary satisfaction of judgment by moving to stay execution of the judgment and by posting a supersedeas bond in an amount deemed by the trial court to be adequate to secure the judgment. *See* R.C. 2505.09; Civ.R. 62(B); App.R. 7(A), (B). "'Once the appellant obtains the stay of execution, neither the trial court nor the non-appealing party is able to enforce the judgment.'" *Alan v. Burns*, 9th Dist. Medina No. 3271-M, 2002-Ohio-7313, 2002 WL 31890067, ¶ 5, quoting *LaFarciola v. Elbert*, 9th Dist. Lorain No. 98CA007134, 1999 WL 1215115, *2 (Dec. 8, 1999). If, however, the appealing party fails to obtain a stay

of execution and the judgment is satisfied, then the appeal becomes moot and the appellate court must dismiss the appeal. *Dept. of Taxation v. Gingrich*, 1st Dist. Hamilton No. C-190455, 2020-Ohio-3794, 2020 WL 4196634, ¶ 3, citing *Baird v. L.A.D. Holdings, LLC*, 1st Dist. Hamilton Nos. C-160265 and C-160409, 2017-Ohio-2953, 2017 WL 2275799, ¶ 15; *Capital Communications v. GBS Corp.*, 10th Dist. Franklin No. 10AP-08, 2010-Ohio-5964, 2010 WL 4968634, ¶ 9-15 (appeal moot when appellant failed to seek a stay to prevent the distribution of escrowed funds that satisfied judgment).

{¶188} Moreover, "determinations of voluntariness do not turn on who satisfies the judgment." *Capitol Communications, Inc. v. GBS Corp.*, 10th Dist. Franklin No. 10AP-08, 2010-Ohio-5964, 2010 WL 4968634, ¶ 9. In *Capitol Communications*, for example, the court determined that the appellant voluntarily satisfied the judgment when it failed to obtain a stay of execution that would have prevented funds escrowed in related litigation from being paid to the appellee, a trust. In *Capitol Communications* the appellant obtained a judgment against two companies, but shortly thereafter, the trust successfully intervened in the action and claimed that it held a secured interest that took priority over the amount held in escrow to satisfy the appellant's judgment. The trial court agreed with the trust and ordered that the

escrowed funds be distributed to the appellee. The appellant appealed the trial court's judgment, but did not seek a stay of execution.

{¶189} On appeal, the trust asserted that the judgment had been satisfied and that the appeal was moot. The appellant, however, argued it did not voluntarily satisfy the judgment. The appellant observed that it had not released the escrowed funds to the trust, but rather, the court had ordered that the funds be released to the trust. The appellant claimed that "the mootness doctrine applies only when the appealing party satisfies the judgment." *Id.* at ¶ 10.

{¶190} The appellate court rejected the appellant's argument that the appellant did not voluntarily satisfy the judgment even though the court ordered the release of the escrowed funds to the trust. The court cited two other cases that had determined that a party voluntarily satisfied a judgment, even though the party did not actually pay the money to satisfy the judgment, when the appellants failed to seek a stay of execution. *Marotta Bldg. Co. v. Lesinski*, 11th Dist. No.2004-G-2562, 2005-Ohio-558, 2005 WL 336630, ¶ 19; *Villas at the Pointe of Settlers Walk Condominium Assn., Inc. v. Coffman Dev. Co., Inc.*, 12th Dist. No. CA2009-12-165, 2010-Ohio-2822, 2010 WL 2499651. The *Capitol Communications* court thus concluded that "[b]ecause [the

appellant] did not move to stay execution of the trial court's judgment, and the escrowed funds were distributed to the trust pursuant to the trial court's order, [the appellant]'s appeals are moot." *Id.* at ¶ 15.

{¶191} As the *Capitol Communications* court indicated, the *Marotta Bldg.* court likewise concluded that the appellants voluntarily satisfied the judgment even though they did not directly pay the amount needed to satisfy the judgment. Instead, the appellee obtained funds from a collateral foreclosure action to satisfy the judgment. The appellate court nevertheless determined that appellants' failure to obtain a stay of execution, which allowed the appellee to satisfy the judgment through the collateral foreclosure action, established that appellants' voluntarily satisfied the judgment.

{¶192} In the case at bar, Jeffrey similarly satisfied the court's judgment that awarded King attorney's fees by failing to obtain a stay of execution of the trial court's decision. Even though Jeffrey did not directly pay the funds to King, the funds were distributed from his share of the trust, and Jeffrey did not seek a stay of the court's ruling to prevent the distribution from his share of the trust. Under these circumstances, we therefore agree with the trustees that the payment of attorney fees to King satisfied the trial court's

decision that granted King's motion for attorney fees. Jeffrey's appeal regarding the trial court's decision that granted King's motion for attorney fees is therefore moot.

{¶193} Accordingly, based upon the foregoing reasons, we dismiss Jeffrey's appeal in Case Number 20CA3723 as moot.

VI

Case Number 20CA3725

{¶194} In Case Number 20CA3725, Jeffrey generally challenges the trial court's decision regarding the trustees' complaint and his counterclaims. Jeffrey raises the following assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN IT RULED THAT A VALID TRUST WAS CREATED."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN IT RULED THAT THE DISTRIBUTION OF THIS INVALID TRUST WAS EQUITABLE."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN IT RULED THAT THE ADENA PROPERTY HAD SOLD FOR AN EQUITABLE VALUE, AND THAT THE TRUSTEES REASONABLY RELIED UPON THE ONE POINT SEVEN (1.7) MILLION APPRAISAL."

A

{¶195} In his first assignment of error, Jeffrey asserts that

the trial court erred by concluding that a valid trust was created. Jeffrey contends that: (1) the probate court did not properly appoint the trustees, and (2) Cutright unduly influenced Dyer and that multiple copies of the trust agreement exist.

{¶196} We first observe that Jeffrey did not attend, and did not participate in, the trial. During the probate court proceedings, Jeffrey thus failed to assert that the trust was not validly created, that the trustees were not properly appointed, that undue influence invalidated the trust, or that multiple copies of the trust agreement exist. Instead, Jeffrey raises all of the foregoing issues for the first time on appeal.

{¶197} It is well-settled that a party may not raise any new issues or legal theories for the first time on appeal. *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Thus, a litigant who fails to raise an argument before the trial court forfeits the right to raise that issue on appeal. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 30 ("an appellant generally may not raise an argument on appeal that the appellant has not raised in the lower courts"); *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 21 (defendant forfeited his constitutional challenge by failing

to raise it during trial court proceedings); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 724 N.E.2d 787 (2000) (party waived arguments for purposes of appeal when party failed to raise those arguments during trial court proceedings); *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992) (appellant cannot "present * * * new arguments for the first time on appeal"); *accord State ex rel. Jeffers v. Athens Cty. Commrs.*, 4th Dist. Athens No. 15CA27, 2016-Ohio-8119, 2016 WL 7230928, fn.3 ("[i]t is well-settled that failure to raise an argument in the trial court results in waiver of the argument for purposes of appeal"); *State v. Anderson*, 4th Dist. Washington No. 15CA28, 2016-Ohio-2704, 2016 WL 1643247, ¶ 24 ("arguments not presented in the trial court are deemed to be waived and may not be raised for the first time on appeal").

{¶198} Appellate courts may, however, under circumstances consider a forfeited argument using a plain-error analysis. *See Risner v. Ohio Dept. of Nat. Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27 (reviewing court has discretion to consider forfeited constitutional challenges); *see also Hill v. Urbana*, 79 Ohio St.3d 130, 133–34, 679 N.E.2d 1109 (1997), citing *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus (stating that

"[e]ven where [forfeiture] is clear, [appellate] court[s] reserve[] the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it'"); *State v. Pyles*, 7th Dist. Mahoning No. 13-MA-22, 2015-Ohio-5594, 2015 WL 9693891, ¶ 82, quoting *State v. Jones*, 7th Dist. No. 06-MA-109, 2008-Ohio-1541, 2008 WL 852071, ¶ 65 (the plain error doctrine "'is a wholly discretionary doctrine'"); *DeVan v. Cuyahoga Cty. Bd. of Revision*, 8th Dist. Cuyahoga, 2015-Ohio-4279, 45 N.E.3d 661, ¶ 9 (appellate court retains discretion to consider forfeited argument); *see Rosales-Mireles v. United States*, ___ U.S. ___, 138 S.Ct. 1897, 1904, 201 L.Ed.2d 376 (2018) (court has discretion whether to recognize plain error).

{¶199} For the plain error doctrine to apply, the party claiming error must establish (1) that "'an error, i.e., a deviation from a legal rule'" occurred, (2) that the error was "'an "obvious" defect in the trial proceedings,'" and (3) that this obvious error affected substantial rights, i.e., the error "'must have affected the outcome of the trial.'" *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209, 436 N.E.2d 1001, 1003 (1982) ("A 'plain error' is obvious and

prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse affect on the character and public confidence in judicial proceedings."). For an error to be "plain" or "obvious," the error must be plain "under current law" "at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 467, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *accord Barnes*, 94 Ohio St.3d at 27, 759 N.E.2d 1240; *State v. G.C.*, 10th Dist. Franklin No. 15AP-536, 2016-Ohio-717, 2016 WL 764409, ¶ 14.

{¶200} The plain error doctrine is not, however, readily invoked in civil cases. Instead, an appellate court "must proceed with the utmost caution" when applying the plain error doctrine in civil cases. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). The Ohio Supreme Court has set a "very high standard" for invoking the plain error doctrine in a civil case. *Perez v. Falls Financial, Inc.*, 87 Ohio St.3d 371, 721 N.E.2d 47 (2000). Thus, "the doctrine is sharply limited to the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself."

Goldfuss, 79 Ohio St.3d at 122, 679 N.E.2d 1099; *accord Jones v. Cleveland Clinic Found.*, 161 Ohio St.3d 337, 2020-Ohio-3780, 163 N.E.3d 501, ¶ 24; *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, ¶ 43. Moreover, appellate courts "'should be hesitant to decide [forfeited errors] for the reason that justice is far better served when it has the benefit of briefing, arguing, and lower court consideration before making a final determination.'" *Risner* at ¶ 28, quoting *Sizemore v. Smith*, 6 Ohio St.3d 330, 332, 453 N.E.2d 632 (1983), fn. 2; *accord Mark v. Mellott Mfg. Co., Inc.*, 106 Ohio App.3d 571, 589, 666 N.E.2d 631 (4th Dist.1995) ("Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process."). Additionally, "[t]he plain error doctrine should never be applied to reverse a civil judgment * * * to allow litigation of issues which could easily have been raised and determined in the initial trial." *Goldfuss*, 79 Ohio St.3d at 122, 679 N.E.2d 1099.

{¶201} In the case sub judice, Jeffrey could have litigated, and the trial court could have determined during the trial court proceedings, the issues he now raises on appeal. Therefore, we believe that Jeffrey has forfeited the right to raise the issues on appeal.

{¶202} Moreover, we do not believe that the circumstances

warrant the application of the plain-error doctrine. None of the alleged errors "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." Thus, the case before us is not an "extremely rare case" that justifies applying the plain-error doctrine.

{¶203} Accordingly, based upon the foregoing reasons, we overrule Jeffrey's first assignment of error.

B

{¶204} In his second assignment of error, Jeffrey challenges the trial court's finding that the distribution of the trust was equitable. The contention is that the distribution was inequitable for the following reasons: (1) the trustees' compensation was unreasonable; (2) the trustees violated their duty to protect the trust property by failing to insure one of the parcels of real estate that belonged to the trust; (3) the trustees misspent around $39 of the trust funds to feed the ducks that lived on the real estate that the trust owned; and (4) the trustees incorrectly listed a piece of property as part of the estate assets. Consequently, appellant asserts that the probate court should have imposed sanctions under R.C. 5808.04, 5808.09, 5810.01(B)(1)-(10), and 5810.02(A)(1).

{¶205} We again note, however, that Jeffrey did not appear at

trial to raise any of the foregoing arguments. Jeffrey thus forfeited the right to raise them on appeal.

{¶206} We additionally note that we also considered most of these same arguments when disposing of Eric's appeal in Case Number 20CA3726. There, we determined that the trial court's judgment is not against the manifest weight of the evidence. Moreover, we concluded that the trial court did not abuse its discretion by failing to assess monetary damages. Jeffrey has not raised any additional arguments that would lead us to conclude otherwise.

{¶207} Accordingly, based upon the foregoing reasons, we overrule Jeffrey's second assignment of error.

C

{¶208} In his third assignment of error, Jeffrey asserts that (1) the trial court erred by determining that the Adena Road property sold for an equitable value, and (2) the trustees overestimated the value of the trust by overvaluing the Adena Road property.

{¶209} Once again, we point out that we addressed this same issue in Case Number 20CA3726. We determined that the trial court's finding that the trustees acted reasonably by valuing the property at $1.7 million is not against the manifest weight of the evidence. Jeffrey raises no argument that make us

question this conclusion.

{¶210} We also observe that the trial court did not determine whether the Adena Road property sold for an equitable value. Instead, the court considered whether the trustees acted reasonably by valuing the property at $1.7 million.

{¶211} Accordingly, based upon the foregoing reasons, we overrule Jeffrey's third assignment of error.

VII

CONCLUSION

{¶212} We dismiss Jeffrey's appeal in Case Number 20CA3723 and Eric's appeal in Case Number 20CA3732.

{¶213} We overrule Jeffrey's three assignments of error in Case Numbers 20CA3725 and Eric's three assignments of error in Case Number 20CA3726.

{¶214} Accordingly, based upon all of the foregoing reasons, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.