

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

BOBBIE JEAN HIGNITE, Administrator DBN, WWA of the Estate of Willie Clay Jones, deceased	:	CASE NO. CI 983067
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	:	
Plaintiff	:	<u>OPINION AND ENTRY</u>
	:	<u>FINDING BREACH OF</u>
	:	<u>FIDUCIARY DUTY</u>
-vs-	:	<u>AND SETTING ASIDE</u>
	:	<u>TRUST FORMATION</u>
JESSE L. JONES, JR.,	:	
	:	
	:	
Defendant	:	
	:	

This matter came before Judge Wayne F. Wilke on July 21, 1999 regarding Plaintiff's Complaint for concealment of assets, a breach of fiduciary duty, and other causes of action against Defendant Jesse L. Jones, Jr. Present were Dennis A. Liggett on behalf of the Plaintiff and William H. Blessing on behalf of the Defendant. At the conclusion of the trial, the parties were given until August 27, 1999 in which to file their final arguments.

FACTS

This dispute centers around certain transactions involving Defendant Jesse L. Jones, Jr. ("Jesse") and the decedent, Willie Clay Jones. By September of 1993, Willie Clay Jones suffered from poor health. He had recently broke his neck, breathed through a tracheotomy tube and suffered from Parkinson's disease.

As poor as his health was, Willie Clay Jones's wife, Elsie, had even worse health, as she was diagnosed with terminal bone cancer shortly after the decedent broke his neck. One of Elsie Jones's nephews, Jim Mercer, approached the Defendant about separating Willie Clay Jones's and Elsie Jones's assets in anticipation of qualification for Medicaid.

On November 12, 1993, the decedent granted Jesse a limited power of attorney for a checking account at Fifth Third Bank (Account # 111-38355). On the date of the power's execution, the account held \$42,941.20. On February 11, 1994, Jesse expanded his powers when he presented Willie Clay Jones with a durable power of attorney that appointed Defendant his attorney-in-fact. The decedent signed the document with his mark but it was never filed with the Hamilton County Recorder's Office.

In January and February of 1994, Jesse persuaded the decedent to enter into an irrevocable trust with the Heritage Investment Trust Group. The lifetime beneficiary of the trust was Willie Clay Jones and upon his death, the residual beneficiary became Defendant Jesse L. Jones, Jr. The original Trustee and marketer of the Trust package, Edward Bartoli, resigned as Trustee less than a month after the trust was created and Defendant Jesse L. Jones, Jr. was appointed Successor Trustee. Willie Clay Jones was also nominated to serve as Successor Trustee, and Jesse L. Jones, Jr. accepted that appointment and served through his power of attorney. The evidence indicates the Defendant's brother, Donald Jones, received a commission from the Heritage Investment Trust Group for selling the trust package to Willie Clay Jones and Jesse L. Jones, Jr.

The trust instrument was signed by Jesse L. Jones, Jr., on March 1, 1994 in his capacity as the decedent's attorney-in-fact. The trust was funded with a purported transfer of the decedent's residence of 616 Maple Street, a portion of the Fifth Third

Checking Account (#111-38355), a 1976 Chevrolet Caprice, and Willie Clay Jones's interest in his wife's estate.

On December 27, 1994, Jesse gave himself \$3,300.00 from the assets of the Trust. He characterized this payment on the check as a "trustee fee" and the memo portion of the check indicates the money was used for a down payment on a house. Jesse later characterized the payment as a loan and repaid the money to the Trust.

Willie Clay Jones died on January 3, 1995. There were no probate assets to administer so the decedent's will was only admitted to probate. The estate was reopened in late 1997 and Plaintiff Bobbie Jean Hignite was appointed administrator of this estate on March 4, 1998. Her inventory indicates that the estate assets consist of those assets currently and previously held by the Trust. On June 1, 1998, Plaintiff instituted this action to recover \$15,000 allegedly concealed by the Defendant; to vacate the purported conveyance from Willie Clay Jones to the Trust; to set aside the establishment of the Trust itself; and to have the Defendant provide a full accounting of all funds received by him in his capacity as attorney-in-fact and as Trustee.

CONCLUSIONS OF LAW

Probate proceedings are restricted to those actions permitted by statute and by the Constitution since the probate court is a court of limited jurisdiction. *Corron v. Corron* (1988), 40 Ohio St.3d 75, paragraph one of the syllabus. Revised Code §2101.24(B)(1)(b) grants a probate court with concurrent jurisdiction to hear and determine actions regarding inter vivos trusts. If jurisdiction is proper, then the probate court has plenary power at law and in equity to dispose of any matter before the court

pursuant to R.C. §2101.24(C). The Ohio Supreme Court has held that a declaratory judgment action may be brought in the probate court to determine the validity of inter vivos transfers where the property transferred would revert to the estate if the transfers are invalidated. *State ex rel. Lipinski v. Cuyahoga Cty. Common Pleas Court* (1995), 74 Ohio St.3d 19, 22.

Plaintiff Bobbie Jean Hignite attacks several of the transactions made by Defendant Jesse L. Jones, Jr. that he made while exercising the power of attorney he held over decedent Willie Clay Jones. To begin, several generalizations may be made. A power of attorney is a written instrument authorizing an agent to perform specific acts on behalf of his principal. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164. The holder of a power of attorney has a fiduciary relationship with the principal. *Brooks v. Bell* (April 10, 1998), Hamilton App. No. C-970548, unreported. Moreover, the law demands the utmost loyalty and honesty from a fiduciary or agent to their principal. 44 Ohio App.3d 164. As fiduciary, Jesse L. Jones, Jr. had the affirmative duty to inform Willie Clay Jones of all of the facts relating to the subject matter of the agency that affected Willie Clay Jones's interest. *Id.* Ratification by a principal cannot occur unless the principal had full knowledge and understanding of the acts performed by the agent. *Id.* In this case, the burden is upon Jesse L. Jones, Jr. to clearly demonstrate that Willie Clay Jones had knowledge of all the facts pertaining to the transfers of property that occurred in this case. *Id.*; *Litchfield v. Standard Oil Co. of Ohio* (1939), 16 O.O. 67, 69-70. Defendant Jones has not done so.

Defendant Jones presents the decedent as physically infirm but mentally competent and alert so as to understand all of the transactions that Jesse L. Jones, Jr.

accomplished. The evidence indicates that in reality, there is little likelihood the decedent was aware of the contents of the inter vivos trust or of its funding. Attorney Charles Bretz opined that it was "impossible" to meaningfully communicate with Willie Clay Jones after he was placed in the nursing home. Mr. Bretz saw the decedent in a fetal position and at the time, Willie Jones appeared to be comatose. Robert Dolle, who was appointed to serve as the decedent's guardian ad litem in connection with the administration of Elsie Jones's estate, indicated that Willie Clay Jones would answer questions put to him in an attempt to please Mr. Dolle. A guardian ad litem was needed to make an election for the surviving spouse in the first place because the administrator believed the spouse was incompetent or otherwise unable to make that decision on his own.

Ultimately, however, Jesse L. Jones, Jr. failed to clearly carry the burden of proof that he has to demonstrate that his principal, Willie Clay Jones, had full knowledge of his agent's acts. All communication between the trust company and Willie Clay Jones occurred through Defendant Jones. Defendant Jones's brother received a commission for the sale of the trust package. There was no evidence that the decedent ratified the loans from the Trust Jesse L. Jones, Jr. made to himself. In conclusion, Defendant Jesse L. Jones, Jr. simply failed to demonstrate Willie Clay Jones approved of the creation of the inter vivos trust, its contents, its funding or its administration. Accordingly, the Court finds as follows:

Jesse L. Jones, Jr. breached his fiduciary duty to Willie Clay Jones in executing the trust document on February 2, 1994 on behalf of Willie Clay Jones. All of the assets held by the Trust are properly assets of the estate of Willie Clay Jones. The purported

conveyance of the real estate described as Auditor's parcel 601-2-32 located at 616 Maple Avenue, Arlington Heights, Ohio, 45215 shall be set aside.

Plaintiff had demanded an accounting be made in her complaint. The Court finds that without any action by the Court, the Defendant has provided a satisfactory accounting of the administration of the Trust. Given credit for appropriate expenditures, the Court finds that \$56,300.24 belongs to the Estate. The Court orders that judgment issue against Defendant Jesse L. Jones, Jr. and in favor of the Estate of Willie Clay Jones in the amount of \$56,300.24.

Plaintiff shall prepare a Judgment Order consistent with the terms of this Opinion and Entry within ten (10) days of the date of this decision.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: William H. Blessing /6848
Dennis A. Liggett/3521