[Cite as *Parisi v. Dayton*, 2004-Ohio-2739.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

GEORGIANNA I. PARISI:

Plaintiff-Appellant : C.A. CASE NO. 20045

vs. : T.C. CASE NO. 02CV7237

CITY OF DAYTON : (Civil Appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 28th day of May, 2004.

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Georgianna I. Parisi, 3430 S. Dixie Drive, Suite 100, Kettering, Ohio 45439
Plaintiff-Appellant, Pro Se

Patrick J. Bonfield, Director of Law; Deirdre E. Logan, Chief Prosecutor; Mary E. Welsh, Asst. Prosecutor, 335 West Third Street, Room 372, Dayton, Ohio 45402, Atty. Reg. No. 0067542
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GRADY, J.

STATEMENT OF FACT

{¶1} Georgiana I. Parisi appeals from a judgment of the court of common pleas affirming a determination by the City of Dayton's Use Nuisance Appeals Board from which Parisi had appealed pursuant to R.C. Chapter 2506.

{¶2} Parisi is the trustee of an Irrevokable Spendthrift Trust for the benefit of Larry J. Parker. The trust document is not in the record; however, it is undisputed that the trustee is

charged with ensuring that Parker has a place to live. To that end Parisi, as trustee, acquired title to a residential property at 1910 East Siebenthaler Avenue in Dayton for Parker's use.

{¶3} Parisi had little physical interaction with the property or its use after Parker moved in. While she never had keys to the property, Parisi did speak regularly with Parker by telephone. On one occasion she instructed Parker that his daughter, a drug abuser recently released from prison, could not live with him. Parisi was also aware of a prior nuisance abatement order issued for the property in 2001. However, the record doesn't reflect the grounds for the order.

{¶4} On August 6, 2002, Dayton police officers executed an arrest warrant for Parker at the Seibenthaler Avenue address. Parker signed a written consent to a search of his home. Police discovered and seized a crack pipe, two metal push rods, and baggies containing cocaine residue. Parker was subsequently charged with and convicted of a violation of R.C. 2925.11(C)(4), felony drug abuse.

{¶5} The City of Dayton Housing Inspection Manager determined that Parker's commission of the felony on the property constituted a nuisance pursuant to the City of Dayton Revised Code of General Ordinances ("R.C.G.O.") 150.01(E)(2)(c). He issued a nuisance abatement order to Parisi as the "owner" of the premises on which the violation occurred. Upon receiving the notice, Parisi changed the locks and expelled Parker from the building.

{¶6} Parisi appealed the inspector's order to the Use

Nuisance Appeals Board. The Board held a hearing to review the order on September 19, 2002. After the hearing, the Board affirmed the order and issued three findings. First, the Board sustained the finding that a public nuisance existed on the property. Second, it found that Parisi was not in *good faith innocent of the knowledge* of the nuisance or unable to discover it by reasonable care and diligence. Finally, the Board decided to take no further action against Parisi so long as no further nuisances occurred within for one year.

{¶7} Parisi appealed the Board's determination to the court of common pleas on October 30, 2002. The court affirmed the Board's decision on August 1, 2003. Parisi filed a timely appeal with this court on August 6, 2003.

FIRST ASSIGNMENT OF ERROR

{¶8} "THE APPEALS BOARD ERRED WHEN IT FOUND THAT MS. PARISI, TRUSTEE, OF THE REAL PROPERTY 'WAS NOT IN GOOD FAITH, INNOCENT OF THE KNOWLEDGE OF THE USE OF SUCH PROPERTY AS A NUISANCE AND THAT, WITH REASONABLE CARE AND DILIGENCE, SUCH OWNER AND/OR TRUSTEE COULD HAVE KNOWN THEREOF' IN VIOLATION OF CITY OF DAYTON REVISED ORDINANCE 152.01C AND THAT SUCH FINDING IS ARBITRARY, CAPRICIOUS, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} R.C.G.O. 150.01(E)(2)(c) provides that "real estate...on which a felony occurs...regardless whether there has been a conviction for said violation," constitutes a public nuisance. The city housing inspection manager is authorized by R.C.G.O. 154.04(A) to issue a nuisance abatement order to the owner of the premises on that cause. R.C.G.O. 152.01(C) includes

mortgagees, executors, administrators, and trustees among the class of "owners" of a premises to whom nuisance abatement orders may issue.

{¶10} An owner who is served a nuisance abatement order may request an administrative hearing of that order before the Dayton Use Nuisance Appeals Board. Per R.C.G.O. 152.07(D), the Board may sustain or reverse the order, initiate other action, or, under R.C.G.O. 152.07(D)(4), dismiss the order on a finding that the owner was, "*in good faith, innocent of knowledge* of the use of such property as a nuisance and that, with reasonable care and diligence...could not have known thereof."

{¶11} The owner may appeal the Board's adverse determinations to the court of common pleas. R.C. 2506.01, et seq. The trial court is authorized to reverse or vacate an administrative order which the court finds is unreasonable or unsupported by a preponderance of substantial, reliable, and probative evidence on the whole record. R.C.2506.04.

{¶12} Our task in reviewing the final judgments or orders entered by the common pleas courts in administrative appeals is to ensure that the court did not abuse its discretion. *See In re Ensley v. City of Dayton* (Sept. 12, 1997), Montgomery App. No. 16130. If there is some "competent, credible evidence supporting the decision of the Court of Common Pleas, and the decision is according to law, it must be affirmed." *Id.*

{¶13} Parisi argues that the court abused its discretion when it affirmed the Board's decision, because her role and powers as trustee for Parker did not put her in a position to prevent the

nuisance in this instance from occurring, notwithstanding the fact that R.C.G.O. 152.01(C) defines "owners" who are subject to the nuisance abatement requirements at issue to include trustees. Parisi also argues that her lack of knowledge that the underlying crime had occurred on the premises fits the "good faith, innocent of knowledge" exception to R.C.G.O. 152.07(D)(4), and required dismissal of the nuisance abatement order against her.

{¶14} A trustee has sufficient power and possession to manage the property and accomplish the objectives of the trust. *See Hill v. Irons* (1953), 160 Ohio St. 21, 27. In *Smith v. Rees* (July 16, 1948), 52 Ohio Law Abs. 417, the Probate Court of Franklin County found that a provision in a will charging the decedent's son to manage real estate to provide income for the widow did not relieve the son of his responsibility for the property. The court held that "the trustee is not an agent for whose acts a principal will respond. Quite the contrary, he is the legal owner of the property and as principal he bears full personal responsibility for his acts in the conduct of his ownership." *Id.*

{¶15} The Ohio Supreme Court previously examined R.C.G.O. 152.01(C) and held that an "owner" must have a right of possession or control of the property sufficient to create or prevent a nuisance. *See Hausman v. City of Dayton* (1995), 73 Ohio St.3d 671, 679, 1995-Ohio-277. In *Hausman* a mere mortgagee, who had but a security interest in the property, lacked the requisite power of possession or control over the property. *Id.* At a minimum, it had to be a mortgagee in possession.

{¶16} It should be noted that *Hausman* sets up an alternative test or standard: possession or control. *Id.*, at p. 679. Parisi, though she held title to the Siebenthaler property as trustee, had no right of possession. That right was conferred on her ward, Parker, and Parisi is not the guardian of his person. However, Parisi may yet be bound if she had a power to control how Parker used the property.

{¶17} *Irons* and *Rees* stand for the proposition that trustees who hold title to real property have control of the property sufficient to create or prevent a nuisance. Parisi instructed Parker that his drug-abusing daughter could not reside with him at the property. After the abatement order was issued, she changed the locks and ordered Parker from the property. She has since put the property up for sale. Evidence presented to the Board was therefore sufficient to demonstrate that, as trustee, Parisi had the requisite power of control over the property where the nuisance occurred in order to be charged to abate it.

{¶18} There seems to be no question that Parisi was in fact in good faith innocent of actual knowledge of the nuisance. However, the relief which that defense permits likewise requires a finding that with reasonable care and diligence she could not have known of it. R.C.G.O. 152.07(D)(4). We do not agree with Parisi that the limits of her charge as a trustee to provide her ward a place to live impaired her capacity to have learned, using reasonable care and diligence, that Parker was using drugs on the premises. More specifically, we cannot find that the trial court abused its discretion when it affirmed the Board's

findings in that respect. *Ensley*.

{¶19} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶20} "THE DETERMINATION OF THE APPEALS BOARD THAT MS. PARISI VIOLATED REVISED ORDINANCE 152.01E2C (sic) IS OVERBROAD AND UNCONSTITUTIONAL UNDER SECTION 3, ARTICLE XVIII OF THE OHIO CONSTITUTION AS APPLIED TO TRUSTEES AND IS AGAINST PUBLIC POLICY."

THIRD ASSIGNMENT OF ERROR

{¶21} "IF SECTION 152.01 WERE FOUND TO BE CONSTITUTIONAL UNDER SECTION 3, ARTICLE XVIII OF THE OHIO CONSTITUTION WITH REGARDS TO TRUSTEES, THE ACTIONS OF THE USE NUISANCE APPEALS BOARD ARE STILL UNCONSTITUTIONAL IN THE INSTANT CASE BECAUSE IT IS OVERBROAD AS TO MS. PARISI."

{¶22} We take Parisi's second and third assignments of error together. Under Article XVIII, Section 3 of the Ohio Constitution, municipalities are authorized to adopt and enforce local police power regulations that do not conflict with the general laws of the state. A municipal ordinance, because it is an exercise of the police power, may not be arbitrary, discriminatory, capricious or unreasonable. *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539.

{¶23} In *Hausman*, the Ohio Supreme Court found the term "mortgagee" in R.C.G.O. 152.01(C) to be unconstitutionally overbroad, but it left the remainder of the definitional ordinance undisturbed, including its classification of trustees

as owners. Parisi argues that her position as trustee, cut off from physical possession of the property, is analogous to that of a mortgagee.

{¶24} There is nothing in Parisi's status as a trustee that prevents her from controlling how her ward uses the property titled in her name and in which she is charged to allow him to reside. Her particular difficulty appears to be that, by reason of Parker's misconduct, Parisi cannot both discharge her duty as trustee and avoid a nuisance abatement order. However, that dilemma does not permit her to avoid the public duty the law imposes in favor of her private duty as trustee.

{¶25} The Supreme Court held in *Hausman* that ownership for R.C.G.O. 152 purposes requires possession or control sufficient to prevent or create a particular nuisance. By refusing to allow Parker's daughter to reside on the property, by changing the locks and expelling Parker, and by initiating a sale of the property, Parisi demonstrated that she has and can exercise a measure of control that a mere mortgagee does not have. Her acts, taken with the law of *Hausman*, *Rees*, and *Irons*, demonstrate that there is nothing arbitrary, capricious, or unreasonable about the City of Dayton's inclusion of trustees as owners in R.C.G.O. 152.01(C). Neither do they support a finding that the ordinance is overly-broad as it applies to Parisi.

{¶26} The second and third assignments of error are overruled. The decision of the court of common pleas will be affirmed.

FAIN, P.J., and YOUNG, J., concur.

Copies mailed to:

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