WILLS—REQUIREMENTS FOR ADMISSION OF WILL TO PROBATE—QUANTUM OF PROOF

Upon a hearing to admit a will to probate, two of the three attesting witnesses asserted that the testator neither signed nor acknowledged his signature in their presence and that they did not recall seeing his signature on the will. The third witness testified that the testator and the three witnesses were all present in a group when the testator signed, followed by the three witnesses, and that the testator was then of full age, sound mind and memory and not under any restraint. The will was complete and regular on its face. The Probate Court's refusal to admit the will to probate was reversed by the Ohio Supreme Court. *Held*, 4-3, where a purported will apparently complies with all formalities on its face, a probate court may not determine as a fact whether such will has been attested and executed according to law, but is merely required to determine whether there is substantial evidence tending to prove such fact, i.e., evidence which will enable a finding of that fact by reasonable minds. *In re Estate of Lyons*, 166 Ohio St. 207, 141 N.E. 2d 151 (1957).

This inquiry will be limited to problems concerning the admission of a will to probate, arising from the following statutory provision:

> The probate court shall admit a will to probate *if it appears* that such will was attested and executed according to law . . . and *if it appears* that the testator at the time of executing such will was of full age, of sound mind and memory, and not under restraint.[1] (Emphasis added.)

It is important to distinguish the matter of admission to probate from a contest action, which is a jury proceeding in the Common Pleas Court to contest the validity of a will which has already been admitted to probate.[2]

In reaching its decision, the Court relied upon *In re Will of Hathaway*[3] and *In re Will of Elvin*,[4] and upon its interpretation of the applicable statutory provisions. The *Hathaway* case holds that for a will to be admissible to probate, the evidence need show only a *prima facie*

[1] OHIO REV. CODE §2107.18 (1953). As to the formal requirements for execution, "Except oral wills, every last will and testament . . . shall be signed at the end by the party making it . . . and be attested and subscribed in the presence of such party, by two or more competent witnesses who saw the testator subscribe, or heard him acknowledge his signature." OHIO REV. CODE §2107.03 (1953).

[2] A recent amendment to the Probate Code accentuates this distinction: "*If it appears* that the instrument purporting to be a will is not entitled to probate, the court shall enter an interlocutory order denying probate of such instrument and shall continue the matter for further hearing. . . . Thereupon, the court shall revoke its interlocutory order denying probate to such instrument and admit the same to probate or enter a final order refusing to probate such instrument. A final order refusing to probate such instrument may be reviewed on appeal." OHIO REV. CODE §2107.181. (Emphasis added.)

[3] 4 Ohio St. 384 (1854).

case in favor of its validity. In the *Elvin* case, after the two attesting witnesses said that the testatrix was under undue influence when she executed the will, the Probate Court found that the testatrix was under restraint and refused to admit the will to probate. After noting the presence of some favorable evidence in the record, the Supreme Court observed that there arose an inference that the testatrix acted of her own volition, and reversed the Probate Court on the principle that:

> A *prima facie* case in favor of the validity of the will is all that is required, and when all the evidence shows as a matter of law that such a case is made out, the court must admit the will to probate, even though the evidence is conflicting.[5]

Equating "*prima facie* case in favor of validity" with "evidence which will enable a finding of that fact by reasonable minds," and concluding that no words of the statute purported to give any authority to the Probate Court to determine as a fact whether a will has been properly attested and executed, the majority in the principal case reversed the Probate Court for acting as a trier of fact in disbelieving the third witness, instead of admitting the will to probate on the ground that reasonable minds could have believed him.

The dissenting opinion properly questions the meaning of the clause "if it appears" as used in the applicable statutes,[6] for the interpretation of this clause is the key to the decision. Revised Code Section 2107.181 was enacted in 1953 to obviate uncertainty created by the old law under which it was possible for an estate to be completely administered as an intestate estate only to have the administration set aside years later and the estate readministered under the will.[7] Although this section provides for a "final order" by the probate court, it does nothing to alter the standard by which the court is to govern its action; indeed, it merely borrows the ambiguous wording "if it appears" from Revised Code Section 2107.18,[8] which sets forth the requirements for admission to probate.

The dissent seeks to distinguish the *Elvin* case, relied upon by the majority, by pointing out that it dealt with the question of undue influence whereas the instant case concerns the formal requisites of a will. Not only was the principle enunciated by the court in that case broad enough to cover the present facts, but it is also supported by a long line of authority following *Hathaway:*

> All that can be required on probate is a "*prima facie* case," and when such "appears" by substantial evidence the

---

[4] 146 Ohio St. 448, 66 N.E. 2d 629 (1946).

[5] *Id.* at 454, 66 N.E. 2d at 632.

[6] *Supra* notes 1 and 2.

[7] 14 OHIO ST. L.J. 373 (1953).

[8] This does not change the superseded General Code section "in any material respect." *In re* Schulz' Estate, 102 Ohio App. 486, 492, 136 N.E. 2d 730, 735 (1956).

> duty is mandatory on the part of the probating court to admit the will to probate. . . .[9]

The dissent further suggests that the words "if it appears" contemplate the exercise of judgment by the probate court. This is certainly true, but the judgment simply consists of determining whether there is sufficient evidence tending toward the validity of the will to justify a finding of validity by reasonable minds. As its final observation, the dissent contends that Revised Code Section 2107.181 "contemplates more than just listening on the part of the probate judge." This formulation does not diminish the validity of the conclusion, set forth above, that the purpose of this section is to forestall further cases of readministration under a will after a complete intestate administration. The majority further refutes the dissent's position here, observing that this section does not purport to give the Probate Court authority to determine as a fact whether a will has been properly executed, and that it would be difficult to conclude that the legislature intended to do so since no notice is provided for "the kinds of persons who might be adversely affected by the will," and no appeal is provided from an order admitting it to probate.

A better understanding of the application of the principles involved may be furthered by a brief consideration of the requisite quantum of proof in specific instances. In *In re Schulz' Estate*[10] attesting witness A stated that she did not know she was signing a will and did not see the testator or witness B sign. Witness B said that she could not remember the occasion but had often witnessed wills for her husband, an attorney, and had made it a practice never to sign unless she saw the testator sign. The Probate Court's denial of admission of the will to probate was reversed by the Court of Appeals, which held that the presumption of due execution which arises on proof of the signatures accompanied by a complete attestation clause is very strong:

> It was not necessary in order to probate this will that both attesting witnesses orally testify that all of the statutory requirements regarding the execution of the will had been complied with; but where, as here, all signatures to the instrument are genuine, the attesting clause is in due form, and there is oral testimony by one of the witnesses that she knew it was the will of the testatrix she was signing, and the testatrix was of full age, of sound mind and memory and not under any restraint, a *prima facie* case is established.[11]

---

[9] McWilliams v. Central Trust Co., 51 Ohio App. 246, 250, 200 N.E. 532, 534 (1935). Accord, Roosa v. Wickward, 90 Ohio App. 213, 105 N.E. 2d 454 (1950); *In re* Schulz' Estate, 102 Ohio App. 486, 136 N.E. 2d 730 (1956); *In re* Blickensderfer, 28 Ohio Op. 42, 13 Ohio Supp. 93 (C. P. 1944); *In re* Will of Watts, 19 Ohio N.P. (n.s.) 225, 27 Ohio Dec. 87 (C.P. 1916); *In re* Wood's Will, 67 N.E. 2d 11 (Ohio Prob. 1945); *In re* Halterman, 27 Ohio Op. 521, 12 Ohio Supp. 150 (Prob. 1943).

[10] 102 Ohio App. 486, 136 N.E. 2d 730 (1956).

[11] *Id.* at 492, 136 N.E. 2d at 735.

In *In re Wood's Will*[12] the court held that it could give full weight to the testimony of one witness to the will, disregarding the testimony of the other, and proceeded to order the will probated on the basis of the testimony of one witness. In the absence of testimony of attestation, it will be presumed that the testator signed in the presence of the witnesses or acknowledged his signature to them.[13] If no legal disability is affirmatively shown, it will be presumed that a decedent had the capacity to make a will and that it was made free from restraint, thus establishing a *prima facie* case of legal responsibility.[14]

The ease with which a *prima facie* case may be established is emphasized by *Roosa v. Wickward*.[15] The will in that case met all the statutory requirements on its face but the only surviving witness testified that she did not see the testator's signature when she signed and could not have seen it because of the manner in which the paper was folded, and that the other witness was not there when she signed. The Probate Court was reversed for refusing to admit the will to probate as not executed according to law, the Court of Appeals saying:

> It appears the Probate Court did not confine its consideration to whether a *prima facie* case in favor of the validity of the will has been established, but went beyond that field of inquiry into one reserved for ultimate determination by a jury under the law of contest.[16]

An analysis of the cases shows that if the will as introduced is in proper form and the signatures have been proved, the slightest additional evidence in favor of the will's validity will suffice to make a *prima facie* case thereof in spite of damaging evidence to the contrary, even if offered by one or more of the attesting witnesses. If this generalization is accurate, the testimony of the third witness in the instant case, combined with the introduction of a will in proper form and with proof of the signatures, constituted *prima facie* proof, notwithstanding that the other two witnesses presented a totally conflicting picture of the circumstances surrounding the will's execution.

In light of the preceding considerations, it is clear that the decision in the principal case properly reconciles the existing case and statutory law on the matter, presenting sound principles upon which the probate judge may ground his action, to wit: he must admit the will to probate unless he determines *as a matter of law* that there is *no evidence* upon which reasonable minds could base a finding of validity.

Wayman C. Lawrence III

---

[12] 67 N.E. 2d 11 (Ohio Prob. 1945). Accord, *In re* Will of Watts, *supra* note 9.

[13] Carpenter v. Denoon, 29 Ohio St. 379 (1876).

[14] Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928); *In re* Stocker, 26 Ohio N.P. (n.s.) 112 (Prob. 1926).

[15] 90 Ohio App. 213, 105 N.E. 2d 454 (1950).

[16] *Id.* at 219, 105 N.E. 2d at 458.