

# RECENT AMENDMENTS AFFECTING PROBATE PRACTICE

RICHARD F. SATER\*

The comments following are on Senate Bills 33, 34 and 35—the legislation sponsored by the Committee on Probate and Trust Law after extensive study of suggestions by members of the bench and bar. It is believed that the 1957 changes which are evolutionary in character will prove of material value in improving probate practice in the applicable areas.

## SENATE BILL 33

This bill enacted supplemental Section 5303.211 and amended Section 2101.24, of the Revised Code, to confer upon the probate court jurisdiction in disentailment proceedings, and amended Sections 5303.27, 5303.28 and 2109.37 as to the investment of proceeds from the sale of entailed estates and the investment powers of fiduciaries. Especially noteworthy new investment powers are the authority of a trustee to invest in real estate and the power of fiduciaries to invest in a home for a ward or an interest in a home for a ward. The effective date was September 9, 1957.

## Section 5303.211

This new section provides that, where an entailed estate sought to be sold or leased was created by will and is held in trust under the jurisdiction of a probate court, an action may be brought by the trustee in the probate court of the county of his appointment or in which the estate or any part thereof is situated. The probate court is given concurrently the same jurisdiction as provided for courts of common pleas. Prior to this amendment, it had been held that probate courts had no jurisdiction for such proceedings.<sup>1</sup> Reliance was placed upon the express power of disentailment given to common pleas courts under Ohio Revised Code Section 5303.21.

It may be argued that probate courts already had similar, if perhaps limited, powers without the aid of the amendment. Probate courts have jurisdiction over testamentary estates by virtue of the Constitution and implementing statutes already existent.<sup>2</sup> In addition, they have the right to control the sale of probate estates by executors, administrators

---

\*Of the Columbus Bar; Chairman, Committee on Probate and Trust Law, Ohio State Bar Association.

<sup>1</sup> Jones v. Wright, 1 Ohio Cir. Ct. (n.s.) 59, 14 Ohio Cir. Dec. 649 (1903).

<sup>2</sup> See Fidelity and D. Co. v. Wolfe, 100 Ohio St. 332, 126 N.E. 414 (1919). State *ex rel.* Ehmman v. Schneider, 78 Ohio App. 27, 67 N.E. 2d 117 (1946), raised the question whether the exclusive jurisdiction given Probate Courts over testamentary trusts by the general probate statutes and the complete equity powers conferred therein on probate matters impliedly repealed the earlier statute granting disentailling powers to the common pleas courts. The court held that while the

or guardians.<sup>3</sup> Complete equity powers relating to matters under their jurisdiction have been conferred upon probate courts by statute.<sup>4</sup> In most jurisdictions it is now held that the equity powers of a court possessing general jurisdiction are sufficient to enable it to order the sale of entailed estates in hardship cases.<sup>5</sup> To the extent at least that a hardship case might have been presented in a disentailing proceeding relating to an estate under an Ohio probate court's jurisdiction, it would seem proper for the probate court to have availed itself of its equity powers to order a sale in the absence of the new amendment.<sup>6</sup>

Doubt is cast upon the validity of this proposition, however, by the Supreme Court cases which originally considered the statute giving the power to disentailed estates to common pleas courts. In *Gilpin v. Williams*,<sup>7</sup> the retroactive aspects of the entailing statute were held unconstitutional and void. The court stated that the sale of a vested right without the consent of the parties involved was unconstitutional under Articles 19 and 28 of the Ohio Constitution. The court did not directly consider the potential power of an equity court to order such a sale, and the point was not argued by counsel. Counsel did attempt to analogize the situation to partition cases, but the court stated that relations between a tenant and reversioner were wholly dissimilar to those between cotenants. In *Ream v. Wolls*,<sup>8</sup> the Ohio Supreme Court held that a disentailment sale involving rights vested prior to the statute was void as there was no other basis for jurisdiction of the subject matter prior to the date upon which the statute became effective. The statute was said to confer special jurisdiction where there was none before.<sup>9</sup>

---

property sought to be disentailed was part of the res of a trust under the jurisdiction of the Probate Court, the disentailing statute was a special statute which was not controlled by the provisions for exclusive jurisdiction in the later general probate statute. See generally 14 OHIO JUR. 2d, *Courts*, §§172-180.

<sup>3</sup> OHIO REV. CODE §2101.24(H) (1953).

<sup>3</sup> *Ibid.*

<sup>5</sup> See: SIMES AND SMITH, LAW OF FUTURE INTERESTS §§1941-46 (1956); 77 A.L.R. 971 (1932); 168 A.L.R. 1018 (1947). The decisions noted in these annotations generally relate to courts with general jurisdiction. Probate courts are said to be courts of special jurisdiction. *Davis v. Davis*, 11 Ohio St. 386 (1860); but the jurisdiction of the Probate Court in matters which are given it by constitutional grant and statutory provision is as comprehensive as any jurisdiction conferred on a court of Common Pleas in suits at law or equity. *Fidelity and D. Co. v. Wolfe*, *supra* note 2.

<sup>6</sup> One Probate Court has suggested that general equity powers of a Court of Common Pleas are necessary to effect such a sale. *Prysi v. Prysi*, 6 Ohio Op. 259 (1936).

<sup>7</sup> 25 Ohio St. 283 (1874).

<sup>8</sup> 61 Ohio St. 131 (1899).

<sup>9</sup> "We suppose that no one would assert that prior to the enactment of the statute, a vested remainder, could, at the suit of the life tenant, have been divested by the judgment of a court, simply for the purpose of making a better investment for that tenant, although it would work no substantial injury to the remainderman." *Id.* at 143.

It thus appears that Ohio courts failed to recognize any inherent equitable power to order the sale of entailed estates without the consent of the parties affected thereby. Actually, the hardship doctrine was unknown in the early common law, and there were few cases on point at the time of the decisions cited. The doctrine has emerged full-blown only in the last 50 years.<sup>10</sup> A relatively recent common pleas decision has recognized the existence of the doctrine and has stated that a common pleas court's jurisdiction in disentanglement proceedings has a basis both in the statute and in its inherent equity powers, but it is conjectural as to whether the Ohio Supreme Court would follow this lead in view of its earlier decisions.<sup>11</sup>

Be as that may, the terms of the disentailing statute are not limited to hardship cases, requiring only that the sale be for the benefit of the tenant in possession and without undue injury to the remaindermen,<sup>12</sup> and enactment of this amendment definitely confers upon probate courts concurrent power with common pleas courts to make sales of entailed estates if created by will and held in trust under probate court jurisdiction. Since the statute amendment merely confers jurisdiction upon another court and does not affect substantive rights, it would seem clear that probate courts may assume jurisdiction of such matters from the effective date of the statute without regard to whether rights vested prior to that date.<sup>13</sup>

#### Section 5303.27

This section provides for the investment of money from the sale of entailed estates under the direction and approval of the court of common pleas. The last sentence authorizes additionally investments which are legal for the investment of funds held by testamentary trustees. The amendment enlarges this last provision by definitely providing that such investments are the general investments permitted to fiduciaries by Section 2109.37 and 2109.371 of the Revised Code.

#### Section 5303.28

The new matter implements the investment and management of money arising from sales made under Sections 5303.21 and 5303.211 by providing that, where a trustee has been appointed and qualified in a probate court, the investment and management of funds of a sale shall be under the exclusive jurisdiction of the probate court. There is no reason for such funds to be under common pleas court jurisdiction, when other funds of the trust are under probate court control.

#### Section 2101.24

The amendment supplements the disentailing sections by making

---

<sup>10</sup> See SIMES AND SMITH, LAW OF FUTURE INTERESTS §1941 (1956).

<sup>11</sup> *Mendenhall v. Leyland*, 4 Ohio Supp. 130, 60 Ohio Op. 47 (1936).

<sup>12</sup> OHIO REV. CODE §5303.21.

<sup>13</sup> See *State ex rel. Slaughter v. Industrial Commission*, 132 Ohio St. 537, 9 N.E. 2d 505 (1937); *People v. Green*, 201 N.J. 172, 94 N.E. 658 (1911).

specific provision for the jurisdiction of the probate court to authorize the sale or lease of any estate in an action by a trustee if the estate is one created by will and is held in trust.

#### Section 2109.37

The law relating to investments by fiduciaries has been amended (1) by the insertion of a section permitting investment, without first obtaining the approval of the court, in shares and deposits of Ohio chartered building and loan associations, members of a deposit guaranty association organized under Sections 1151.80 to 1151.92; (2) to permit a trustee as well as a guardian, with the approval of the court, to invest in productive real estate; and (3) to permit funds to be invested in a home for a ward, or an interest in a home for a ward in which a member of the ward's family may have an interest, notwithstanding the general requirement that investments in real estate are limited to productive real estate. Longfelt needs are thus fulfilled.

#### SENATE BILL 34

This bill amended Sections 1779.01, 1779.04 and 1779.05 of the Revised Code relative to inventory and appraisalment of a deceased partner's interest, purchase of partnership property by surviving partners and the transfer of a deceased partner's interest to surviving partners electing to purchase. The effective date was September 4, 1957.

#### Section 1779.01

The amendment provides that the inventory and appraisalment of the assets of a partnership in which a deceased partner has an interest shall be set for hearing, be subject to exceptions, and heard in the same manner as the inventory and appraisalment of the decedent's own property. The section previously provided for the taking and filing of an inventory of assets and a schedule of debts of the partnership. However, there was no provision in the Code for hearing upon, or approval of, the partnership inventory or for notice of its filing. ---

The amendment was predicated upon the belief that those interested in the estate should have notice and an opportunity to be heard. The additions provide a procedure necessary to protect the rights of interested parties, and, at the same time, provide a means of giving finality to the partnership inventory and appraisalment as approved by the probate court after a full hearing has been provided for all interested persons.

The possibility of exceptions being made to the value of the deceased partner's interest at the time of a hearing on the estate inventory and appraisalment is eliminated, for when the probate court has approved the partnership appraisalment, and the appropriate interest of the deceased partner has been included in the deceased's inventory, there is no need to re-open the matter of valuation on exceptions to the decedent's inventory, since all interested persons will have had an

opportunity to be heard in the matter of the partnership inventory and appraisalment.

#### Section 1779.04

Analysis of the sections of the Uniform Partnership Act, and particularly Ohio Revised Code Section 1775.24(A) and (B) (4), discloses that a partner's property rights in a partnership are those of "tenant in partnership" as to specific partnership property. Paragraph (B) (4) provides that on the death of a partner, his right in specific partnership property vests in the surviving partners, except where the deceased was the last surviving partner, in which case his right vests in his legal representative.

Ohio Revised Code Section 1779.04 provides for the purchase of a deceased partner's interest in partnership assets by surviving partners.

The provision formerly requiring the consent of the deceased's executor or administrator to such purchase was not consistent with the substantive rights of the surviving partners to purchase at the appraised value. The language requiring such consent has been deleted from the section. Court approval, however, is still required for the protection of the estate.

#### Section 1779.05

Ohio Revised Code Section 1779.04 provides for the purchase of a deceased partner's interest in partnership assets by the surviving partners. However, formerly there was nowhere in the Code any provision for any conveyance of title or assignment or transfer of the interest from the estate of the deceased partner to the partnership, even though part or all of the partnership property stands in the name of the deceased partner.

The addition establishes the procedure for implementing the provisions of other sections in Chapter 1779. The amendment provides that when the interest of a deceased partner in partnership assets is taken by the surviving partners, the fiduciary for the estate of the deceased partner shall deliver to the surviving partners an assignment of the interest of the deceased partner in the assets and cause a certificate of transfer of title to issue as to partnership real estate.

#### SENATE BILL 35

This bill amended Sections 2101.25, 2107.13, 2107.14, 2107.17, 2107.35, 2109.13, 2111.04, 2111.09, and 2111.16 of the Revised Code relative to optional jurisdiction of the probate court judge, notice of probate, taking of depositions by commission, encumbrances on property devised as being a debt of the estate, notice required for appointment of guardian, ineligibility of an executor or administrator to serve as a guardian of a minor, and vouchers not allowed as credits in guardian's account. The effective date was September 4, 1957.

## Section 2101.25

The probate court is given appellate jurisdiction by Ohio Revised Code Section 6117.09 in sewer district cases and county water supply cases. In a number of counties, the volume of such cases has been, and will continue to be, such as to seriously interfere with the hearing and determination of normal probate matters.

The change does not deprive the probate court of the jurisdiction granted it by statute, but permits the probate judges to certify appeals in sewer district and water supply cases to the common pleas court, as well as appropriation and road cases which may now be so certified.

## Section 2107.13

The Supreme Court has held that the requirement of notice of application for probate to be given to the surviving spouse and next of kin of the testator resident of the state is mandatory and jurisdictional.<sup>14</sup> The statute in its earlier form led to much uncertainty as to the validity of the probate of a will in the event the person offering the same notified all next of kin known to him to be residents of the state when it subsequently developed that there were other residents of the state not known to him who had not been served. The amendment removes this uncertainty by providing that the notice is to be given to the surviving spouse and to the persons known to the applicant to be residents of the state.<sup>15</sup>

## Section 2107.14

In executing a will it is sometimes felt desirable to have more than two witnesses to the testator's signature. Section 2107.03 provides that a will 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. When a will is presented for probate with more than two witnesses the question arises whether all of such subscribing witnesses to the will must testify before such will is admitted to probate, or whether it is necessary that only two of such witnesses be presented and examined.

The language of the statute before the amendment had been interpreted to require the court to have all witnesses, however many there might be, to appear and testify as to the execution of the will.<sup>16</sup> Such interpretation defeated the purpose of having more than two witnesses to a will.

Henceforth, only the testimony of two witnesses to a will will be required even though more than two witnesses signed the will.

## Section 2107.17

This section provides for the sending of a will outside the court

---

<sup>14</sup> Scholl v. Scholl, 123 Ohio St. 1, 173 N.E. 305 (1930).

<sup>15</sup> Cf. Estate of Hammer, 99 Ohio App. 7, 130 N.E. 2d 437 (1956).

<sup>16</sup> See Mosier v. Harmon, 29 Ohio St. 220 (1876).

where it is necessary to obtain the sworn testimony, by deposition, of the attesting witnesses to a will who are not presently available.

The law now enables the court to annex a "copy made by photostatic or similar process" of the original will with its commission for a deposition. This will reduce the hazard of a possible loss of a will while it is out of the control and possession of the court having jurisdiction of probate and save time in securing probate when the witnesses are in different localities, for separate copies may be sent to each witness. Inasmuch as some counties may not have available reproducing equipment, the use of a "copy" is optional.

#### Section 2107.35

In its previous form the section had two parts. The first part, as now, provided that a mortgage placed on property devised or bequeathed in a will after the will is executed does not revoke the will as to the property so mortgaged. However, the language of the former latter part of this section, "but the devises or legacies therein contained shall pass subject to such encumbrance," raised the question whether such a mortgage encumbrance under the sections relating to presentment of claims, or under debt payment clause was to be paid as a debt of the estate and the property devised or bequeathed pass free and clear, or whether the encumbrance was to be paid by the devisee or legatee.

In New York<sup>17</sup> and Missouri<sup>18</sup> the inclusion of the customary "debt payment clause" in wills has been held not such a manifestation of intent as to relieve the property devised or bequeathed of the burden of the encumbrance.

Under the old section it was apparently necessary to determine the date of the mortgage with relation to the date of execution of the will. Mortgages executed before the will were, by inference only and by the trend of cases on exoneration, to be paid as a debt of the estate out of personalty. Those mortgages executed after the will were to be paid by the devisee.

Under the new section encumbrances on both real and personal property bequeathed or devised are treated as debts of the estate to be paid by the executor and the property to pass free and clear of the encumbrance, unless the will clearly provides otherwise. It is believed this view is consonant with the desires and intentions of the majority of testators. There is no logical reason for distinguishing between encumbrances placed on the property before the will was executed and those subsequent to the execution of the will so long as the indebtedness does, in fact, exist at the date of death.

Deletion was made of that part of the statute which gave rise to the question as a preventative measure to avoid what is believed to be an undesirable result, namely, that the former language would require a

<sup>17</sup> *Dell's Estate*, 276 N. Y. S. 960 (1935).

<sup>18</sup> *Hannibal Trust Co. v. Elzea*, 315 Mo. 485, 286 S. W. 371 (1926).

holding that the property must be burdened with the encumbrance. Of course, a testator may still provide that property shall pass subject to an encumbrance.

#### Section 2109.13

The amendment corrects two errors in the Revised Code, the important action being to change the word "expedient" to "inexpedient" and restore the obvious intent of the law.

#### Section 2111.04

Prior to the amendment no certain provision existed as to how to obtain service on a ward for whom the appointment of a guardian was asked where the ward was a resident of this state but temporarily absent from the jurisdiction thereof or where the ward was a non-resident. Section 2111.04 has required that notice shall be by personal service. The practice in some courts has been to provide for deputized service outside of the State of Ohio, but this has been without statutory authority. It is now expressly provided that personal service of notice when required may be made out of the state by anyone designated by the court to serve such notice. It is believed that this will solve the problem.

Change has also been made to eliminate the special provisions existing in the statute as to the manner of service, to substitute therefor the provision that service shall be made in the manner provided by the sections regularly governing service of notice, Sections 2101.26, 2101.27 and 2101.28.

#### Section 2111.09

Generally and for good reason an executor or administrator is ineligible to serve as guardian of a minor interested in the estate until after his final account as executor or administrator has been filed. However, in this day of frequent simultaneous deaths of both a husband and wife in a common airplane or automobile accident, a great many persons wish to name the same person as both executor of their estates and guardian of their minor children. This desire is present because they have complete confidence, either through a family or business relationship, in some particular person.

Under Section 2111.12 of the Revised Code, a surviving parent has the right by will in writing to appoint a guardian for any of his minor children.

By the amendment, a person appointed by will both as guardian and also as executor, will not be disqualified from serving as guardian until after the settlement of the estate. The prohibition of this section otherwise is left unchanged.

#### Section 2111.16

The section before amendment provided that no guardian could

be allowed a credit in his account for a voucher signed by his ward. There are many cases, especially in the cases of minors, where as a practical matter, and in the best interests of the ward, it appears desirable to permit payment of certain amounts directly to the ward.

Now, on a court order previously made, it will be possible to accept vouchers from wards for any proper purpose subject to such limitations as may be determined by the court in those cases where the circumstances warrant. Authority from the court will have to be obtained in each instance in advance before the guardian makes any payment directly to the ward and obtains a voucher directly from such ward.