Case Western Reserve Law Review

Volume 6 | Issue 3

1955

Wills and Estates

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a different conclusion, according to the court. Aside from the court's confusing, although traditional, language[28] it seems unfortunate that the court ruled on the basis of what was clearly the driver's opinion of what he would have done under different circumstances. It somehow sounds as if the court has not told the whole story.[29] Reasonable men could certainly disagree on the result here, especially in light of the driver's additional statement of opinion that had the road roller been lighted, he might not have pulled so far to the right and so might not have lost control. If the court felt that the plaintiff simply had not carried the burden of proof or that defendant really was not negligent, it should have said so. Proximate cause is confused enough when understood.[30]

WALTER PROBERT

WILLS AND ESTATES

Right of Murderer to Take Property Exempt From Administration

The question of whether a husband who had been adjudged guilty of murdering his wife was entitled to $2500 set off to him in the inventory of the deceased wife's estate as property exempt from administration, was presented to the Ohio Supreme Court in *Bauman v. Hogue.*[1] The court held that the provisions of the statute[2] prohibiting a convicted murderer from taking any part of the estate of the victim applied to a surviving spouse's statutory right to take property exempt from administration,[3] and

[28] There is no doubt that the road roller was a contributing cause to the collision. The more realistic question is: to what extent did its obscurity unreasonably increase the risk of the collision?

[29] Perhaps the court did not believe the driver's story about the oncoming car, for instance.

[30] Two other negligence cases worthy of brief mention are:

1. Connelly v. U.S. Steel Co., 161 Ohio St. 448, 119 N.E.2d 843 (1954). The plaintiff was employed by a railroad company. While spotting cars on the defendant's premises, plaintiff was negligently kicked in the face by one of defendant's employees. Plaintiff took $250.00 from his employer and gave a release without reserving a right to sue the defendant. Held that defendant and the railroad were concurrent tortfeasors and a release to one was a release to both.

2. Cox v. Cartwright, 69 Ohio App. 245,121 N.E.2d 673 (1953). It is here held that actions for negligence against dentists must be brought within one year rather than six years from the time the cause of action arises.

Outside the area of negligence:

In *Schmukler v. Ohio-Bell Tel. Co.,* 66 Ohio L. Abs. 213, 116 N.E.2d 819 (Cuyahoga Com. Pl. 1953) it was held not an invasion of the plaintiff's right of privacy for the defendant to monitor plaintiff's telephone calls to determine if plaintiff was using a non-business telephone for business purposes.

therefore the husband was not entitled to the $2500 set off to him in the inventory of the deceased wife's estate.

Determination of Heirship — Applicability of Presumed Decedent's Act in Estate of Actual Decedent

In *Baker v. Meyers*,[4] the Ohio Supreme Court stated that in a proceeding to determine heirship[5] in the estate of an actual decedent, the provisions of the Presumed Decedents' Act[6] are not applicable in presumptively fixing the date of the death of one who if living would have the right to participate in the estate of the actual decedent. It was therefore held that in the absence of evidence that the decedent's aunt, who disappeared in 1927 and had not been heard from since, survived her nephew, who died after the aunt's disappearance, the aunt's husband was not entitled to participate in the deceased nephew's estate, as the surviving spouse of the aunt, who would have inherited the nephew's estate had she survived her nephew.

Husband Primarily Liable for Expenses of Wife's Last Illness

In In re *Shield's Estate*[7] the children of the decedent excepted to certain claims listed in the schedule of debts. The disputed claims consisted of doctor and hospital bills incurred during decedent's last illness and the claim of the surviving spouse of the decedent for reimbursement for payment to the hospital. The court held the expenses of the wife's last illness are primarily the responsibility of the surviving husband and cannot be charged against the deceased wife's estate. The court distinguished the present case from that of *McClellan v. Filson*,[8] in which case the estate of the decedent was held primarily responsible, on the ground that in the *McClellan* case the surviving husband did not contract the indebtedness, and that in fact the creditors had looked to the decedent's separate estate at the time they were engaged.

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[1] 160 Ohio St. 296, 116 N.E.2d 439 (1953)
[2] OHIO REV. CODE § 2105.19.
[3] OHIO REV. CODE § 2115.13.
[4] 160 Ohio St. 376, 116 N.E.2d 711 (1954).
[5] OHIO REV. CODE §§ 2123.01 *et seq.*
[6] OHIO REV. CODE §§ 2121.01 *et seq.*
[7] 116 N.E.2d 828 (Ohio Prob. 1953).
[8] 44 Ohio St. 184, 5 N.E. 861 (1886).

"Half and Half Statute"

Another part of the "half and half" puzzle was put in place by the Ohio Supreme Court in *Millar v. Mountcastle*[9] which involved a stock dividend. In 1939 a wife received 1350 shares of stock by the will of her husband. In 1948 she received a stock dividend of 2700 shares of stock. In 1951 she died intestate and without issue, possessed of the above 4050 shares of stock. In reversing the court of appeals[10] and affirming the probate court it was held that under the "half and half" statute,[11] which provides for the descent of property when a relict dies intestate and without issue possessed of identical property which came to the relict from a deceased spouse, the *total* 4050 shares of stock were identical property and pass under the "half and half" statute.

After-born Child — Declaration of Intent to Disinherit in Express Terms Not Necessary

In *Spieldenner v. Spieldenner*,[12] a testator devised all of his property to his " wife absolutely and in fee simple." At the time of the execution of the will, testator was the father of six living children and was aware of the fact that his wife was pregnant with the seventh child. Testator died thirty-eight days after the execution of the will, and the seventh child was born shortly after the testator's death. Held, under Ohio statute[13] which provides for afterborn chilren " unless it appears by such will that it was the intention of the testator to disinherit such pretermitted child or heir , " a testator's intention to disinherit an after-born child need not be declared in express terms, but may be drawn from the language of the will in connection with the facts and circumstances surrounding the testator when the will was made. In the present case, an intent to disinherit the after-born child is implied from the language of the will when construed in connection with the facts and circumstances surrounding the execution of the will, and the after-born child has no interest in the estate. A clear, well-written opinion based upon sound reasoning.

Presentation of Creditors' Claims

Under the Ohio statute[14] requiring claims against the estate of a decedent

[9] 160 Ohio St. 409, 119 N.E.2d 626 (1954).

[10] 114 N.E.2d 119 (Ohio App. 1953); reported in Survey of Ohio Law — 1953, 5 WEST. RES. L. REV. 221, 321 (1954).

[11] OHIO REV. CODE § 2105.10.

[12] 122 N.E.2d 33 (Ohio Prob. 1954).

[13] OHIO REV. CODE § 2107.34.

[14] OHIO REV. CODE § 2117.06.

to be presented to the executor or administrator in writing within four months after appointment, it was held in *Beacon Mutual Indemnity Co. v. Stalder*,[15] that presentation must be to the representative in his capacity as an officer of the probate court, and the function of that office cannot be delegated to an agent. Consequently, the presentation of a claim to the agent of an insurance company, even though appointed by the representative as the respresentative's agent, does not satisfy the statute, and the claim becomes barred at the end of the time fixed by statute, unless otherwise properly presented.

Payment of Proceeds of Deceased Veteran's Disability Pension to State for Support of Veteran

In *State Department of Public Welfare v Wendt*,[16] a mentally disabled veteran was hospitalized in a state mental hospital and died there. At his decease, he had no money or property other than $1,520.85 accrued Federal disability pension, which had been deposited by the Veteran's Administration during the period of his hospitalization in its "Fund Due Incompetent Beneficiaries" account. This sum was turned over to the administrator of the deceased's estate. The Department of Public Welfare presented to the administrator a claim for the support of the deceased while confined in the state hospital. The claim was allowed, but the administrator contended that he had no funds available for the payment thereof, maintaining that the funds in his possession were exempt under the provisions of Federal law,[17] which, *inter alia,* provides that

> payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from the claims of creditors

Held, the exemption provided does not extend to the protection of the heirs or next of kin of the pensioner, as against the rights of the pensioner's creditors. The fund held by the administrator should be administered as other assets and distributed under the intestate laws of Ohio. The administrator is required, therefore to pay the state's claim out of such fund.

Implied Revocation of Will by Divorce

In *Younker v. Johnson*,[18] the Ohio Supreme Court held that where a husband executed a will during marriage leaving one-half of his property

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[15] 120 N.E.2d 743 (Ohio App. 1954)

[16] 94 Ohio App. 440, 116 N.E.2d 30 (1953)

[17] 54 Stat. 1195, 38 U.S.C. § 454a.

[18] 160 Ohio St. 409, 116 N.E.2d 715 (1954).

to his wife, and a divorce decree which included a settlement of property rights was thereafter obtained by the wife, there was, as to the legacies and devises to the divorced wife, an implied revocation of the will.

In *Sutton v. Bethell*,[19] testatrix in 1943 made a will in which she named her husband sole beneficiary. In 1951 her husband filed an action for divorce against her, and while that action was pending they entered into a separation agreement. Subsequently, the husband was granted a divorce, and the separation agreement was made a part of the decree. By this agreement, the husband transferred all his interest in the household furniture and certain real estate to his wife, and agreed to pay her ten dollars per week during the pendency of the divorce action. The husband received nothing by the separation agreement. The agreement expressly provided for the right of each party to dispose of his or her own property by will, but made no mention of any existing will. The wife died eight months and eight days after the separation agreement was signed. Held, the will was not revoked by implication of law. The decision stresses the fact that the only transfer of property effected by the separation agreement was from husband to wife, and the only apparent effect of her will would be to return to him the property that was his before the agreement; the right of each party freely to dispose of his property by will, which was expressly declared by the agreement, and the fact that the agreement made no reference to the will and did not indicate any intent on the wife's part to revoke it.

Joint and Survivorship Bank Accounts

In In re *Estate of Jones*,[20] the decedent created joint and survivorship bank accounts, naming Lee Hamilton, her nephew, as the joint owner. In addition, the deceased and Lee Hamilton and his wife entered into an agreement to the effect that Lee Hamilton should pay all of the decedent's bills and funeral expenses and care for her until her death, and whatever was not needed for such purposes was to go to the Hamiltons as compensation for their services in caring for the decedent. Held, the agreement was not testamentary. The interest of the Hamiltons in the accounts was the result of their contract to perform services for the deceased, which services were to be performed, with the exception of the funeral expenses, during the deceased's lifetime. The result of the contract would be a debt due the Hamiltons for services to be paid out of the joint accounts. It is not claimed that they were to be beneficiaries of the estate of the deceased upon her death.

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[19] 116 N.E.2d 594 (Ohio App. 1953).

[20] 122 N.E.2d 111 (Ohio App. 1952).

Husband's Estate Only Secondarily Liable for State Aid Furnished Wife

In *Hausser v. Ebinger*,[21] the executor of the estate of the wife brought an action for a declaratory judgment against the executor of the husband's estate to determine which estate was ultimately liable to repay moneys advanced by the State of Ohio to the wife as aid for the aged for necessary living expenses during the marriage. The husband and the wife were unable to support themselves or each other. Simultaneously, they individually applied for aid. Each of the estates has sufficient funds to reimburse the state for the assistance given to each of them. The plaintiff claims that the husband's estate is liable not only for the aid furnished the husband upon his own application, but is liable also for the aid furnished to the wife, on the theory that it was the husband's duty to support the wife and to exonerate her estate for aid given in lieu of his furnishing such support.

The court of common pleas held that the plaintiff, as executor of the wife, had no claim for reimbursement from the estate of the husband. The court of appeals affirmed, and the executor of the wife's estate appealed. Held, under Revised Code Section 5105.13, which provides in part that "Upon the death of a person the total amount of aid paid to said person, his spouse, or either or both of them shall be a preferred claim against the estate of the deceased " the statutory obligation of the estate of the husband to reimburse the state for aid paid to his wife was in the nature of a secondary, or suretyship, liability, the primary liability for aid to the wife resting upon her estate. The court further stated that since the husband was unable to support himself, by statute[22] it became the wife's duty to support herself and her husband, if necessary, and by her personal contract with the Division of Aid for the Aged she contracted at least as to her own necessities, and in the absence of an agreement for reimbursement, she was not entitled to reimbursement from her husband or his estate for money or property contributed by her for family use, for her assets applied with her consent to the maintenance of the family, or for expenditures voluntarily made by her. Judgment affirmed.

Devise Adeemed by Guardian's Sale of Realty

In *Roderick v. Fisher*,[23] testator by the second item of his will devised an undivided one-half interest in certain real property to his wife. By the fourth item of his will, he gave the remainder of his property in trust for the maintenance and support of his wife for life and the remainder to

[21] 161 Ohio St. 192, 118 N.E.2d 522 (1954).
[22] OHIO REV. CODE §§ 3103.01, 3103.03.
[23] 122 N.E.2d 475 (Ohio App. 1954)