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Wills and Decedents' Estates

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WILL CONTEST

Standing To Contest

Ohio Revised Code section 2741.01 provides that:

> A person *interested* in a will or codicil admitted to probate . . . may contest its validity by a civil action in the Court of Common Pleas in the county in which such probate was had. (Emphasis added.)

In the case of *Hermann v. Crossen*,[1] the Cuyahoga County Court of Appeals sustained the demurrer interposed to plaintiffs' petition on the ground that plaintiffs were not "interested" persons under the terms of the above quoted statutory enactment. Plaintiffs were named as executors in a will executed by testator prior to the execution of the will which plaintiffs were now contesting. The plaintiffs, said the court, as nominated executors under a prior will, did not have the requisite ". . . direct pecuniary interest in the devolution of the estate of the testator or testatrix, that would be impaired or defeated if the instrument admitted to probate was held to be a valid will."[2] The arguments of plaintiffs included an assertion that as executors of a prior will they were under a "duty" to contest the second will. The court dismissed this argument on the basis that no such duty is expressly provided for in the Ohio statutes relevant to will contests, which statutes ". . . provide the exclusive mode of setting aside a last will and testament."[3]

In the case of *Bruckmann v. Shaffer*,[4] a corollary to the rule asserted in the *Hermann* case was pronounced. In this case, it was held that a contestant of a will need not include, as parties defendant to such will contest action, executors originally appointed under testatrix' will when, by a codicil to such will, testatrix appointed different executors, although otherwise ratifying the original will. The court indicated that the original executor-nominee in a revoked appointment is not an "interested person" and, therefore, not a necessary defendant in a will contest. The reasoning of the court was similar to that found in the *Hermann* case.

Perhaps the most interesting current case in this area is that of *Bussell v. Cline*,[5] decided by the Court of Common Pleas of Clinton County. The facts of this case are significant and were substantially

1. 160 N.E.2d 404 (Ohio Ct. App. 1959).
2. *Id.* at syllabus 2.
3. *Id.* at 410.
4. 109 Ohio App. 531, 155 N.E.2d 491 (1958).
5. 161 N.E.2d 655 (Ohio C.P. 1959).

as follows: The husband died testate and left his entire estate, including realty, to his spouse. Besides his surviving spouse, the husband was survived by a brother, but not by any children or lineal descendants. Subsequently, the wife died testate, disposing, by her will, of the property which passed to her under the will of her predeceased husband. The brother of her predeceased husband survived her death. After probate of the wife's will, a nephew of the wife filed suit to contest her will. The contestant failed to make the brother of the predeceased husband a party defendant to the will contest action. A motion was filed to dismiss the will contest on the ground that the said brother had not been made a party defendant within the six-month limitation provided by Ohio Revised Code section 2741.09. The foundation for such motion to dismiss was Ohio Revised Code section 2105.10, commonly known as the "half and half" statute. Under the terms of such statute, the brother of the predeceased husband would be entitled to one-half of the property having passed previously from the predeceased husband to the wife, if the wife later died intestate possessing such property. The court upheld the position of the defendants and dismissed plaintiff's petition on the ground that the brother of testatrix' predeceased husband was an "heir" of testatrix and was, therefore, a "necessary party" to the will contest action.

The possible implications of this decision are many and may provide the basis for a new strain of hyperlegalistic thinking in an area which has been unduly burdened with such thinking in the past. In reaching this decision, the court was obviously concerned with the problems raised by virtue of the requirement in the "half and half" statute that the relict die possessed of "identical real estate or personal property." As a consequence of this requirement of the statute, there would be a tremendous burden upon any will contestant to determine, if the "half and half" statute were at all applicable, whether the deceased relict held "identical" property, in order to determine the necessity of joining possible claimants under the "half and half" statute as defendants in the will contest action. The court attempted to justify its position in the instant case by emphasizing the fact that the property the relict acquired from her predeceased husband was real estate, the ownership of which could be readily ascertained by examination of the public land records. However, the scope of the decision is not limited to a case involving solely real estate, and thus the stage is set for further legalistic "hairsplitting" in this area. It is submitted that, if nothing else, this case serves as a reminder that the "half and half" statute is an anachronistic residuum of "ancestral property" concepts, which have been generally denounced in this country and, with the exception of the "half and half" statute, in Ohio as well.

Directed Verdict for Proponent

The only evidence offered by the contestant in the case of *Dyce v. Koch*,[6] was testimony that the testator had orally stated that he had executed a will made subsequent to that which had been probated, and that the subsequent will revoked the probated will. Such subsequent will was not produced, however, nor was there any further evidence of its execution. The trial judge withdrew the contestant's evidence from the consideration of the jury at the close of plaintiff-contestant's case and directed a verdict for defendants, finding the contested instrument to be testator's last will and testament.

RIGHTS OF SURVIVING SPOUSE

Exempt Property and Year's Support

The Probate Court of Fairfield County, in *In the Matter of the Estate of Priest*[7] disapproved of statements put forth by the Ohio Supreme Court in the case of *Bauman v. Hogue*,[8] and held that the right of a surviving spouse to exempt property and year's support are debts and preferred claims, incident to marriage, and are not acquired by intestate succession. In the instant case, the surviving spouse of decedent did not survive decedent by thirty days. Ohio Revised Code section 2105.21 provides:

> When the *surviving spouse or other heir at law, legatee or devisee* dies within thirty days after the death of the decedent, the estate of such first decedent shall pass and descend as though he had survived such surviving spouse, or other heir at law, legatee or devisee. (Emphasis added.)

In construing this code section, the court indicated that the phrase "surviving spouse or other heir at law" referred to those parties taking property by intestate succession and that the phrase "legatee or devisee" referred to those parties taking property by testate succession. Reference to "surviving spouse" in the above quoted statute thus embraced only the *statutory heirship* rights of a surviving spouse. The right of the surviving spouse to exempt property and year's support, being debts and preferred claims against the estate of the predeceased spouse, were not in the nature of intestate successions. Therefore, the court concluded, the reference to a "surviving spouse" in the lapsing provisions of section 2105.21 of the Ohio Revised Code did not apply to the right of the surviving spouse to exempt property and the year's support.

In the case of *In re Estate of Wreede*,[9] a year's allowance was set off and allowed to a widow from her husband's estate, but was not

6. 157 N.E.2d 130 (Ohio Ct. App. 1958).
7. 156 N.E.2d 206 (Ohio P. Ct. 1958).
8. 160 Ohio St. 296, 116 N.E.2d 439 (1953).
9. 106 Ohio App. 324, 154 N.E.2d 756 (1958).

paid because there was no personal property available for payment. The widow died approximately fifteen years after the death of her predeceased spouse. The administrator of her estate included in the inventory of her estate, as a debt due her estate from the estate of her predeceased husband, the unpaid year's allowance. Exceptions to the inventory were filed and, in overruling the exceptions, the court held that a widow's right to a year's allowance from the estate of her deceased husband, ". . . immediately upon death becomes a preferred and secured debt of his estate, and, when it has not been paid to the widow during her lifetime, . . . survives as an asset of her estate."[10]

Surviving Spouse's Election Rights

Ohio Revised Code section 2107.39 provides, in substance, that after probate of a will and filing of the inventory and related schedules, the probate court shall issue a citation to the surviving spouse to elect whether to take under the will of the decedent or under the Statute of Descent and Distribution.[11] In the case of *In re Rogers' Estate,*[12] the surviving spouse requested the right to file her election prior to the filing of the inventory and related schedules. The court properly held that the surviving spouse could choose to file her election at such earlier time, on the grounds that the requirement of issuing the citation to elect *after* the filing of the inventory was for the protection of the surviving spouse in that he or she would have a clear understanding of the net value of the estate, and, since this is ". . . a right given to the surviving spouse, it is such a right that he or she may waive if desired."[13]

ADMINISTRATION

The Supreme Court of Ohio, in the case of *Winters National Bank and Trust Company v. Ross,*[14] was called upon to clarify the bonding requirements which a corporate trust company must meet before assuming the position and duties of a testamentary trustee. Ohio Revised Code section 2109.04 provides, in substance, that every fiduciary shall, prior to the issuance of his letters, file in the probate court a bond to secure the faithful performance of his duties. Section 1107.14 of the code, however, which appears in the chapter relating to trust companies, provides that: "No bond or other security shall be required from any such trust company in respect to any trust, or when such trust company is appointed . . . trustee. . . ." The conflict

10. *Id.* at 327, 154 N.E.2d at 758.
11. OHIO REV. CODE § 2105.06.
12. 160 N.E.2d 442 (Ohio P. Ct. 1959).
13. *Ibid.*
14. 169 Ohio St. 335, 159 N.E.2d 603 (1959). See also discussion in *Trusts* section, p. 441 *supra.*

presented in the case of a trust company acting as a testamentary trustee is obvious and was precipitated by an amendment, in 1935, of section 10506-4 of the General Code of Ohio (the predecessor of Ohio Revised Code section 2109.04). By this amendment, the initial exculpatory phrase of such section, which read, "unless otherwise provided by law . . . ," was deleted.

The Ohio Supreme Court held that the deletion of such words had the effect of "repealing by implication" the provisions of the predecessor of section 1107.14 of the Ohio Revised Code (section 710-161 of the General Code). As a result of this decision, a trust company must provide the required statutory bond before letters of appointment may be issued to it as a testamentary trustee. The court, however, pointed out that power is vested in the probate court by Ohio Revised Code sections 1107.14, 2109.04, and 2109.05 to require or dispense with such bond from a trust company *after* the issuance of original letters of appointment to such trust company-trustee. The court obviously recognizes the strong possibility that after issuance of letters of trusteeship to such a trust company, the probate court may well exercise its discretion in favor of doing away with the bond and thereby saving the testamentary trust estate the expense related thereto. A hint of a desire for legislative correction of this situation is seen in the court's concluding remark: "Any further clarification of this problem should come from the General Assembly."[15]

In the case of *In re Estate of Howe,*[16] decedent's automobile-liability insurer made wrongful representations as to the date of decedent's death, to a person who had been injured in an accident involving decedent and arising out of decedent's allegedly negligent operation of his automobile. As a result of these representations, the injured claimant did not file his claim against decedent's estate until after the four-month period for presentment of claims. The court held that the claimant's petition for authority to present his claim after expiration of the four-month period should be granted, on the ground that decedent's automobile-liability insurer was, as far as matters concerning the claim arising out of decedent's operation of his automobile were concerned, the agent of the administrator and, therefore, the administrator was bound by the insurance adjuster's intentionally false statement.

An action to set aside an administrator's sale of an estate asset to his wife was presented in the case of *Christman v. Christman.*[17] The administrator's sale to his wife had been concluded seventeen years prior to the time the present action was instituted by the brother and sister of the administrator. The court pointed out that the sale was improper and was *voidable,* and that the administrator's brother

15. *Id.* at 349, 159 N.E.2d at 611.

16. 107 Ohio App. 361, 159 N.E.2d 622 (1958).

17. 160 N.E.2d 419 (Ohio Ct. App. 1959).

and sister could have had the sale set aside at the time it was made or within a reasonable time thereafter. A lapse of seventeen years, however, supported the defense of laches asserted by the administrator, particularly in view of the fact that the property involved was real estate which had been substantially improved and developed. The court distinguished the case of *Magee v. Troutwine*,[18] decided by the Ohio Supreme Court, on the ground that, under similar facts, the defense of laches had apparently not been asserted.

In the case of *Herring v. Herring*,[19] it was held that the administrator of an estate is entitled to set off against the distributive share of an incompetent child the amount paid from the estate of the father for such child's support in a state institution.

Execution of Will

The case of *Blankner v. Lathrop*[20] involved the requirement of section 2107.03 of the Ohio Revised Code that a valid last will and testament be attested and subscribed to "by two or more competent witnesses." In this case, the two witnesses to the testator's will were attorneys, practicing law as partners, one of whom prepared the will. Furthermore, the two attorneys were named in the will as executor and alternate executor, respectively. The Ohio Supreme Court held that such witnesses were "competent" within the meaning of section 2107.03. The supreme court thus aligns this state with the rule supported by the decisions of the majority of jurisdictions in this country.[21] The court's analysis indicates that one rationale for holding an executor to be a "competent witness" is that the executor's fees are not a gratuity, but are compensation for services performed and thus are *earned* by the executor. An alternative rationale might be that the nominated executor was "competent" at the time of attestation since, at such time, his potential interest as executor of the estate was not fixed, it being contingent upon letters being granted by the court having jurisdiction over the estate.

Revocation by Operation of Law

Ohio Revised Code section 2107.06 invalidates, under certain conditions, testamentary dispositions for charitable purposes when such dispositions appear in a will executed within a year of the death of such testator. In the case of *Ireland v. Cleveland Trust Company*,[22] the sole heir at law and residuary beneficiary of, and under, the will of the testatrix declared his intention to waive the benefits of the pro-

18. 166 Ohio St. 466, 143 N.E.2d 581 (1957).
19. 108 Ohio App. 28, 160 N.E.2d 558 (1958).
20. 169 Ohio St. 229, 159 N.E.2d 229 (1959).
21. *Id.* at 231, 159 N.E.2d at 231, citing 57 Am. Jur. *Wills* § 316 (1948).
22. 157 N.E.2d 396 (Ohio P. Ct. 1958).

visions of section 2107.06 in favor of the nominated charitable objects. The Probate Court of Cuyahoga County, in upholding the validity and effectiveness of the waiver, relied heavily on the position taken by Professor Scott and cited the following from his work:

> Where the statute, whether requiring that the will making gifts to charity be executed more than a certain time prior to the testator's death, or limiting the amount of the testator's estate which can be given to charity, is applicable only where the testator leaves certain near relatives, the question arises as to a waiver by such relative. Clearly enough if they all join in such waiver after the death of the testator, the charitable disposition is valid since the restriction is imposed only for their benefit.[23]

The testator's will, in the case of *Schuck v. Schuck*,[24] bequeathed the residue of his estate to the widow of a deceased brother and to a surviving brother. Testator's sister-in-law survived him by one day. The children of testator's sister-in-law filed a petition to determine heirship, asserting that they were entitled to the share of the residue which their mother would have taken had she survived the testator by the thirty days required by section 2105.21 of the Ohio Revised Code. The children based their claim on section 2107.52 which provides, in substance, that a devise to ". . . a relative of a testator . . ." shall pass to such relative's issue if such relative dies after the testator, leaving issue surviving the testator. The question thus presented to the court was whether a sister-in-law is a "relative" within the meaning of section 2107.52. This question was answered in the negative by the court. The court held that the use of the word "relatives" or "relations" in a will is presumed to mean such persons who would take the estate of the testator under the statutes of descent and distribution, unless there is an apparent intent to the contrary. The result of this construction is to limit the benefits of section 2107.52 to consanguineous, and not mere affinitive, relationships.

CONSTRUCTION

In the case of *In the Matter of the Estate of Jacoby*,[25] the testatrix' will directed that all "testamentary expenses" be paid out of her estate. The Probate Court of Butler County held that the phrase "testamentary expenses" included expenses that were incurred in defending a will contest and in defending an action brought by a third person who claimed ownership of certain property inventoried in the estate.

In *Winter v. Turner*,[26] the executrix brought an action for declaratory judgment against the granddaughter of testatrix, asserting that the granddaughter had forfeited a three thousand dollar legacy under

23. SCOTT, TRUSTS § 362.4 (2d ed. 1956).
24. 156 N.E.2d 351 (Ohio P. Ct. 1958).
25. 155 N.E.2d 275 (Ohio P. Ct. 1957).
26. 169 Ohio St. 233, 158 N.E.2d 897 (1959).

testatrix' will by instituting a will contest action, which had been voluntarily dismissed upon discovery that it had been brought more than six months from the date on which the will had been probated. Testatrix' will provided: ". . . If any of the . . . legatees or devisees attempt to overthrow this, my last will and testament, then in that event the gift, devise, or bequest to that person is to be void." The granddaughter filed an answer to the petition of the executrix, stating that the executrix had mailed her a check for three thousand dollars in payment of the legacy and that, after receiving same, the granddaughter had presented the check to the drawee bank which, after consulting with the attorneys for the executrix, had certified the check. Thereafter, the granddaughter alleged, the son-in-law of the executrix, who was also an employee of the firm of attorneys that represented the executrix, confronted the granddaughter on the street and asked to see the check. The granddaughter alleged that she complied with the request and that the said attorney then carried away the check against the will of, and without the consent of, the granddaughter. The executrix filed a motion to strike these facts from the granddaughter's answer, which was granted by the trial court on the ground that the bequest of three thousand dollars to the granddaughter had been forfeited by reason of her acts in attempting to contest the will of testatrix. The court then ordered that the said amount be paid over to the executrix, who was also the residuary legatee and devisee under the will of testatrix. The trial court relied principally upon the case of *Bradford v. Bradford*,[27] wherein the validity of an *in terrorem* clause was upheld.

The Ohio Supreme Court, in reversing the lower court, held that the facts alleged by the granddaughter in her answer, if proved, would establish a voluntary payment of the legacy by the executrix, who was the principal beneficiary and residuary legatee under the will and who, if there was a forfeiture of the said three thousand dollar legacy, would receive payment thereof. As such, said the court, an estoppel would arise in favor of the granddaughter and the executrix would not prevail on her petition to declare the legacy to the granddaughter void. The court refused to extend its decision beyond the immediate facts of the case and indicated (at least to this writer) that some doubt might exist as to whether the present court would follow the *Bradford* case. The court stated: ". . . There is no need to decide now whether the law announced in *Bradford v. Bradford* . . . is applicable to the facts of this case or whether the strict rule there adopted is controlling in all circumstances."[28]

In the case of *Fineman v. Central National Bank*,[29] testator's will

27. 19 Ohio St. 546 (1869).

28. Winter v. Turner, 169 Ohio St. 233, 236, 158 N.E.2d 897, 899 (1959).

29. 161 N.E.2d 557 (Ohio P. Ct. 1959). See also discussion in *Domestic Relations* section, p. 375 *supra*.

provided that a trust created therein should terminate at the time the testator's son ". . . shall be divorced from his present wife. . . ." The will further provided that at the time of such termination, the corpus of such trust, after the payment of a specified bequest, would vest in the testator's son absolutely and free of trust. No divorce action was pending between the testator's son and his wife at the time the will was executed or at any time thereafter. The court held that this provision of the will offered an *inducement* to the son of the testator to obtain a divorce and was, therefore, contrary to public policy and void. An important drafting lesson may be derived from a careful reading of this decision. The court points out that the validity of a provision such as was contained in this will would depend upon ". . . whether the provision in the will provides a premium or reward in the event of divorce."[30] Such a clause in a will might therefore be valid and upheld if it appears that the ". . . purpose of the testator [was] to provide some support or maintenance for one who might suffer economically from [a] divorce, [since] no divorce has been encouraged. . . ."[31]

Descent and Distribution

In the case of *Kest v. Lewis*,[32] the Supreme Court of Ohio was faced with the following facts. *A* was the mother of *B*, an illegitimate child. *A* married *C*, who was not the father of *B*. *A* predeceased and *B* survived *C*, who died intestate. *B* claimed *C*'s estate on the ground that he was a "stepchild" of *C* within the meaning of Ohio Revised Code section 2105.06 (I), which provides that, in the absence of next of kin, the property of a deceased should descend to stepchildren. The issue thus presented to the Ohio Supreme Court was whether the word "stepchildren" found in the above-mentioned code section includes illegitimate as well as legitimate stepchildren. The court held that *B* was entitled to take the estate of *C* on the ground that Ohio Revised Code section 2105.06 (I) ". . . makes no distinction between legitimate stepchildren and illegitimate ones."[33]

In a concurring opinion,[34] Judge Taft agreed with the judgment of the majority of the court, but disagreed with the reasoning employed. Judge Taft would have held that the illegitimate child of the predeceased wife of the decedent became the "stepchild" of the decedent on his marriage to such child's mother, by virtue of the provisions of section 2105.17 of the Ohio Revised Code enabling illegitimate children to inherit from their *mother*. By virtue of this section, said Judge Taft, the illegitimate child of a mother is granted the

30. *Id.* at 558.
31. *Ibid.*
32. 169 Ohio St. 317, 159 N.E.2d 449 (1959).
33. *Id.* at 318, 159 N.E.2d at 451.
34. *Id.* at 320, 159 N.E.2d at 451 (concurring opinion).