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Wills and Decedents' Estates

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into the will.[20] Subsequent amendments to the trust had to be incorporated into the will by codicil in order for the pour-over property to pass according to the terms of the trust as amended.[21]

The doctrine of independent legal significance provides in effect that an inter vivos trust stands independently of a will, and that once the trust has been referred to in the will, subsequent amendments to it do not have to be incorporated into the will by codicil in order for the residue of the estate to pour over into the trust as amended.[22]

JOE H. MUNSTER, JR.

WILLS AND DECEDENTS' ESTATES

WILL CONTEST

The contestant in an appropriate action[1] failed to join, as a party defendant, within the statutory six-month period,[2] the son of the predeceased husband of the testatrix. Under the so-called "half and half" statute[3] of Ohio, the son of the predeceased husband, stepson of the widow whose will was contested, would have inherited the property in the widow's estate which had passed from his father's estate had the widow died intestate. Accordingly, the trial of the will contest action was dismissed on defendant's motion when the evidence showed that the aforementioned person had not been joined in the action and, hence, a "necessary" party had not been joined within the requisite six-month period.[4]

An interesting aspect of the instant case is found in the plaintiff's argument that a prior will of the testatrix was in existence which would become effective if the will which was the subject of this action was declared invalid. In this way, the plaintiff sought to show that intestacy would not result from the invalidation of the contested will and, therefore, the stepson of the testatrix would not stand to inherit under the "half and half" statute.[5] The court gave this argument short shrift, stating that ". . . an unprobated will is wholly inoperative in Ohio for any purpose whatever."[6] In any event, said the court, title to the property which would, in case of intestacy, pass to the stepson of the widow on her death would vest at such time ". . . subject to being divested at a later date,"[7] in the event for example, an effective prior will would be found.

20. OHIO REV. CODE § 2107.05; Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944).

21. Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934). If the trust amendment was not executed with the requisite formality of a codicil, only the property originally in the trust fund was distributed according to the amendment.

22. See 1 SCOTT, TRUSTS § 54.1-.3 (2d ed. 1956). For a discussion of Ohio Revised Code section 2107.05 in relation to the Ohio Mortmain statute, see Note, *The Ohio Mortmain Statute — A Need for Reform*, p. 592 *infra*.

LOST WILLS

In the case of *In re Estate of Simon*[8] an application for probate of a lost will was filed under the provisions of Ohio Revised Code section 2107.27. It was undisputed that a will had been validly executed by the decedent some three years prior to his death. Evidence was introduced showing that a thorough search of decedent's home did not reveal the existence of the will, although other personal papers were found.

The court pointed out that where a will has at all times, been in the exclusive control of the decedent, the fact that such will is not found at the death of the decedent ". . . gives rise to presumption that the will was revoked."[9] Therefore, the party claiming under the "lost" will has the burden to ". . . prove that . . . [the will] was not revoked, by *clear and convincing* evidence."[10] The court ruled, in the instant case, that the burden of proof was not met and dismissed the application for probate.

ADMINISTRATION

Debts of Administration

The will involved in the case of *In re McKitrick's Estate*[11] provided that "just debts and funeral expenses be paid out of [the estate]." Attorney's fees, in this case, were paid by the recipient of certain non-probate property to defend against asserted additional liability under the federal estate tax predicated upon the inclusion, in the taxable estate, of the non-probate property.

The representative of the estate applied for instructions so as to determine whether the attorney's fees should be paid from the estate's assets as a cost of administration. The court pointed out that, generally, the burden of federal estate tax on non-probate property did not fall upon the probate estate but, rather, upon such non-probate property.[12] The will

1. Kluever v. Cleveland Trust Co., 173 N.E.2d 183 (Ohio Ct. App. 1961).
2. OHIO REV. CODE §§ 2741.01-.09. Section 2741.02 states: "All the devisees, legatees, and heirs of the testator, and all other interested persons . . . must be made parties to an action under section 2241.01 of the Revised Code."
3. OHIO REV. CODE § 2105.10.
4. The application of the principle of the "half and half" statute to a will contest action was commented on by this author in a prior year. See Aronoff, *Survey of Ohio Law — Wills and Decedents' Estates*, 11 WEST. RES. L. REV. 444 (1960).
5. Kluever v. Cleveland Trust Co., 173 N.E.2d 183, 184 (Ohio Ct. App. 1961).
6. *Ibid.*
7. *Ibid.*
8. 177 N.E.2d 92 (Ohio P. Ct. 1961).
9. *Id.* at 94-95.
10. *Id.* at 95 (Emphasis added.).
11. 172 N.E.2d 197 (Ohio P. Ct. 1960).
12. See *In re* Estate of Gatch, 153 Ohio St. 401, 92 N.E.2d 404 (1950).

provision to pay debts in the instant case did not, said the court, serve to alter this general rule, especially in view of the fact that the available personalty in the probate estate would be ". . . insufficient . . . to discharge an additional large obligation of federal estate taxes on non-probate assets."[13] The absence of a source in the probate estate for such additional tax payments supported, said the court, the view that the testator could not have had ". . . an intention to burden the probate estate with the non-probate taxes."[14]

Since the avoidance of federal estate tax on the non-probate property did not result in a benefit to the probate estate, the attorney's fees in question were held not to be costs of administration and, hence, not payable from the assets of the probate estate.

Waiver of Rights to Administer an Estate

In an interesting but rather unique case,[15] the Probate Court of Columbiana County was confronted with the following factual situation: the son of the intestate decedent waived in writing his rights to administer his father's estate and consented in writing to the appointment of a Mr. A. J. Brown, who was not related to the decedent, as administrator of the estate; thereafter the son filed a motion requesting appointment of himself as administrator and seeking to set aside the appointment of Mr. Brown.

Upon a hearing of the motion, the son renounced his former waiver and consent and stated that he did not desire the said A. J. Brown to administer the estate. The court found specifically that no fraud or deceit was involved in the securing of the original appointment.

The court approved a prior decision upholding the right of withdrawal of a similar waiver and consent, where such withdrawal took place prior to the actual appointment.[16] In the instant case, the appointment of Mr. Brown had already taken place, and Letters of Administration had been granted. However, no action, with regard to the administration of the estate, had been taken by Mr. Brown prior to the filing of the motion to set aside his appointment. The court set aside the original appointment on the grounds that ". . . the law favors the placing of administration of estates . . . first in the hands of the family of the decedent."[17] In appointing the son of the decedent as the administrator of the estate, the court took pains to note that its decision ". . . is limited . . . to the facts of the case, i.e., that there has been no action in the estate

13. *In re* McKitrick's Estate, 172 N.E.2d 197, 199 (Ohio P. Ct. 1960).
14. *Ibid.*
15. *In re* Estate of Garvin, 175 N.E.2d 551 (Ohio P. Ct. 1961).
16. *In re* Estate of Welch, 29 Ohio L. Abs. (P. Ct. 1939).
17. *In re* Estate of Garvin, 175 N.E.2d 551, 552 (Ohio P. Ct. 1961).

other than the naked appointment."[18] The court added, obviously as dictum, that its decision would have been in favor of retaining the original administrator had actual administrative steps begun, since, in such situation, the son would be ". . . estopped from withdrawing his waiver and consent."[19]

Statutory Period for Filing Claims Against an Estate

The law pertaining to the four-month period for filing claims against an estate was scrutinized in a recent decision of the Ohio Supreme Court.[20] In this case the claimant corporation knew of the death of the decedent and her residence address. The corporation, however, did not realize that the street upon which the decedent had resided was partially in Cuyahoga County and partially in Geauga County. Claimant assumed, without investigation, that the decedent's residence had been in Cuyahoga County, whereas she had actually resided in Geauga County. The records of Cuyahoga County alone were checked as to the appointment of a personal representative of the estate. Before the claimant corporation became aware of its mistake, more than four months had passed after the appointment of the personal representative in the Probate Court of Geauga County. The claimant's petition for authority to present its claim was allowed by the Geauga County Probate Court, and this decision was affirmed by the court of appeals.

Ohio Revised Code section 2117.07 provides that a court *may* authorize the presentment of a claim after the statutory four-month period has elapsed if ". . . the claimant did not have actual notice of the decedent's death or of the appointment of the executor or administrator in sufficient time to present his claim within the . . ." statutory period. The claimant, in the instant case, relied upon arguments of statutory construction and judicial interpretation. These arguments failed to secure a favorable opinion from the supreme court, which by a bare majority (including a concurring opinion) reversed the lower courts and entered judgment for the defendant administrator.[21]

The claimant's first argument, rapidly disposed of by the court, was that the statutory section in question should be construed to the effect that lack of actual notice of *either* the death or the appointment of the personal representative would warrant the presentment of the claim after the statutory period had elapsed. The court's answer to this question of statutory construction was concisely stated: "The word 'or' is disjunctive,

18. *Ibid.*
19. *Ibid.*
20. Redifer Bus Co. v. Lumme, 171 Ohio St. 471, 172 N.E.2d 304 (1961).
21. *Ibid.*

and there is nothing in the context to indicate that it was employed by the General Assembly in other than its general acceptation."[22]

The interpretation placed upon the statute in question in an earlier supreme court decision[23] provided fuel for the arguments of both the claimant and the administrator of the estate. In this earlier decision, emphasis had been placed in the syllabus and in the opinion on the concept of "reasonable diligence" in discovering the appointment of a personal representative, after having actual notice of the decedent's death. Three dissenting judges in the later case held that "reasonable diligence" had been shown, particularly in light of the fact that extensive negotiations were had, during the four-month period, with the insurance carrier of the decedent for settlement of the claimant's claim against the decedent. The dissenting judges apparently placed substantial weight on the fact that the same law firm apparently represented the estate *and* the insurance carrier. Although not clearly stated, it would seem that the dissenting judges felt that the representatives of the decedent and his insurance carrier, by silence on the subject, had permitted the claimant to err in not filing its claim within the requisite four months.

Judge Zimmerman, the fourth judge to vote for reversal of the lower court's decision, did so in a concurring opinion which indicated support of the "reasonable diligence" concept as providing possible exculpation from the stringency of the four-month filing limitation. However, Judge Zimmerman, in apparent disagreement with the factual analysis of the dissenting group, indicated that such diligence had not been shown in the instant case, as the claimant had ". . . slept on its rights . . . ."[24] and had shown a ". . . lack of due diligence."[25]

DISCLAIMER OF RIGHTS UNDER A WILL

In an interesting recent decision[26] a beneficiary under a will sought to disclaim and renounce his rights under the will. His action, according to a judicial "finding of fact," was motivated, at least in part, by a desire to ". . . prevent the United States Government from satisfying its lien"[27] against and out of the property which would pass to him under such will.

The federal district court first found that it must look to the law of Ohio in order to determine whether the putative beneficiary had any "property" to which the federal tax liens could attach. The court then

22. *Id.* at 474, 172 N.E.2d at 306.

23. *In re* Estate of Marrs, 158 Ohio St. 95, 107 N.E.2d 148 (1952).

24. Redifer Bus Co. v. Lumme, 171 Ohio St. 471, 476, 172 N.E.2d 304, 308 (1961) (concurring opinion).

25. *Id.* at 476, 172 N.E.2d at 307.

26. United States v. McCrackin, 189 F. Supp. 632 (S.D. Ohio 1960).

27. *Id.* at 634.

concluded that, under Ohio law, a beneficiary under a will is not bound to accept a gift under a will and that the motivation for a rejection of such gift is immaterial, unless there is fraud or collusion present. The United States attorney argued that the beneficiary's motive in renouncing his legacy was to defraud the United States and that such "fraud" made the renunciation improper and voidable by the court. The court, in rendering judgment against the United States, held that the actions of the beneficiary did not constitute a "fraud" under the terms of the applicable Ohio law, since there were no false representations made by the beneficiary to the United States Government which were relied upon by the latter.

CONSTRUCTION

When is an absolute bequest in fee simple not what it appears to be? In the case of *In re Will of Iles*[28] the will of the testatrix provided for the creation of a life estate for her husband in certain property providing that all such property remaining at the life tenant's death was to pass ". . . absolutely and in fee simple . . ." to the son of the testatrix. However, the testatrix added to the apparently unequivocal grant in the immediately succeeding clause the following language: ". . . in trust, with authority to my Executor . . . to pay to my son from the income or principal of my estate . . ." a monthly sum of $75, and such further amounts as might be needed for ". . . medical and hospital expenses." After the death of the son, the testatrix's will directed, ". . . if there is any residue from my estate, I give, devise and bequeath all of my estate to my heirs and next of kin."

The surviving husband elected to take against the will and thus accelerated what was left of the remainder interest in the son. Confronted with the question of the nature of the remainder interest, the executor filed an action for construction of the will and for a determination of heirship. The son of the testatrix argued that his remainder interest was that of full ownership in fee simple absolute.

The court agreed that, as a general rule, ". . . a fee, once given, cannot be cut down by other provisions of the will . . . a remainder cannot be engrafted upon a fee."[29] However, the court noted, a clause subsequent to a clause purportedly granting a fee simple estate may, in effect, "lessen" the previous apparent grant if the language used in the subsequent clause ". . . is as clear, plain and unequivocal as that in the first grant."[30]

The question of construction presented to the court was obviously

28. 175 N.E.2d 781 (Ohio P. Ct. 1960).
29. *Id.* at 783.
30. *Ibid.*

one dependent upon a determination of the "intention" of the testatrix. The court's concern with this "intention" was clear in its statement that "it was plainly the intention of the testatrix to create a spendthrift trust for the benefit of her son."[31] The court correlated its finding of intention with the relevant case law by finding that ". . . the language creating the trust here is as clear, decisive, plain, and unequivocal as that in the first grant."[32] It is submitted by this writer that the most important consideration supporting the court's decision was the close proximity of the "trust" language to the "fee simple" granting clause.

ADEMPTION

The testator, in the case of *Bishop v. Fullmer*,[33] had specifically devised the farm on which he resided. After making the will, the testator was adjudged incompetent and a guardian was appointed. Prior to the testator's death the guardian sold the realty which was specifically devised. At the death of the testator the sole asset of his estate was money remaining from the proceeds of the sale of the realty.

Instructions from the court were sought by the executor as to the proper distribution of the estate assets. The probate court, relying principally on the decision of the Ohio Supreme Court in the case of *Bool v. Bool*,[34] held that the specific devise had been adeemed, and that since the will had no general residuary clause, the estate assets should be distributed as if the testator had died intestate. The court declined to answer, as irrelevant, an interrogatory as to whether the testator was mentally competent to make a new will at the time his farm was sold by the guardian or at any time thereafter until his death.

The court of appeals reversed and remanded, directing the lower court to consider the testimony on mental competence and to answer the interrogatory submitted.[35] The reviewing court recognized that the general rule of ademption is: if the subject of a specific bequest is extinguished during life, such bequest is adeemed and no property will pass thereunder. However, the court indicated that, in its view, if the testator did not have testamentary capacity at the time of the sale by the guardian, an ademption should not result. The underlying question, not directly touched upon by the court, is the relevance of *intention* to the doctrine of ademption by extinction. Although the general rule leaves no room for inquiries as to intention, it would seem that such an inquiry is properly made in cases such as the *Bishop* case.

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31. *Ibid.*
32. *Ibid.*
33. 112 Ohio App. 140, 175 N.E.2d 209 (1960).
34. 165 Ohio St. 262, 135 N.E.2d 372 (1956).
35. Bishop v. Fullmer, 112 Ohio App. 140, 175 N.E.2d 209 (1960).