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Anthony A. Morano

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## Error in Omitting "or Die" After a Testamentary Gift of Income to Widow

Anthony A. Morano\*

WE LAWYERS STRIVE for professional perfection in an atmosphere of harassment. We are harried and hurried; yet, for all our meticulous attention to detail and reverent rechecking, most of us have experienced that overwhelming feeling of knee-buckling shame which accompanies the blushing realization that we have made an astoundingly trivial but costly mistake. While agonizing memory goads us to redoubled caution in drafting all legal documents, we are especially haunted by the fear of oversight in the preparation of wills.

We must dread not only error but also the consequent time consuming and extensive research required to determine the ramifications and effects of that error. The purpose of this essay is to consider the problems posed by a hypothetical omission of the words "or dies" from a typical testamentary gift of income to a surviving spouse during widowhood. While it is sincerely hoped that no one will have need of it, the writer wishes to record the products of his research and analysis just in case it may assist some blushing brother's future search for the consequences of that most painful of errors—the rare, unique mistake that no one before has made.

While any variation of circumstances will vary analysis, our hypothetical case is intended to provide a specific context for the general kinds of ramifications and considerations occasioned by such an error. In zeroing in on the issues raised by our particular case and by marshaling relevant authorities, we hope to furnish not only a general guide to assist in future cases, but also to increase the reader's appreciation of the intricacy which even the simplest error can generate.

Suppose the following situation were to arise in Ohio. Testator dies domiciled here survived by a wife and collateral relations. After devising the homestead to wife, the will directs the executrix-wife and a named co-executor to pay the income from the real and personal property to wife "as long as she remains unmarried." "Should she remarry," the executors are directed to sell the income-producing property and to distribute the proceeds equally among testator's collateral relations. The will contains no express, absolute and general residuary clause as such. Nor does it expressly provide for ultimate disposition of the income-producing property in the event of wife's death without having remarried. The only *clearly expressed* condition of the remainder to collaterals is wife's remarriage.

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\* Assistant Professor of Law, University of Toledo.

The executors are granted sole discretionary power of sale over said property without court approval.

### Problems Presented

The ultimate problem is to advise wife correctly concerning the effects of election to take under or against the will. That advice depends upon answers to the following issues:

1. Is the remarriage provision valid?
2. If wife dies without having remarried, who is entitled to the remainder?
3. What is the effect of the power of sale granted to co-executors?
4. If wife elects to take against the will, what would be the effect upon her interest in property passing to her under the will, especially the homestead?

#### Problem 1. Is the Remarriage Provision Valid?

The rule is elementary that conditions in general restraint of marriage violate public policy and are void. The reason is obvious. Society forbids monetary inducements unreasonably disruptive of the marital institution. A gift on condition that the donee never marry anyone is clearly unreasonable and void, so that the donee takes the gift free of the condition.

The remarriage provision in the present case is unlimited as to persons and duration, but is it a condition or a limitation? A well recognized distinction with regard to limitations is admitted (with some apparent distaste) by at least one Ohio authority. It is said in 56 *Ohio Jur.* 2d Wills,<sup>1</sup>

Although the policy of the law is as much violated by saying that a donee shall enjoy the gift only until marriage as it is by saying that the gift shall become forfeited upon the marriage of the donee, and the rule as to restraints upon marriage would seem logically to be just as much violated in the one case as in the other, and although the doctrine that the rule against restraints does not apply where an estate is limited until marriage has been criticized upon the ground that whether the restraint is by limitation or condition is, in the vast majority of cases, the effect of accident, depending on the turn of expression used, it is nevertheless so firmly established that even the courts which have criticized it have not thought proper to decline to follow it. The distinction is therefore universally recognized that while a condition in absolute restraint of marriage is invalid, a limitation until marriage is good; or, as it is sometimes put, marriage may be the ground of a limitation ceasing or commencing.

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<sup>1</sup> Section 729 at 243-44.

An old Ohio decision has given effect to a provision which generally restrained remarriage of a widow. The case is *Luigart v. Ripley*.<sup>2</sup> There the testator's will created a life estate for his wife with remainder to his children upon her death or remarriage. She elected to take under the will, remarried, and claimed dower.

The court's opinion was concerned mainly with whether she might have dower in addition to the life estate. It held that she was not entitled to dower because the will failed to provide specifically that the life estate was given in addition to dower. By her election to take under the will, she impliedly relinquished her dower interest.

The court further decided, without discussion, that wife lost her life estate upon her remarriage. Language such as "so long as" or "until" is generally held to be language of limitation rather than condition. In any event, there is ample authority in accord with *Luigart* to the effect that a general restraint on remarriage of a widow is valid.<sup>3</sup>

Although authority to the contrary may be found,<sup>4</sup> recent Ohio cases recognize the validity of such provisions, at least implicitly, and the conclusion is inescapable that they are valid in this state.<sup>5</sup>

Restraint on a second marriage is not so repugnant to the law's policy when weighed against the judicial desire to effectuate a decedent's intention to save his property for his family and to protect it against enjoyment by a stranger—the widow's second spouse. But we must return to this problem later.

## **Problem 2. If Wife Dies Without Having Remarried, Who Is Entitled to the Remainder?**

Although research has disclosed no Ohio decision involving this precise problem, the Supreme Court of Tennessee, in *Putnam v. Robertson*,<sup>6</sup> has held that where a devise was made to a widow for life, or widow-

<sup>2</sup> 18 Ohio St. 24 (1869).

<sup>3</sup> See Am. Jur., Marriage, Section 263 and citations at 364, n. 11. A host of cases which implicitly sustain such provisions are collected in annotated form in 22 A.L.R. 437, 454, supplemented in 68 A.L.R. 507 and 171 A.L.R. 649, all of which support the statement in 56 Ohio Jur. 2d, Wills, Section 730 at 244:

The majority of the cases sustain the validity of a condition in restraint of the second marriage of a widow, whether the widow is the surviving spouse of the testator or some other decedent.

And the Restatement Trusts 2d (1959), Section 62 provides in part:

g. Restraining Marriage. A provision in the terms of the trust may be held invalid on the ground that its enforcement would tend to restrain the marriage of the beneficiary. Thus, a provision in the terms of the trust divesting the interest of a beneficiary if he or she should ever marry anyone may be invalid. *Such a provision with respect to the remarriage of a widow, however, is valid . . .* (Emphasis added.)

<sup>4</sup> See, e.g., *Crawford v. Thompson*, 91 Ind. 266, 46 Am. Rep. 598 (1883).

<sup>5</sup> See *Kuhn v. Kuhn*, 111 Ohio App. 304, 168 N.E. 2d 582 (1960) and *Bowman v. Bowman*, 3 Ohio Misc. 161, 210 N.E. 2d 920 (1965) and authorities cited therein.

<sup>6</sup> 140 Tenn. 456, 205 S.W. 309 (1918).

hood, with remainder to testator's daughter, should the widow remarry, the daughter took the remainder on the widow's death without having remarried, even though the words "or death" were omitted from the conditions expressed in the will.

The reasoning is this: the will expressly limits the widow's gift to a life estate, so her death, even if unmarried, will terminate that estate without an express provision to that effect, because it is implicit in the nature of the estate granted. The event of her remarriage merely provides another contingency upon which her estate may terminate before her death. The provision for remaindermen in that earlier event is not to be read as separate and apart from the basic life estate provision. Rather, it is to be read as part and parcel of the basic life estate provision. It is to be viewed as enlarging the rights of the remaindermen by imposing a contingency upon which they may sooner enjoy their estate.

This analysis is further aided by the presumption against intestacy—that is, the presumption that a testator intends to dispose of all his interest in property mentioned in his will, rather than have a partial intestacy as to it.

The *Putnam* court contends that it merely follows a settled rule of English law on this point and cites many English authorities. The court further claims that earlier American authorities and writers are in accord with the English rule, but, apparently, *Putnam* stands alone in America in deciding this precise point.<sup>7</sup>

Now the question is whether Ohio courts could and should follow *Putnam* in light of established principles.<sup>8</sup> At the outset, it is noted that Ohio clearly recognizes the presumptive rule that a testator intends to dispose of every interest in property mentioned in his will. Ohio Revised Code Section 2107.51 so provides as to a devise of real estate "unless it clearly appears by the will that the testator intended to convey a less estate." As to personalty, a judicial presumption against intestacy is equally available.<sup>9</sup>

Can it be said that the will here clearly expresses an intention of the testator to convey less than a complete remainder after wife's life interest?

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<sup>7</sup> Shepard's citations indicate only one other citation of *Putnam*, and that by the same Tennessee court on another point. No case other than *Putnam* is cited in support of the following statement in 96 C.J.S. Wills (1957), Section 726 at p. 115:

Where an estate is given for life and with a gift over on the marriage of the life tenant, the gift over may be effective on the death as well as the marriage of the first taker. (Emphasis added.)

The 1967 pocket supplement indicates no change.

<sup>8</sup> Any action to construe a will must be brought in compliance with Ohio R. C. 2107.46 and related requirements indicated in 56 Ohio Jur. 2d Wills, Section 701.

<sup>9</sup> See 56 Ohio Jur. 2d Wills, Section 575.

When in doubt, must an Ohio court construe this will to mean that the collateral remaindermen were intended to take their estate in the event of *death or* remarriage of wife? The presumptive rule indicates an affirmative answer, but the problem is that such a construction would seem to require "writing in" language in violation of the ancient maxim that a court may not reform a will. The Statute of wills requires *testator* to write his own will. The court may not do it for him.<sup>10</sup>

Having stated that basic rule, it would be futile to attempt to analyze the myriad exceptions and confusion of principles employed by the legions of courts which have evaded it. Many legalistic devices have been employed, the most curious of which has been the adoption of that imperceptibly vague distinction between latent and patent ambiguities and the notion that extrinsic evidence may be heard to resolve latent but not patent ambiguities, since the court may construe the will without technically "writing in" or changing the provisions as written where the ambiguity is latent (not apparent on the face of the will).<sup>11</sup>

In the instant case, although an ambiguity may be patent on reading the will, it may be argued that no reformation or "writing in" is required. The language in the will which creates a life interest in income imports the testator's intention that wife's estate is to terminate at her death. No other language need be inserted to that effect. That the remaindermen are intended to take in that event, as well as upon remarriage, may result solely from an interpretation of the words actually used in the will, by reading the provisions as a whole without the need for *any extrinsic evidence*, so this case is not within that area.

Without greater detail then, it is enough to say that Ohio cases recognize the anti-reformation rule, and that they have exercised wide latitude and leniency in construing wills. Since each will is factually peculiar, precedents are rarely of value. Indeed, rules and principles fall to the ultimate goal which is to ascertain the testator's intention. This broad, unhampered, liberal view is frequently enunciated and acted upon by Ohio courts.<sup>12</sup>

<sup>10</sup> See 56 Ohio Jur. 2d Wills, Section 537.

<sup>11</sup> For an example of this kind of difficulty, see *Nicholl v. Bergner*, 76 Ohio App. 245, 63 N.E. 2d (1945), where the will provided a gift to one Edward Bergner. There were two Edward Bergners, a nephew and a brother of testatrix. The issue was which of them was intended.

It was held that the ambiguity was latent so the court might hear extrinsic evidence proving which Edward was intended. The court could do so without adding to or deleting language from the will since the "Edward Bergner" contained in the will was technically sufficient to describe either one. Fiction is obvious because on deciding which Edward was intended the court *actually* would read into the will either the words "my brother" or "my nephew."

<sup>12</sup> See *Kuhn v. Kuhn*, 111 Ohio App. 304, 168 N.E. 2d 583 (1960); *Merrick-Rippner*, Ohio Probate Law (2d Ed.) at 147; 56 Ohio Jur. 2d Wills, Sections 508 and 509.

For a rapid view of the see-saw of rule rigidity and leniency and of the mass of confusion and contradiction, see 56 Ohio Jur. 2d Wills, Sections 531-563.

The ample Ohio precedents for leniency are cited in 56 *Ohio Jur.* 2d. Wills, Section 570, the text of which reads as follows:

Although there are dicta in Ohio to the contrary, in the construction of a will, *words or clauses may be transposed, supplied, or omitted, when warranted by the will.* The act of supplying, transposing, or changing words or clauses in a will, however, is a strong measure and justified only where it is clear on the face of the will that the testator has not accurately or completely expressed his meaning, and where it is also clear what words have been omitted which should be supplied. The facts of a particular case may be such that the court will not add words or phrases. (Emphasis added)

Now the writer cannot resist blunt advocacy. The general scheme of the instant will indicates testator's general intent that the wife was to have only a life estate and that his blood relatives were to take the remaining assets. The plan here is usual, ordinary, and obvious. Wife is to have full benefit of the property during her life, or so long as she has no second spouse to support her. Thereafter, the unexpended estate which remains is intended for testator's own blood relations, the natural objects of his bounty.

A reading of this will in light of common legal practice and experience tends strongly to indicate an unintentional omission of the words "or die" following the words "should she remarry." Such words are almost universally intended by testators, and they are almost always included as part and parcel of remainder provisions of this kind. Indeed the universality of such inclusion is so vast that hours of research have disclosed only one American case deciding the effect of their omission, and that in Tennessee in 1918.

Obviously the writer's view is that an Ohio court could and should construe this will to provide a remainder to collateral relations in event of wife's death without having remarried, but the rest of our discussion on this point assumes the possibility that an Ohio court may take the stricter view and reach the conclusion that the will is clear and unambiguous, and that it simply fails to dispose of the remainder in the event of wife's death without remarriage.<sup>13</sup>

Such a conclusion should result in a partial intestacy as to the reversionary interest retained by testator in the event wife dies without marrying again. That reversionary interest should pass as intestate property to wife as sole intestate heir of a testator who leaves no surviving parents or issue.<sup>14</sup>

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<sup>13</sup> There is at least dicta to the effect that an Ohio court may not supply omitted language but may only construe what is written by testator. *Nelson v. Minton*, 46 Ohio App. 39, 14 Ohio Law. Abs. 679, 187 N.E. 576 (1933); *Moore v. Dekebach*, 46 Ohio App. 381, 188 N.E. 880 (1933).

<sup>14</sup> Ohio Rev. Code Section 2105.06(d).

Should wife elect to take the provisions made for her under the will, would she thereby relinquish her rights as sole heir to all intestate property including the aforementioned residuary interest? Such was the holding of *Jones v. Webster*.<sup>15</sup>

But the *Jones* case was decided under a former statute<sup>16</sup> which provided:

If the surviving spouse elects to take under the will, such spouse *shall be thereby barred of all right to an intestate share of the estate, and shall take under the will alone*, unless it plainly appears from the will that the provision therein for the spouse was intended to be in addition to an intestate share. But an election to take under the will does not bar the right to remain in the mansion of the deceased consort, or the widow to receive one year's allowance for the support of herself and children, as provided by law, unless the will expressly otherwise directs.

The current statute<sup>17</sup> reads:

If a surviving spouse elects to take under the will, such spouse shall be barred of all right to an intestate share of the property passing under the will and shall take under the will alone, unless it plainly appears from the will that the provision therein for the spouse was intended to be in addition to an intestate share. *Such election shall not bar the right of the surviving spouse to an intestate share of that portion of the estate as to which the decedent dies intestate.* Unless the will expressly otherwise directs, such election shall not bar the right of the surviving spouse to remain in the mansion of the deceased consort, or to claim and receive the property or money in lieu thereof, which is not an asset of the estate for administration as provided by section 2115.13 of the Revised Code. Nor shall such election bar the right of the widow to receive the allowance for the support of herself and children provided by section 2117.20 of the Revised Code, unless the will expressly otherwise directs. (Emphasis added)

Surely this statute overrules *Jones*. Any property not mentioned in the will is wife's as sole intestate heir.

Such an interest in wife, together with her life estate and her power of sale as co-executrix, taken all together, would constitute a title in her large enough to be fairly described as a fee simple defeasible in the event of her remarriage, but absolute upon her death without having remarried, so that she might dispose of it by her will to the total exclusion of testator's collateral blood relations, notwithstanding the provisions of the Ohio Half and Half Statute.<sup>18</sup>

It is submitted that this conclusion would result in a full cycle return to the policy problem of restraining marriage considered *supra* in

<sup>15</sup> 133 Ohio St. 492, 14 N.E. 2d 928 (1938).

<sup>16</sup> Ohio Gen. Code Section 10504-61.

<sup>17</sup> Ohio Rev. Code Section 2107.42.

<sup>18</sup> Ohio Rev. Code Section 2105.10 does not apply to testators.



Problem 1. A judicial refusal to interpret this will would provide the widow strong inducement not to marry, for in doing so, she would lose not only her life estate but also the right to direct disposition of the fee at her death. Yet, where such remarriage provisions were held valid in Ohio, the widow had only a life estate to lose, and the obvious policy sustaining validity in those cases was to save assets for the testator's family.

But here, if widow has the reversion, she is not only offered far greater inducement not to marry, but also this would be done without the saving grace of thereby affording greater protection to testator's family, since the very essence of the inducement not to marry is itself the right of the widow at her death to divert the property from the family.

### Problem 3. What Is the Effect of the Power of Sale Granted to the Co-Executors?

This issue is closely related to the discussion in Problem 2, *supra*, for it may be contended that the grant of a life estate together with a power of sale in the life tenant yields a grant of the fee, since the power of sale is inconsistent with a mere life estate and therefore must have been intended to enlarge it.

Fortunately the Ohio cases on this point appear to be dispositive of the problem. In *Bishop v. Remple*,<sup>19</sup> testator left his wife a full power to convey. The supreme court said that it was unnecessary to label the wife's estate a life estate or fee. It was sufficient to say that it was not merely a life estate. The power to sell was inconsistent with a naked life estate, but if the wife failed to sell the fee during her life, the remaindermen were entitled to all of it. However, if she sold all or part of it, she could defeat remaindermen's rights in the portion sold, since their rights attached at her death to any property "that may then remain."

Subsequent explanation was made by the Ohio court in *Tax Commission v. Oswald*.<sup>20</sup>

A power is not property, but a mere authority, and an absolute power of disposal is not inconsistent with an estate for life only. The gift of such power will not enlarge the estate previously given but confers an authority in addition thereto. One may have a life estate and yet be empowered to convey an estate in fee simple.

Combinations of life estates and powers of sale were granted by the wills construed in *Kuhn v. Kuhn*<sup>21</sup> and *Bowman v. Bowman*.<sup>22</sup> Both

<sup>19</sup> 11 Ohio St. 277 (1860).

<sup>20</sup> 109 Ohio St. 36, 51, 141 N.E. 2d 678, 682 (1923).

<sup>21</sup> 111 Ohio App. 304, 168 N.E. 2d 583 (1960).

<sup>22</sup> 3 Ohio Misc. 161, 210 N.E. 2d 920 (1965).

cases involved wills of life estates to surviving spouses together with powers to sell the property. Each held that such powers of sale did not enlarge the estate of the surviving spouse to a fee simple. The spouse took the life estate and the power and the remaindermen retained the *right to any balance remaining at death of the life tenant*.<sup>23</sup>

There is a division of authority on this point and cases contra to Ohio may be found, but where, as in the instant case, the wife's power of sale is limited in that she requires co-executor's consent, nearly all courts refuse to hold that she has a fee.<sup>24</sup>

But in the present case, if wife obtains co-executor's consent to sell, what is to prevent her from selling the estate assets prior to remarriage, thereby defeating the remaindermen who are entitled to distribution of proceeds from the sale of "all my remaining assets, including the building"?

Has not testator here provided a means whereby wife may defeat the expectant estates of the remaindermen as contemplated by Ohio Revised Code, section 2131.06, which reads:

When expectant estates defeated.

An expectant estate cannot be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizen, forfeiture, surrender, merger, or otherwise; but an expectant estate may be defeated in any manner which the party creating such estate in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation.?

The will imposes no limit on the rights of co-executors to sell. In *Bishop*<sup>25</sup> the court insinuated that the right may be dependent on wife's need for support and limited by that necessity, although no such limitation was inserted in the will provision there. Here it may be implied from the total testamentary scheme. Further, it may be argued forcefully that the power of sale clause was inserted solely to facilitate the performance of executors fiduciary duties of management of the assets, their sale and resale having been contemplated by testator as a necessary incident to the production of income and preservation of the fund.

Thus, as in a trust, the remaindermen have no interest in assets sold, but they retain their interest in the proceeds of such sales, if not disposed of for the life tenant's permitted purposes.<sup>26</sup> Surely where the wife's gift is of income only, she has no right to sell and consume the corpus apart from that amount necessary for her support and comfort. The power to sell is not a power to waste.

<sup>23</sup> See also the Ohio authorities cited in *Bowman* at 165-166 of 3 Ohio Misc. and 924 of 210 N.E. 2d.

<sup>24</sup> See Page on Wills (Bowe-Parker Revision 1961), Section 37.31.

<sup>25</sup> *Supra* note 19.

<sup>26</sup> Page on Wills, *supra* note 24, Section 37.37 at 670.

**Problem 4. If Wife Elects to Take Against the Will, What Would Be the Effect Upon Her Interest in Property Passing to Her Under the Will, Especially the Homestead?**

By reason of Ohio Revised Code Section 2107.39, a surviving spouse who elects to take against the terms of a deceased spouse's will may take no more than one half of the net estate, and the balance of the net estate shall pass to the deceased spouse's other heirs as if the surviving spouse had predeceased him.

The term "net estate" as used in the statute means so much of the testator's property as remains for distribution after payment of the surviving spouse's statutory allowances, the decedent's debts, funeral expenses, and the costs of administration. The allowance for a year's support for a widow and children and one for property which a surviving spouse may take free from administration . . . are to be deducted before determining the share to be taken by a surviving spouse. . . .<sup>27</sup>

She takes her share by way of inheritance as though it came to her from her deceased husband as an intestate,<sup>28</sup> and she obtains an undivided interest in fee in all the real and personal property in the estate.<sup>29</sup>

So it appears that the effect of an election against the will here would be to attach wife's undivided one half interest to all the assets of the estate, including a one half interest in the fee to the homestead. The will is not otherwise affected, and specific legacies will pass as stated in the will "except so far as may be necessary to satisfy the spouse who refuses to take under the will."<sup>30</sup>

Even contingent-remainders created in the will are accelerated by an election to take against the will.<sup>31</sup>

In summary then, the effect of an election against the will would be:

1. Wife would take an undivided one half interest in all net real and personal property, testate and intestate.
2. All specific legacies to others would be paid in full, if possible.
3. All remainders, even if contingent, would be accelerated.
4. The remaining one half interest in any intestate property would pass to testator's other heirs as if wife had predeceased him.<sup>32</sup>

<sup>27</sup> 56 Ohio Jur. 2d Wills, Section 842 at 358-59.

<sup>28</sup> See *Winters National Bank v. Riffe*, 2 Ohio St. 2d 72, 206 N.E. 2d 212 (1965).

<sup>29</sup> See *Barlow v. Winters National Bank & Trust Co.*, 41 Ohio Abs. 457, 59 N.E. 2d 212 (1944).

<sup>30</sup> See 56 Ohio Jur. 2d Wills Section 840 at 358.

<sup>31</sup> *Funkhouser v. Dorfmeier*, 95 Ohio Abs., 140, 200 N. E. 2d 266 (1963).

<sup>32</sup> On this last point, see 56 Ohio Jur. 2d Wills, Section 842, for discussion of some conflict in the Ohio decisions.

### Conclusion

Analysis of the foregoing hypothetical yields the conclusion that its problems suggest the simple solution that wife be advised to elect to take against the will. Uncertainty and litigation are thereby avoided, and at the same time, equitable distribution of testator's property is effectuated. That solution may ameliorate future difficulty occasioned by drafting oversights which any of us may make.

If the writer has accomplished nothing more, it is hoped that the reader has been better apprised of the complexity of difficulties which may flow from drafting oversights, however human and understandable.

Of course, the best solution is to continue close attention to detail. The drudgery of proofreading remains the surest safeguard against error and consequent injury to professional pride, to say nothing of client's interests. As anyone who has done it can attest, that drudgery is negligible compared to greater task of research and analysis of novel and unsolved problems in an intricate legal field.