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Wills and Estates

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WILLS AND ESTATES

Jurisdiction of Probate Court

In In re *Edward's Estate*[1] the former executors of the estate, after the estate was closed, sought a declaratory judgment. They asked that an heir at law of the deceased who had, they alleged, not been served with notice of the application seeking probate of the will of the deceased be held estopped from making any claim objecting to the probate of the will of the administration of the estate. From a final order of the probate court overruling the application of the executors, the executors appealed. The court of appeals held that by virtue of the heir's conduct which indicated an intention to waive any objection to probate or administration (he executed a waiver when the matter was brought to his attention) and his complete knowledge of all proceedings (he testified that to the best of his recollection he was in fact served with notice) and the absence of any claim of fraud, the heir is estopped from asserting any adverse claim, and the probate court, having equitable jurisdiction in the administration of estates and the power to entertain a declaratory judgment action to determine the rights of persons interested in such a proceeding, had the power to render such judgment.

The question of whether a probate court, after a finding that property should be excluded from an inventory, has authority to direct the administrator to redeliver it to the owner was involved in *Hoover v. Hoover*.[2] The court of appeals held that the probate court possesses the authority to determine whether inventoried property belongs to an exceptor to the inventory. If the property is found to belong to him, the court has no authority to direct its redelivery to the exceptor-owner either upon a motion to vacate the approval of the original inventory or upon exceptions to the amended inventory. While the decision appears to be a correct interpretation of the powers of the probate court the court's lack of authority in such a situation seems undesirable.

Presentation of Creditors' Claims

It was held in In re *Gogan's Estate*[3] that the appellant who was confined to a county jail was a "person in captivity" and therefore included within Ohio General Code Section 10512-2 defining legal disability. Furthermore, the probate court was held to have abused its discretion in dismissing the appellant's petition for authority to file his claim as a creditor with the administrator more than four months after his appointment. Although the permissive word "may" is used in Section 10509-134, the dis-

[1] 106 N.E.2d 87 (Ohio App. 1951).
[2] 90 Ohio App. 148, 104 N.E.2d 41 (1950)
[3] 108 N.E.2d 170 (Ohio App. 1951).

missal of the appellant's petition by the probate court was an abuse of discretion because of the clear showing of legal disability on the appellant's part, namely, confinement in the county jail for murder (a non-bailable offense) during the four-month period for presentation of claims.

However, in view of the fact that the appellant while in the county jail had executed and filed in the probate court a declination to act as executor and had renounced any claim to the estate, the position taken by the dissenting judge seems preferable.

The question of whether an administratrix, appointed on the assumption that she was the sole heir of the decedent and a creditor of the estate, is required as a creditor to present her claim to the probate court and serve notice thereof on herself as sole heir, pursuant to Ohio General Code Sections 10509-106 through 10509-108, was presented in *Haag v. Meffley*.[4] Subsequent to the appointment under this assumption it was found that she was not an heir, because not legally adopted, and she resigned. An administrator *d. b. n.* was appointed and the court set a four-month period for presentation of claims to him. The plaintiff, the former administratrix, presented her claim for the first time to the administrator *d. b. n,* within four months after his appointment. After the claim was rejected, the plaintiff brought suit in common pleas court. The administrator *d. b. n.* demurred on the ground that the claim was not timely filed. The court sustained the demurrer and dismissed the petition. On appeal it was held that since the law does not require a claimant to do a vain act the mandatory provisions of statutes are softened when their application would run contrary to reason and common sense. The court reasoned that since the plaintiff presented her claim within four months after the administrator *d. b. n.* was appointed as required by the probate court order her presentation was timely and the demurrer was improperly sustained.

In In re *Fahle's Estate*[5] the court held that in the absence of evidence that a creditor of a decedent had read a notice of the death or the appointment of an administrator of the decedent, proof of publication of such notice was insufficient to establish "actual notice" thereof as the phrase is used in Ohio General Code Section 10509-134. This section prescribes the conditions under which a claimant who has failed to present his claim within four months may have the right to file after such period has expired, one of which is that the claimant did not have actual notice of the decedent's death or of the appointment of the administrator in sufficient time to present his claim within the prescribed time.

The non-claim statute, Ohio General Code Section 10509-112, was held

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[4] 89 Ohio App. 471, 103 N.E.2d 37 (1951).

[5] 90 Ohio App. 195, 105 N.E.2d 429 (1950).

applicable to a novel fact situation in *Buydden v. Mitchell.*[6] The vendor, alleging the deceased purchaser's default, brought an action against the administratrix of the purchaser's estate, seeking rescission of a land contract and also the right to retain all payments made by the purchaser as liquidated damages in accordance with the terms of the contract.

While not necessary to the decision, since the purchaser was found not in default, the court, nevertheless, held that the vendor could not rescind without restoring the purchaser's consideration except by relying on the terms of the contract permitting the vendor to keep all payments, and that such reliance brought the vendor within Section 10509-112 which requires presentation of the claim to the administratrix, an act which the vendor had not performed.

Construction of Will

That the wills draftsman should always tickle his mental file to make certain that he has not run afoul of the doctrine of *ejusdem generis* is illustrated in *Snodgrass v. Snodgrass*[7] where it was held that a bequest of "all of my personal property and personal effects, such as furniture, household goods and jewelry," under the doctrine of *ejusdem generis,* limited the property passing thereunder to such items as were particularly enumerated, and other items of personal property not included therein (such as the testator's automobile, stock, checking account and proceeds of insurance policies) passed under the residuary clause of the will.

Execution of Wills

Two interesting cases involving the execution of wills were reported in 1952. In *Borgman v. Dillow*[8] both witnesses testified that although they were asked to witness the testatrix's will, the testatrix did not sign the will in their presence, they were not told by her that she had signed it, and they could not see whether the testatrix's signature was on the instrument when they signed it since only the attestation clause was visible to them. The probate court refused to probate the instrument. The court of appeals in affirming the decision stated that in the absence of proof tending to show that the testatrix had signed the instrument prior to the witnesses' subscription the instrument was not entitled to probate.

While the result reached by the court seems correct the writer submits that even had the testatrix's signature been on the instrument at the time the witnesses signed it still should not have been entitled to probate, for while Ohio General Code Section 10504-3 permits a testator to acknowledge his signature to attesting witnesses, how can one acknowledge that a signature is his if such signature is not visible?[9]

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[6] 102 N.E.2d 21 (Ohio App. 1951).

[7] 90 Ohio App. 441, 107 N.E.2d 155 (1951).

The second execution case is *Roosa v. Wickward.*[10] In that case one of the attesting witnesses was dead at the time the will was offered for probate. The surviving witness testified that the testatrix informed her that a paper lying on a table was the testatrix's will and asked her to sign the will, but the testatrix did not sign the will in her presence, and she was, as a result of the way in which the instrument was folded, unable to see, and did not know, whether the testatrix's signature was on the instrument.

The surviving witness further testified that she and the deceased witness did not sign in the presence of each other but that the deceased witness' signature was on the instrument when the surviving witness signed. The probate court refused to admit the instrument to probate on the ground that the purported will was not executed according to law. In reversing, the court of appeals stated: "A presumption of due execution of a will arises from the fact of attestation, reciting an observance of all statutory requirements, in the absence of a contest as to the genuineness of the signature of testator and witnesses," and that proponents sustained the burden of making a prima facie case in favor of the validity of the will.

The case, both prima facie and upon close scrutiny, appears incorrectly decided.[11] While it is true that in the absence of proof to the contrary a presumption of due execution arises from the fact of attestation, where there is *only* such contrary evidence the presumption of due execution does not arise, or if it does it is rebutted, for the due execution of a will cannot be assumed in the face of only positive evidence to the contrary merely because it purports to be the will of the testator and the attestation is in due form.[12]

Inheritance Rights of An Adopted Child

Always interesting, generally confusing and never quite settled are the inheritance rights of an adopted child. *Third National Bank & Trust Co.*

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[8] 105 N.E.2d 69 (Ohio App. 1951).

[9] Attention is called to the case of Keyl v. Feuchter, 56 Ohio St. 424, 47 N.E. 140 (1897), where an interpretation of a partly analogous execution statute was made in a somewhat similar fact situation. The extent to which the case is applicable to the problem of the visibility of the testator's signature seems to be one on which reasonable minds may well differ, since the issue of publication of the will as well as acknowledgment of the testator's signature was involved. See Note, 4 WEST. RES. L. REV. 158 (1952).

[10] 90 Ohio App. 213, 105 N.E.2d 454 (1950).

[11] The court failed to mention Keyl v. Feuchter, 56 Ohio St. 424, 47 N.E. 140 (1897), where in a similar fact situation the supreme court upheld a refusal to admit the instrument to probate. Although, in the *Keyl* case the court did not discuss the prima facie issue, since the proponents at that time, as now, were required only to prove a prima facie case to entitle the will to probate, it is assumed that the court was aware of the burden and felt that such burden had not been sustained.

[12] For a statement to this effect, see Haynes v. Haynes, 33 Ohio St. 598 (1878).

v. Davidson[13] involved an action to determine whether a grandchild adopted after the death of the testatrix was a beneficiary of a testamentary trust established by the testatrix in a codicil to her will, wherein she bequeathed property to " each of my then living grandchildren, whether born prior or subsequent to my decease. " At the time of the execution of the codicil and at her death testatrix had four grandchildren, all of whom were blood children of her daughter. Both the probate court and the court of appeals decided in favor of the adopted child. In reversing and remanding the judgment the supreme court stated: "In view of the facts that in bequeathing or devising property by will it is presumed that a testator who has not been a party to any adoption proceedings prefers his own blood relatives to strangers; that at the times of the execution of the tenth codicil and of testatrix's decease neither of her children had adopted any children; that in such codicil she made her grandchildren direct beneficiaries and not beneficiaries through her children; and that she provided for her grandchildren *born* before or after her decease, as distinguished from *adopted,* we have come to the conclusion that she intended her grandchildren named in the tenth codicil to be those who were born to her children and not those adopted by them."[14]

The adopted child prevailed, however, in *Tiedtke v. Tiedtke.*[15] The testator, after leaving a life estate to his daughter, provided that: "In case of the death of my daughter leaving no children, then such trust estate shall be divided among my heirs at law." The testator's daughter was unmarried at the time of the testator's death in 1924. She married later but died leaving only an adopted child surviving her. Both the probate court and the court of appeals held in favor of the adopted child. The supreme court in affirming the judgment stated: "Where in providing for his 'heirs at law' after a life interest, a testator indicates his intention that such heirs should be determined at the date of the expiration of such life interest, then the statutory law in effect at the expiration of such life interest should be applied in determining such heirs of the testator unless by the provisions of the will or surrounding circumstances a contrary intention is indicated, even though such statutory law will permit an adopted child of the testator's daughter to take and the statutory law in effect at the

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[13] 157 Ohio St. 355, 105 N.E.2d 573 (1952).

[14] *Id.* at 366-367, 105 N.E.2d at 579.

[15] 157 Ohio St. 554, 106 N.E.2d 637 (1952).

[16] *Ibid.* Syllabus 2.

[17] 108 N.E.2d 88 (Miami Com. Pl.), *aff'd,* 108 N.E.2d 101 (Ohio App. 1952).

[18] OHIO GEN. CODE § 10504-73.

[19] 158 Ohio St. 54, 107 N.E.2d 120 (1952).

[20] *Id.* at 66, 107 N.E.2d at 126.

testator's death would not have permitted such adopted child to take and even though such adopted child was not either born or adopted until long after the testator's death."[16]

Contract to Devise Property

In re *Barnes' Estate*[17] involved a rather complicated fact situation whereby a husband and wife, intervivos, made an equal division of their property among themselves and orally agreed to make mutual wills and to do whatever else was necessary to assure that the first decedent's property would pass to the survivor with full power to consume and at the survivor's death the unconsumed estate would pass to the decedent's brothers and sisters. Mutual wills to this effect were made. The parties, however, had acquired title to certain realty by a joint and survivorship deed so that when the husband died the surviving wife took title to the realty as a result of the deed and not the husband's will, the effect of which was to remove the realty from the control of the husband's will in regard to the matter of unconsumed property. As a result their scheme of equal division, in so far as the realty was concerned, was frustrated when the surviving wife died possessed of such realty for by her will it passed not to the husband's heirs, as both had by their oral agreement intended, but to the wife's heirs. Exceptions to the inventory of the wife's estate were filed by the husband's heirs. The common pleas court held that the part performance of the oral contract on the part of the husband removed it from the ban of the Statute of Frauds and that a trust would be impressed upon the property in accordance with the agreement of the husband and wife.

Effect of Lapse of Residuary Bequest or Devise

The question of to whom property passes upon the lapse or ineffectiveness of a residuary bequest in a situation where the residuary legatees are not members of a class, and to which the "anti-lapse" statute[18] is not applicable, was presented to the supreme court for the first time in *Commerce National Bank of Toledo v. Browning.*[19] While the great bulk of numerical authority holds that the lapsed portion passes as intestate property on the theory that there can be no residue of a residue, the court in the *Commerce* case cast their lot with the minority, stating that: " if a bequest or devise of a part of the residue lapses or is otherwise ineffective, that part of the residue, except as provided by statute and in the absence of provisions of the will or surrounding circumstances justifying the conclusion that the testator expressed a different intention, will ordinarily pass under such residuary provisions of the will to any other parties entitled thereunder to portions of the residue, instead of passing as intestate property."[20] The position taken by the court seems desirable since it probably corresponds in the majority of instances to the wishes of the testator.