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Wills and Decedents' Estates

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Discretion of Trustee in Expending Funds for Support and Education of Minor Beneficiary

In *Caswell v. Lenihan*[2] defendant was a trustee under a trust which provided that income from the trust was to be used by the defendant as he may deem necessary, or advisable properly to provide for the care, support, education, and comfort of the plaintiff; and that any excess income not used for such purposes was to be accumulated until plaintiff reached 21 years of age, at which time such accumulations were to be paid to plaintiff. The trust further provided that the defendant trustee should be absolutely protected as to expenditures for the care, support, etc., of the plaintiff beneficiary.

During the minority of the plaintiff the entire income received by the defendant was paid over by him to the plaintiff's mother, with whom plaintiff lived most of the time, although a divorce decree had awarded custody of plaintiff to her father. Plaintiff's mother, during the period such moneys were paid to her, was having a difficult time maintaining her home.

In an action for an accounting from the defendant, plaintiff claimed that the payments made by defendant to plaintiff's mother were a diversion of the trust income for the benefit of the mother, for which defendant should be held to account to the plaintiff. The Court of Common Pleas of Cuyahoga County entered judgment for the defendant. The court of appeals reversed the judgment,[3] and the case was taken to the Supreme Court upon the allowance of a motion to certify the record. In holding that such payments were proper, the Supreme Court stated that where, as in the present case, a fiduciary is given the widest possible discretion as to the expenditure of funds entrusted to him for the benefit of another, and he expends such funds in good faith and in a manner related to the terms of the trust, there is no diversion of those funds because other persons may think that the funds could have been more wisely and judiciously expended.

ROBERT C. BENSING

WILLS AND DECEDENTS' ESTATES

Administration

Order of Probate Court Discharging Surety Prior to Final Accounting May Be Set Aside

The case of *In re Estate of Gray*[1] recognized that a probate court has gen-

[1] 163 Ohio St. 539, 127 N.E.2d 385 (1955).
[2] 163 Ohio St. 331, 126 N.E.2d 902 (1955).
[3] 120 N.E.2d 317 (Ohio App. 1954).

eral legal and equitable power to vacate a judgment which it had no jurisdiction to make. In this case an administrator c.t.a., d.b.n. was appointed in 1943 after the death of the executor who had been appointed in 1928. The executor had filed no final account. When the administrator learned of three items totalling $1,950 which the executor had not accounted for, he obtained from the probate court an order authorizing him to compromise this claim for $1,950 and discharging the executor's surety company from further liability upon payment of this amount. Later the administrator learned of two additional items totalling $4,726.10 and upon petition to the probate court had its prior order set aside. The surety company protested in vain against the setting aside of the order which discharged it from further liability. The Ohio Supreme Court held the first order was improper because the representative of the deceased executor had not filed a final account, and therefore the probate court had no jurisdiction to discharge the surety from further liability.

Filing Claim After Four Months Period

A creditor was informed by a person who had no connection with the deceased's estate that decedent's widow had been appointed administratrix. After the creditor filed its claim with decedent's widow, the attorney for decedent's administrator wrote the creditor that he was attorney for decedent's estate. This letter did not disclose the name of the administrator. The petition of the creditor for authority to file its claim after the expiration of four months from the appointment of the administrator was denied by the probate court. The court of appeals in the case of *In re Miller's Estate*[2] affirmed this denial because the creditor could have learned the name of the administrator from the administrator's attorney or from the records of the probate court. Therefore, the probate court properly exercised its discretion in denying the creditor's petition.

When the creditor had no knowledge, within the four month period, of his debtor's death or of the appointment of a personal representative the probate court in the case of *In re Dulle's Estate*[3] properly authorized the filing of his claim after the expiration of this period.

Death of Mortgagee

The court of appeals in *Eastwood v. Capel*[4] properly stated that upon a mortgagee's death, his rights as owner of a defaulted mortgage pass to his personal representative as personal property, but if not enforced during the

[1] 162 Ohio St. 384, 123 N.E.2d 408 (1954).

[2] 98 Ohio App. 445, 129 N.E.2d 838 (1954); Miller's Estate v. Sublee Transfer, 98 Ohio App. 445, 124 N.E.2d 450 (1954).

[3] 130 N.E.2d 253 (Ohio Prob. 1955).

[4] 126 N.E.2d 343 (1955).

administration of the estate, these rights pass to the mortgagee's heirs. Although this issue was not before the court, because the right of the mortgagee's heirs to enforce the mortgage had not been put in issue, the court desired to indicate its disapproval of the earlier case of *Stafford v. Collins*[5] which denied the mortgagee's heirs the right to enforce the mortgage after administration of the mortgagee's estate had been completed.

Final Distribution by Transfer to Life Beneficiary

When a testator provides in his will that life beneficiaries are to be given possession of property in which they have life interests, an order of a court approving the transfer of the property to the life beneficiaries without bond is an approval of final distribution. Thereafter the property is no longer part of the testator's estate and is beyond the jurisdiction of the probate court. The Ohio Supreme Court so held in *In re Sexton's Estate*.[6] Under section 2113.58 of the Ohio Revised Code the probate court has broad powers to determine whether possession of personal property should be given to life beneficiaries even when the will so provides.[7]

Description of Beneficiary

Gift to Named Charitable Organization, "As Now Organized and Functioning"

Testator in 1949 executed his will in which he gave ten thousand dollars "to the Christian Church of Chardon, Ohio, as now organized and functioning." On July 7, 1950 this church and another church consolidated to form The Pilgrim-Christian Church in accordance with section 1715.10 of the Ohio Revised Code. Under this section each of the consolidating churches is to be regarded as continuing for the purpose of any gifts to them in their respective names. The issue before the Ohio Supreme Court in the case of *In re Barker's Will*[8] was whether the testator had indicated by the language of his will that this statutory provision should not apply. The court, in construing the testator's will, took into consideration the fact that testator knew about section 1715.10, and held that by his inter vivos gifts to The Pilgrim-Christian Church, and by his acts he clearly indicated that he regarded this church as his church. Therefore, the court affirmed the decision of the court of appeals awarding the legacy to the Pilgrim-Christian Church in accordance with section 1715.10.

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[5] 16 Ohio L. Abs. 621 (1933).

[6] 163 Ohio St. 124, 126 N.E.2d 129 (1955), *cert. denied*, 350 U.S. 838 (1955).

[7] *In re* Estate of Miller, 160 Ohio St. 529, 117 N.E.2d 598 (1954).

[8] 162 Ohio St. 531, 124 N.E.2d 421 (1955).

Determination of Heirship

Not Equity Proceeding

The Ohio Supreme Court in *Bradford v. Micklethwaite*[9] considered an action under section 2123.01 of the Ohio Revised Code to determine heirship as part of the administration of an estate and therefore an action at law. The mere fact that this statutory action does not provide for a jury does not make it equitable. Consequently, on appeal from the probate court to the court of appeals, only questions of law may be considered.

Burden of Federal Estate Tax

Charitable and Non-Charitable Beneficiaries

On the authority of *Campbell v. Lloyd*[10] the Ohio Supreme Court in *Hall v. Ball*[11] distributed the burden of the federal estate tax among all of testator's residuary beneficiaries, including several charities. The distribution of the burden of this tax depends upon state law when the testator does not state how the burden is to be distributed. The state courts usually try to distribute the burden the way they believe the testator would have specified if his attention had been called to the problem. Although in *Hall v. Ball* the amount of the federal estate tax was increased when this tax was distributed among all residuary benficiaries, including the charities, this increase in the tax is not necessarily contrary to a testator's presumed interest.

Interest on General Legacy

Direction to Invest in Government Bonds

Section 2113.25 of the Ohio Revised Code provides that the executor or administrator shall complete the administration of the estate so far as he is able within nine months after the date of his appointment. In the case of *In re Estate of Shanafelt*[12] the Ohio Supreme Court required the executors to pay interest of two and one-half per cent per annum (beginning nine months after the appointment of the executors) on a charitable bequest of twenty thousand dollars which testator had directed should be invested in United States Government Bonds at all times. The fact that the estate had been involved in extended litigation did not relieve the executors of the obligation to invest the twenty thousands dollars in Government

[9] 163 Ohio St. 301, 127 N.E.2d 21 (1955).
[10] 162 Ohio St. 203, 122 N.E.2d 695 (1954).
[11] 162 Ohio St. 299, 123 N.E.2d 259 (1954).
[12] 164 Ohio St. 258, 129 N.E.2d 816 (1955).

Bonds. The court fixed the interest rate at two and one-half per cent instead of the usual six per cent because that was the rate paid on United States Government Bonds on and after the time when the money should have been invested in them.

Probate

Soldiers' and Sailors' Civil Relief Act Not Applicable

Probate proceedings are in rem and are not an action as that word is used in the Soldiers' and Sailors' Civil Relief Act. Therefore, this act has no application to the probating of a will according to the probate court in *Case v. Case.*[13] If an heir has his domicile in Ohio but is temporarily absent from the state while in military service, his "usual place of residence" for purpose of service under sections 2107.13 and 2101.26 of the Ohio Revised Code is the place in Ohio which he left to enter military service and to which he intends to return.[14]

Surviving Spouse

Power of Probate Court to Authorize Guardian of Incompetent Surviving Spouse to Buy Mansion House

There is a definite trend in favor of increasing the rights of the surviviug spouse against the estate of the deceased spouse. Statutes setting forth the rights of the surviving spouse are construed liberally. In *Dorfmeier v. Dorfmeier*[15] a probate court upon petition of the guardian of an incompetent widow, under its equity powers, authorized the guardian on behalf of the widow to purchase the mansion house at its appraised value. The probate court properly held that the nondivisible urban house occupied by a husband and wife before the husband's death is a "mansion house" as that phrase is used in section 2113.38 of the Ohio Revised Code, although small portions of the house have been and are rented to others.

Vacating Widow's Election to Take Against Will

In *Smith v. First National Bank*[16] the common pleas court, pursuant to a suit in equity, vacated the election of a widow to take against the will of her husband. Although the widow had been advised by her counsel to take against the will, neither the widow nor her counsel knew at the time of election that she would receive eleven thousand dollars more if she took

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[13] 124 N.E.2d 856 (Ohio Prob. 1955).

[14] *Ibid.*

[15] 123 N.E.2d 681 (Ohio Com. Pl. 1954).

[16] 124 N.E.2d 851 (Ohio Com. Pl. 1954).

under her husband's will and not against it. It was this lack of full knowledge of the facts and the fact that no innocent third persons were involved that caused the court to vacate the election.

Widow Separated from Husband Prior to His Death Entitled to Statutory Exemptions and Allowances

The court of appeals in the case of *In re Clark's Estate*[17] reluctantly held that a widow who had voluntarily lived away from her husband for twenty-two years was nevertheless entitled at his death to the widow's statutory exemptions and allowances. This case raises the question whether the applicable statutes should be amended to bar from their benefits a surviving spouse who without cause has elected to live apart from the other spouse for a certain period prior to his or her death.[18]

Right of Widow to Set Aside Inter Vivos Gifts by Husband

The benefits of the right of a widow to take against the will of her husband are seriously impaired if this right may be substantially defeated by inter vivos gifts from the husband to third persons. In the same way a wife may deprive her husband of his statutory rights to take against her will. Various jurisdictions are now in the process of working out a satisfactory solution to this problem.[19] The probate court in *MacLean v. J. S. MacLean Co.*[20] almost completely ignored this difficult problem by using as its test whether the husband had failed to support his wife during their joint lives to determine whether to set aside substantial gifts of stock by the husband to his children by a former wife. These gifts were made by the husband to prevent his second wife from taking this stock after his death as his heir or against his will. Yet, since the husband had supported his wife during their joint lives, and since this duty of support terminated at the husband's death, the court upheld the gifts to the children against the claim of their stepmother.

Right of Widow With Respect to Joint Bank Account in Name of Husband and Third Person

The Ohio Supreme Court has held that when the settlor of a trust reserves the income and the right to revoke or amend the trust, the settlor's widow at his death is entitled to a portion of the trust property if she elects

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[17] 128 N.E.2d 437 (Ohio App. 1954).

[18] SIMES, MODEL PROBATE CODE 263 (1946). Compare OHIO REV. CODE § 2103.05 (spouse who leaves other spouse "and dwells in adultery" barred from dower); 20 PA. PURDON'S STAT. § 180.9.

[19] ATKINSON, WILLS § 32 (1953); Bensing, *Inter Vivos Trusts and The Election Rights of A Surviving Spouse,* 42 KY. L. J. 616 (1954).

[20] 123 N.E.2d 761 (Ohio Prob. 1955).

to take her statutory share.[21] However, when a husband, a few months prior to his death had his individual savings account changed to a joint bank account with his sister so that at his death his sister would receive the amount in the account, and to prevent his wife from claiming any portion of this account, the court of appeals in *Guitner v. McEwen*[22] held that the wife as the surviving spouse had no claim to any portion of the joint bank account. The explanation made by the court for its decision is not satisfactory. If the purpose of the law is to protect the rights of the surviving spouse, then it is immaterial that neither spouse is the creditor of the other. Yet the court relied upon this fact. The court also treated the creation of the joint bank account as an absolute transfer when, in fact, a joint bank account is similar to a revocable trust.

A logical and simple way for Ohio to protect the right of a surviving spouse to elect would be the enactment of a statute similar to section 33 of the Model Probate Code. This section reads as follows:

§33. Gifts in fraud of marital rights.

(a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.[23]

Delay in the adoption of a statutory provision of this type in Ohio will probably result in prolonged and expensive litigation in the courts and in decisions which may not be acceptable to the married residents of Ohio, particularly the wives who are increasingly inclined to favor the basic concepts of community property law.

Widow May Be Permitted to Elect After Expiration of Nine Months from Probate

The Ohio Revised Code[24] provides in part as follows:

After the probate of a will and filing of the inventory, appraisement, and schedule of debts, the probate court . . . shall issue a citation to the surviving spouse to elect. . . . The election shall be made within one month

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[21] Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); Harris v. Harris, 147 Ohio St. 437, 72 N.E.2d 378 (1947).

[22] 99 Ohio App. 32, 124 N.E.2d 744 (1954).

[23] SIMES, MODEL PROBATE CODE 72 (1946).

[24] § 2107.39.

> after service of the citation to elect, or if no citation is issued such election shall be made within nine months after the appointment of the executor or administrator. On a motion filed before the expiration of such nine months and for good cause shown, the court may allow further time for the making of the election. . . .

This statute was enacted for the benefit of the surviving spouse. It should be construed and administered to attain this desirable objective. If the estate has not been administered, the inventory has not been filed, the surviving spouse has not been cited to elect, and no person would be prejudiced by a delayed election to take against the will, then the probate court should permit election although the normal period of nine months after probate for election has expired and no request for further time was made within the nine month period. Under similar facts the court of appeals properly reversed the judgment of the probate court in the case of *In re Estate of Bersin*.[25] The probate court had ruled that the surviving spouse could not elect after the nine months period to take against the will even though no inventory and appraisement had been filed within that period.

The court of appeals restricted to situations involving third persons the applicability of section 2107.41 of the Ohio Revised Code which provides that the surviving spouse is conclusively presumed to have elected to take under the will if there is no election to take against the will within the period of nine months after probate. This decision is significant because it establishes the necessity of filing the inventory and appraisement so that the surviving spouse may make an intelligent election to take under the will or to take against the will.

Will Contest

Heirs Named as Defendants But Not Served and Other Heirs Joined as Plaintiffs in Will Contest

The Ohio Supreme Court in *Gravier v. Gluth*,[26] decided an interesting problem involving the jurisdiction of the common pleas court to hear a will contest. Will contests must be brought within six months after a will has been probated except where the persons involved are under a legal disability.[27] All devisees, legatees, heirs, and other interested persons, including the executor or administrator must be made parties.[28]

Testator's will was probated September 8, 1950. Three heirs brought an action on February 27, 1951 to contest the will. Although the petition

[25] 98 Ohio App. 468, 129 N.E.2d 868 (1955).
[26] 163 Ohio St. 232, 126 N.E.2d 332 (1955).
[27] OHIO REV. CODE § 2107.23.
[28] OHIO REV. CODE § 2741.02.

named as defendants the sole legatee and devisee, the executrix, and three named heirs, only the sole legatee and devisee and the executrix were served with summons within the six months period after probate. On January 15, 1953, the contestants attempted to solve the jurisdictional problem by having the three heirs who had been named originally as defendants and also nine other heirs join as plaintiffs in the will contest. The common pleas court ruled that the will contest had not been properly instituted within the six month period after probate and that it did not have jurisdiction. The Ohio Supreme Court affirmed this ruling for the simple reason that a contrary decision would extend indefinitely the time for settling estates, contrary to the established policy of the state. The Supreme Court considers reasonable the statutory requirement that the heirs, as well as the personal representative and beneficiaries under the will, must be made parties because of the statutory provision for joining unknown heirs. Some persons may disagree with the reasonableness of this jurisdictional requirement.

Revocation of Wills

Testator's Will Not Revoked by His Marriage

A model probate code should provide specifically when a will is revoked by operation of law. Section 2107.33 of the Ohio Revised Code provides that "This section does not prevent the revocation implied by law, from subsequent changes in the circumstances of the testator." Section 2107.37 provides that "A will executed by an unmarried woman is not revoked by her subsequent marriage." If a married woman executed a will, before the death of her husband, is her will revoked by remarriage? If a man executes a will and then marries, is his will revoked under section 2107.33? The court of appeals held in the case of *In re Estate of Bersin*[29] that marriage of a man does not revoke his will, citing an 1897 Ohio Circuit Court decision.[30] The court of appeals did not mention section 2107.33 or section 2107.37. The specific changes in circumstances which will revoke a will by operation of law should be set forth in clear language in the Ohio Revised Code.

Joint Bank Accounts

Simultaneous Death of Depositors

A joint bank account in Ohio is created by a contract between the bank and one or both of the owners. This contract ordinarily provides that

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[29] 98 Ohio App. 432, 129 N.E.2d 868 (1955).

[30] Mundy's Executors v. Mundy, 15 Ohio C.C. 155 (1897).

either owner may make withdrawals, and, at the death of one, the survivor is entitled to the entire balance.

The case of *In re Markiewicz Estate*[31] arose because the contracts of joint deposit failed to provide for distribution of the balance in the joint bank accounts when both depositors died simultaneously. The joint depositors were husband and wife who had engaged in business enterprises together, although at times the wife received no wages or salary for her services. The court therefore properly held that the balance in the joint bank accounts should be divided equally between the estates of the joint depositors.

The ordinary contract which creates the joint bank account fails to state specifically the interest of each depositor in the account prior to the death of one of the depositors. Consequently, creditors of either joint depositor are at a disadvantage when they seek to reach their debtor's interest in a joint bank account. Also, if the joint depositors die simultaneously, their respective personal representatives may have difficulty determining the share of each decedent in the balance in the joint bank account at the time of the depositors' deaths. Both of these matters should be included in each contract which establishes a joint bank account. However, banks are not likely to take the initiative in this matter, and joint bank accounts are sufficiently related to the disposition of property at death that a statute would be proper. The statute might provide that whenever two or more persons create a joint bank account with or without the provision that the survivor is entitled to the balance in the account, the rights of the depositors are as follows: In the absence of any provision to the contrary in the contract of joint deposit, (1) each is the owner of an equal interest which can be reached by his creditors, (2) upon the simultaneous death of the joint depositors, the balance in the joint bank account at that time is to be divided among their respective personal representatives, and (3) during their joint lives as among themselves, but not with respect to the bank, each may withdraw without the consent of the other his share of the amount in the joint bank account. With respect to the bank, any joint depositor may withdraw any amount from the joint bank account.

The possible use of a joint bank account between one spouse and a third person to prevent the other spouse from taking any of the money in the joint bank account at the death of the spouse who made the deposit is considered above under the heading Surviving Spouse.

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[31] 129 N.E.2d 328 (Ohio Prob. 1955).