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Wills and Decedents' Estates

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WILLS AND DECEDENTS' ESTATES

Probate

1. *Jurisdiction of Probate Court*

Section 2107.13 of the Ohio Revised Code provides that "no will shall be admitted to probate without notice to the surviving spouse and to the persons known to be residents of the state who would be entitled to inherit from the testator if he had died intestate."

The court of appeals properly held in the case of *In re Estate of Hammer*[1] that if the proponent of the will, the known heirs, and the probate court all believed that a certain resident heir had died survived by no issue, failure to give this heir notice of probate did not deprive the probate court of jurisdiction. As an alternate ground for its decision, the court of appeals stated that if a resident heir is not notified of probate, but later contests the will, this contest bars him from attacking the regularity of the probate proceeding.

In this same case the probate court erroneously set aside the probate of the will and the executor appealed to the common pleas court which erroneously sustained the probate court. The right of the executor to appeal from the decision of the probate court was challenged and upheld in the court of appeals because the will had been probated, the executor had been appointed, and had undertaken the duties of an executor. One of these duties as executor was to appeal from the decision of the probate court setting aside the order of probate.

In the case of *In re Estate of Gottwald*,[2] decedent at his death had a margin account with a brokerage firm. This account was properly included in the inventory of decedent's assets. An exception to the inventory was filed with the probate court on the ground that 100 shares of stock of the exceptor were included in the margin account. All stock in the margin account was held in the name of the brokerage firm, which was not made a party to the proceeding in the probate court. For this reason and because the proceeding before the probate court was summary and therefore inadequate to consider properly the issues raised by the exception, the probate court dismissed the exception to the inventory without prejudice to the right of the exceptor to bring a more appropriate action. The Supreme Court sustained the action of the probate court as a proper exercise of its discretionary power to dismiss exceptions to the inventory whenever the probate court believes "the summary procedure

[1] 99 Ohio App. 1, 130 N.E.2d 437 (1955).
[2] 164 Ohio St. 405, 131 N.E.2d 586 (1956)

would not give the litigants an opportunity to present fully their respective sides of the controversy."

2. *Proof of Will at Probate*

Subscribing witnesses to a will may not recall at the probate of the will that they signed as subscribing witnesses to a will, and in some cases they may remember subscribing but falsely deny their signatures. Therefore, in order to protect properly executed wills, the probate court must not allow a properly attested will to fail because of the faulty memory at the time of probate of one or all of the subscribing witnesses.[3] In the case of *In re Estate of Schulz*[4] the court of appeals reversed the judgment of the probate court. The probate court refused to probate a will because one of the subscribing witnesses, who was probably a person who lived in testatrix' neighborhood, although admitting her signature as a witness to the will testified that she did not know that she was attesting a will, and that she did not see the testatrix nor the other subscribing witness sign. The other witness was the wife of the attorney who prepared the will and took it to testatrix' home for execution. Although the wife of the attorney could not remember the execution of the will, she did recognize her signature as a subscribing witness and testified that since she had previously witnessed wills prepared by her husband, she would not have subscribed her name as a witness to a will unless she had seen the testatrix sign or the testatrix had acknowledged her signature. The will was on a printed form which contained a printed attestation clause which stated that the will had been properly executed. The court of appeals reversed the judgment of the probate court because a prima facie case of proper execution of a will is proved where "all signatures to the instrument are genuine, the attesting clause is in due form, and there is oral testimony by one of the witnesses that she knew it as the will of the testatrix."

In order to avoid unnecessary litigation in connection with the execution of wills, especially with respect to the requirement of two or more subscribing witnesses, consideration should be given to eliminating the requirement of subscribing witnesses as Pennsylvania has done. In that state testator's signature must be proved by two witnesses who may or may not be subscribing witnesses.[5]

Under section 2129.04 of the Ohio Revised Code, ancillary administration proceedings are proper in any county in Ohio in which there is property of a nonresident decedent. Application for the appointment of an ancillary administrator must be filed by an interested person.

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[3] 2 PAGE, WILLS § 755 *et seq.* (3d ed. 1941)

[4] 136 N.E.2d 730 (Ohio App. 1956)

[5] PA. STAT. ANN. tit. 20, §§ 180.2, 180.4 (1950)

In the case of *In re Estate of Wilcox*,[6] the probate court of a county where a nonresident decedent was involved in an automobile accident granted letters of ancillary administration, upon the application of a resident of Ohio who had no claim against the estate of the nonresident decedent. The application for the appointment of an ancillary administrator was made by the disinterested person at the request of the attorney of the residents who were involved in the automobile accident with the decedent and who desired to present their claims against decedent's estate. The application stated that decedent's asset in the county consisted of the right of decedent's estate to reimbursement from his insurance company. The court of appeals held that the probate court had no jurisdiction to appoint an ancillary administrator because the decedent had no assets in the county of the probate court and the applicant for letters of administration was not an interested person. The court considered immaterial the fact that decedent had public liability and property insurance, because no action had been brought against decedent in the county where the ancillary letters of administration were obtained. This decision apparently left the Ohio residents who had claims which arose from the automobile accident without a remedy. Their claims had previously been rejected by the administratrix of the nonresident decedent in the state of his residence because they were filed too late. Suit could not be instituted in Ohio because death terminated the applicability of Ohio Revised Code section 2703.20 which provides for substituted service as to nonresidents. No similar statute provided for substituted service on a personal representative of a nonresident decedent who had been involved in an automobile accident in Ohio prior to his death. Section 2703.20 should be amended to permit substituted service in an action against the estate of a nonresident who dies before suit is instituted for damages arising from an automobile accident in Ohio.

3. *Imposition of Trust on Person Who Received Property Under Will Probated By His Fraud*

The Ohio Supreme Court in *Jacobsen v. Jacobsen*[7] upheld the jurisdiction of the common pleas court to impose a constructive trust upon persons who received property under a will which was probated through fraud on the probate court. This constructive trust was imposed for the benefit of those persons who would have been entitled to decedent's estate under the statute of descent and distribution.

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[6] 73 Ohio L. Abs. 571, 137 N.E.2d 301 (Ct. App. 1955).

[7] 164 Ohio St. 413, 131 N.E.2d 833 (1956).

Will Contest

Section 2741.04 of the Ohio Revised Code provides that whenever an action to contest a will is brought in the common pleas court the issue of whether a certain writing is the will of deceased "shall be tried by a jury." For this reason the Ohio Supreme Court in *Andes v. Shippe*,[8] held that a contestant may not dismiss a will contest and thereby prevent another contestant who has been joined as a defendant from continuing with the contest, including a jury trial.

If a will includes a charitable trust, is the attorney general a necessary party when the will is contested? Section 109.25 of the Ohio Revised Code provides that "the attorney general shall be a necessary party in all proceedings, the object of which is: (1) to terminate a charitable trust " A common pleas court held that the purpose of a will contest is not to terminate a charitable trust even though the charitable trust will obviously be defeated if the will is not probated.[9] This issue should be clarified by legislation.

A legatee who is not an heir or next of kin of the testator is not united in interest with legatees who are heirs or next of kin of the testator. Therefore after the six month period for contesting a will has elapsed, this legatee who is not united in interest with legatees who were made parties, cannot be made a party and the will cannot be contested according to the court of appeals case of *Staley v. Scheck*.[10] The reasonableness and the desirability of the jurisdictional requirements of section 2741.02 of the Ohio Revised Code should be reconsidered. The requirements of this section may be preventing proper will contests.

In *Wilhelm v. Landt*,[11] a common pleas court held that if a trust company is served in a will contest as trustee under a trust created by the will and as executor of the will, but is not served as a legatee and trustee under an inter vivos trust, the trust company as trustee of the inter vivos trust may be served after the six month period because it is united in interest with other duly served legatees. Although section 2305.17 of the Ohio Revised Code, which provides for service upon persons united in interest with other persons who have been served, does not refer to will contests, the common pleas court in the instant case relied upon Ohio Revised Code section 1.24. The latter section provides that by enacting the Ohio Revised Code the General Assembly did not intend "to change

[8] 165 Ohio St. 275, 135 N.E.2d 396 (1956).

[9] Spang v. Cleveland Trust Co., 73 Ohio L. Abs. 164, 134 N.E.2d 586 (C.P. 1956).

[10] 99 Ohio App. 242, 133 N.E.2d 189 (1954) (legatee was widow of testatrix' deceased nephew).

[11] 136 N.E.2d 741 (C.P 1955), *affirmed*, 136 N.E.2d 744 (Ohio App. 1956) (Ross, J. dissenting).

the law as heretofore expressed by the section or sections of the General Code in effect on the date of enactment of this act." Since the court had to rewrite section 2305.17 of the Ohio Revised Code, the General Assembly should make this section conform to its intention as stated in section 1.24.

Rights of Surviving Spouse

In accordance with the general desires of the people, the courts are usually liberal in protecting the rights of the surviving spouse. Consequently, decisions and future legislation favorable to the surviving spouse are expected by many lawyers.

In the case of *In re Estate of Fetzer*[12] testator bequeathed his automobile, all his household goods, and certain other property to his widow. The widow did not elect to take against the will but the probate court approved her request to the executor to have the automobile and the household goods set off to her as property exempt from administration. Later the widow moved to vacate this request. The probate court denied the widow's motion to vacate, but the court of appeals reversed the probate court. The widow was allowed to vacate her selection of property and to take in addition to the property given to her under the will, including the automobile and household goods, the sum allowed her under section 2115.13 of the Ohio Revised Code in lieu of the property which the widow had requested should be exempt from administration. The court of appeals based its decision on the fact that the widow never waived any rights under section 2115.13 because she received the personal property under the will.

The Ohio courts are favorable to nonresident as well as to resident surviving spouses. In the case of *In re Estate of Weatherhead*[13] the testator and his widow were both residents of Texas. Testator owned realty in Ohio. The probate court held that under Ohio Revised Code section 2115.13 a nonresident spouse is entitled to have the ancillary administrator set off certain property as exempt from administration. Also under Ohio Revised Code section 2117.23 a nonresident widow is entitled to a year's allowance because the state of which her deceased husband was a resident, Texas, made no "provisions for a year's allowance as contemplated by the Ohio Legislature."

The case of *In re Estate of Callan*[14] is unusual. Section 2107 45 of the Ohio Revised Code provides that when a surviving spouse is unable

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[12] 71 Ohio L. Abs. 275, 130 N.E.2d 732 (Ct. App. 1954)

[13] 73 Ohio L. Abs. 524, 137 N.E.2d 315 (Prob. 1956).

[14] 101 Ohio App. 114, 135 N.E.2d 464 (1956) (Skeel, J., dissenting)

because of a legal disability to determine whether to take under or against the will, the probate court shall appoint a suitable person to ascertain the value of the provision made for the surviving spouse if she takes under the will and the value if she takes against the will. After the person so appointed makes a report, the probate court shall determine whether it "is better for the spouse" to take under or against the will. In the instant case testator left a gross estate of about one-half million dollars, and his eighty-three year old, incompetent widow owned property worth about one-quarter million dollars. Testator's will created a trust for his widow. Under the terms of this trust the widow was entitled to the net income of the net estate and to whatever additional sum was necessary "for her comfort and support" if she certified to the trustee the need for this additional sum "after taking into account her income from other sources."

The person appointed by the probate court to evaluate the widow's interest under the will and under the law reported to it that the widow's interest under the will, not including the right to invade the principal of the trust, had a value of $83,900 and the widow's interest under the law had a value of $267,736. The probate court then elected on behalf of the widow to take under the law. A sister of the testator appealed from the judgment by the probate court. The court of appeals with one judge dissenting affirmed the judgment of the probate court.

In the instant case the court of appeals based its affirmance of the judgment of the probate court on the following grounds. First, the court of appeals should not substitute its judgment for the judgment of the probate court. Second, the attack on the probate court's judgment was that the probate court erred as a matter of law and not for abuse of discretion. Third, the appellant as one of several residuary beneficiaries has no justiciable interest which is entitled to recognition in the probate court.

The objections of the dissenting judge merit consideration. He believed that the judgment of the probate court should be reversed because it was an abuse of discretion for the following reasons. First, the widow is given the power to elect to take against the will of her husband to protect the widow from being disinherited and not to benefit her heirs to the detriment of the beneficiaries under her deceased husband's will. Second, the law favors testacy. Third, the legislature amended in 1932 the applicable statute by striking from it the words "more valuable" and substituting the words "is better for the spouse." Fourth, the probate court completely disregarded the right of the widow to use up the entire corpus of the husband's estate if needed for her support. Fifth, the judgment of the probate court transferred $267,736 from a carefully drafted trust to a guardian's account free of the protection of the trusts created by the

deceased husband's will. Sixth, the appellant is an interested party and entitled to appeal from the judgment of the probate court.

There will probably be a number of cases in the future similar to the instant case. For this reason, the legislature should consider the possibility of establishing a more satisfactory test to be used by the probate court when it elects on behalf of an incompetent spouse to take under or against the will. Also, the right of beneficiaries under the deceased spouse's will to appeal from the judgment of the probate court electing on behalf of an incompetent spouse to take against the will should be specifically recognized by statute.

Another case of special interest is *In re Estate of Williams.*[15] In this case the decedent in contemplation of death conveyed to his wife real estate which was later appraised at $13,500. Decedent also deposited $10,234 in two joint bank accounts in his name and the name of his wife with right of survivorship. At decedent's death the $10,234 in the joint bank accounts was included with $1,059 of cash items in the inventory. The total debts, including cost of administration, were $1,615. The widow as executrix in her inventory set off $2,258 as her exempt property and $3,000 for her year's allowance. In the widow's application to determine the inheritance tax, she included the real estate, the joint bank accounts, and the cash items and from the total of these taxable assets she deducted the sum of $2,258 for exempt property, $3,000 for a year's allowance, and the debts of $1,615. The Department of Taxation filed exceptions to this application on the ground that although the real estate and the joint bank accounts were taxable, neither one could be used to determine exempt property or to pay a year's allowance. The probate court agreed and the widow's tax was increased. Apparently the real estate was not conveyed, nor were the joint bank accounts created, in fraud of creditors, because the probate court stated that the real estate and the joint bank accounts were not subject to the debts of decedent's estate. If the value of property that passed under testator's will had been greater, his widow would have been in a better tax position.

The admitted facts in *Morrison v. Morrison*[16] indicate no injustice to the surviving spouse. Testator's first wife purchased certain securities which were to be held by testator as trustee under an oral irrevocable trust for the benefit of their children. For some unknown reason the securities were issued to testator with no statement that he held them as trustee. After the death of testator's first wife, he remarried. Shortly after testator's remarriage, the oral trust was reduced to writing. At testator's death the securities were not included in his estate. Testator's second wife sued

[15] 138 N.E.2d 189 (Ohio Prob. 1956).

[16] 99 Ohio App. 203, 132 N.E.2d 233 (1955).

in the probate court for a declaratory judgment as to her rights as surviving spouse with respect to these securities. The probate court declared the alleged trust null and void and a fraud upon the second wife. On appeal the court of appeals properly reversed the probate court because the testator never owned the beneficial interest in the securities. Oral declarations of trust of personal property are permitted in Ohio.

Discovery Proceeding

A proceeding under section 2109.50 of the Ohio Revised Code to determine the right of decedent's estate to certificates of stock registered in decedent's name, but which are claimed by some person as his own is summary and inquisitorial. The person who alleges as a defense to this proceeding that decedent gave him the certificates as a gift must prove the gift by clear and convincing evidence.[17]

Administration

1. *Statute of Limitation Not Applicable to Sale of Realty to Pay Decedent's Debts*

The court of appeals in *Fox v. Holcomb*[18] held that whenever the claims of creditors against a decedent's estate have been filed and accepted, and the personal property is insufficient to pay the debts and the widow's allowance, the personal representative may petition the probate court at any time in the future for authority to sell the realty to pay these claims. It is immaterial that the decedent's heirs have instituted an action in the common pleas court to partition this realty. It is immaterial that the petition by the personal representative for authority to sell the realty is not filed for more than six years after the personal representative knew the personalty would be insufficient to pay the debts and the widow's allowance. No statute of limitations bars the right of creditors and the widow to have their claims satisfied from realty if the personalty is insufficient.

Although the decision of the court of appeals in the instant case is probably correct, it does raise the question whether a statute of limitations should be enacted to bar the sale of realty a certain number of years after the personal representative learns that the personalty is insufficient to pay debts and the widow's allowance.

2. *Creditors' Claims*

A fairly common type of claim against a decedent's estate is one for

[17] *In re* Estate of Fife, 164 Ohio St. 449, 132 N.E.2d 185 (1956).

[18] 71 Ohio L. Abs. 334, 132 N.E.2d 130 (Ct. App. 1955)

services rendered over a long period of time to the date of decedent's death for which services decedent agreed to pay at his death. The need for this type of contract is obvious. Decedent needs some person to care for him but he can pay this person only from the principal of his estate, which may be a house or a farm that cannot be sold prior to decedent's death if he is to live there during his life. However, in order to protect estates against fraudulent claims, the legislature should consider the adoption of a statute which would require this type of contract to be in writing. An agreement to leave property by will to a designated person must be in writing under section 2107.04 of the Ohio Revised Code.

In the case of *Moore v. Curtzweiler*[19] the Ohio Supreme Court held that a plaintiff who alleged in an action in 1953 against decedent's estate, that plaintiff rendered services to decedent, his invalid wife, and decedent's nephew from November 1935 to June 1937 for which decedent agreed to pay at decedent's death, stated a cause of action. The Ohio Supreme Court, except for one of the judges, apparently believes that the dead man's statute, Ohio Revised Code section 2317.03, is adequate protection against fraud in this type of case. But Judge Stewart in his concurring opinion is "fearful that unless there is legislative relief, (the) present decision, will open to the unscrupulous a vast vesta of privileged pillage."

How will a person who has cared for a decedent over a period of years prove decedent's oral promise to pay for this care at decedent's death? The plaintiff in *Weber v. Billman*[20] proved her claim by the testimony of decedent's friend and of the mail carrier. Plaintiff claimed $75 per month from August 1, 1940 through December 31, 1940, $900 per year from January 1, 1941 through December 31, 1950, and $10 per day from January 1, 1951 to February 6, 1953, the date of decedent's death. Of plaintiff's claim for $17,055 the jury awarded her $12,500. Judges Stewart and Taft dissented on the ground that plaintiff alleged in her complaint that the payments for services rendered during the period from August 1, 1940 through December 31, 1950 were payable at the end of each year for the services during the preceding twelve month period. Consequently, they believed the six year statute of limitations barred a substantial portion of plaintiff's claim.

In the case of *In re Estate of Natherson*,[21] the claimant and her husband filed claims against decedent's estate for decedent's negligence in operating upon claimant. The administratrix rejected the claims because they were filed over eight months after the appointment of the adminis-

[19] 165 Ohio St. 194, 134 N.E.2d 835 (1956).
[20] 165 Ohio St. 431, 135 N.E.2d 866 (1956).
[21] 134 N.E.2d 852 (Ohio App. 1956).

tratrix. Claimant and her husband alleged that decedent fraudulently concealed his negligence and this fraud excused their failure to file within the statutory period of four months. The court of appeals did not agree with claimant's contention. Although section 2305.09 of the Ohio Revised Code provides that an action for fraud shall not accrue until fraud is discovered, this statutory provision applies only where the action is for fraud, whereas in the instant case the action was for decedent's negligence.

If at the hearing on the schedule of debts there is no evidence against a debt which has been allowed, the probate court has no power to refuse to confirm the allowance of the claim by the personal representative.[22]

The pleadings in the case of *Parrish v. McKee*[23] are interesting. Plaintiffs were the owners, lessors and insurers of a tractor and trailer which were damaged on May 28, 1953, in a collision allegedly caused by decedent's negligence. Decedent died November 1, 1953, but decedent's administrator was not appointed until May 24, 1955.

On May 25, 1955, in violation of section 2117.30 of the Ohio Revised Code, which prohibits suits by a claimant against the personal representative within nine months from his appointment unless he has rejected the claim, the plaintiffs sued decedent's personal representative. The court of appeals held that this suit was of no effect in keeping plaintiffs' claims alive.

On September 20, 1955, plaintiffs presented their claims to decedent's administrator within the four month period from his appointment but more than two years from the date of the collision. The administrator rejected plaintiffs' claims because they were barred by the two year statute of limitations and the court of appeals agreed with the administrator. Death of the tortfeasor, the decedent, did not stop the running of the general two year statute of limitations, because the plaintiffs as creditors might have had an administrator appointed to whom they could have presented their claims.

Construction of Wills

Testator in 1948 bequeathed to B "all cash in the box on the desk in the back room of my home." About a month prior to testator's death and at his direction, $1,400 was removed by C, the residuary beneficiary, from the box and deposited with other funds in a commercial account in the name of "C Agent." At testator's death the box contained a five dollar gold piece, $2.50 in currency and two savings account bank books with balances of $708 and $936.

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[22] *In re* Estate of Koplin, 137 N.E.2d 424 (Ohio App. 1956)

[23] 73 Ohio L. Abs. 65, 135 N.E.2d 486 (C.P 1956)

In the action before the probate court for a construction of the will, the probate court held that B was entitled to only $7.50. B appealed to the court of appeals which decided that B was entitled to the $1,400 which was removed from the box as well as the $7.50. Unfortunately for B, the Ohio Supreme Court in the case of *In re Estate of Evans*[24] agreed with the probate court.

A bequest of all cash in a box is not one which is likely to be found in a properly drafted will. Those courts which have carefully analyzed the cases involving bequests of the contents of a receptacle, recognize that gifts of this type can be sustained only on the theory that testator's act of adding to or removing part or all of the contents of the receptable is nontestamentary.[25] However, in some of these cases testator's "nontestamentary" acts are in fact testamentary; that is, they are done solely to change the disposition of his property at his death.

In the instant case it is easy to agree with the Ohio Supreme Court that B was not entitled to the $1,400 removed from the box. But, why did the court fail to explain its exclusion of the money in the two savings accounts? The word "cash" might have been used by the testator as including the two savings accounts.[26]

Under section 2127.03 of the Ohio Revised Code, as a general rule a legacy is not payable from realty unless the personalty is insufficient and the provisions of the will charge the realty with the payment of the legacy. In *Snyder v. La Due*[27] testatrix devised a life estate in testatrix' home to her daughter with a contingent remainder to other persons. Next, testatrix bequeathed $1,000 to her son and finally stated that all her "property of whatever kind" shall "pass under the laws of intestacy of the state of Ohio." The probate court and the court of appeals both held that the realty, which was testatrix' sole remaining asset after payment of debts, had not been impliedly charged with the payment of the legacy of $1,000. The court of appeals stated "it is inferable that the testatrix at the time she executed her will had a personal estate and that she did not know it would not be sufficient to satisfy the debts of her estate and pay the legacy." But, testatrix' heirs were probably her son and daughter who received the reversion to the home under the residuary clause. Since realty and personalty were blended in this clause, why did the court of appeals not charge the reversion with the payment of the $1,000?[28]

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[24] 165 Ohio St. 27, 133 N.E.2d 128 (1956).
[25] ATKINSON, WILLS § 81 (2d ed. 1953).
[26] See 2 PAGE, WILLS § 974 (3d ed. 1941).
[27] 100 Ohio App. 526, 137 N.E.2d 432 (1955).
[28] 4 PAGE, WILLS § 1452 (3d ed. 1941)

Ademption

In the case of *Bool v. Bool*[29] the Ohio Supreme Court defined liberally the word "securities" to avoid an ademption of a specific legacy. As stated in the instant case courts are disposed "to lean away from ademption."

Testator owned certain preferred stock of the Mather Iron Company which was redeemed in 1953, about eight months prior to testator's death, by depositing $100 per share in a certain bank to be paid to testator upon the presentation of his stock certificates.

Testator in his will which was executed August 4, 1948 bequeathed "stock or securities issued by the Mather Iron Company" to a trustee for certain trusts. The court construed this bequest as specific and therefore subject to ademption. If the words "or securities" had not been used, then according to the court there would have been an ademption because at testator's death the unredeemed certificates of preferred stock were "securities" but not "stock."

The court in its opinion refers to ademption by satisfaction. Under the doctrine of satisfaction testator's intention is important. Under the doctrine of ademption the general rule is that testator's intention is immaterial because the issue is whether he owns at his death property which is the same, or substantially the same, as the property specifically given in his will.[30] For this reason it is better for judges and lawyers not to use the term "ademption by satisfaction" to avoid possible confusion when the same idea can be more simply expressed as "satisfaction." For example, the doctrine of ademption does not apply to general legacies, but the doctrine of satisfaction does.

Abatement

In the case of *Moore v. Smoyer*[31] testatrix bequeathed 17 general legacies with an aggregate sum of $45,000, then left the residue of her estate, real and personal, to the ABC church. Later testatrix by codicil revoked the residuary clause in her will and left the residue of her estate, real and personal, to a named person. About a month later testatrix executed a second codicil in which she gave a general legacy to the ABC church and specifically made this general legacy a charge on her real and personal property. At testatrix' death her estate after payment of debts and taxes was insufficient to pay all the general legacies. The court of appeals properly held that the blending of personalty and realty in the residuary

[29] 165 Ohio St. 262, 135 N.E.2d 372 (1956)

[30] See ATKINSON, WILLS §§ 133, 134 (2d ed. 1953).

[31] 137 N.E.2d 887 (Ohio App. 1956)

clause charged the realty with the payment of all the general legacies, including the one to ABC church in the second codicil. The contention that the general legacies in the will should be paid first ahead of the general legacy in the codicil was properly rejected by the court.

If a will contains a residuary clause disposing of personalty and another residuary clause disposing of realty, the general rule that personalty abates first applies and the personalty must be exhausted first to pay the debts of the estate before using the realty for this purpose.[32]

Statute of Descent and Distribution

1. *Adopted Child Does Not Inherit from Natural Ancestors*

In 1954 a common pleas court properly held in *Frantz v. Florence*[33] that under the Ohio statutes with respect to adoption, a child who has been adopted by his stepfather does not inherit from his paternal natural grandfather. The common pleas court stated that this rule is harsh. But, it is in accord with modern theories of adoption, which have as their objective the development of a strong family unit. Whenever, as in the instant case, a parent dies survived by children there is always the possibility that the surviving parent will remarry and that the children of the first marriage will be adopted by their stepfather or stepmother. Therefore, whenever adoption bars a descendant from inheriting property from his natural ancestor, the solution to the problem is not to change the statute but for all natural ancestors who desire the descendant to receive all or part of the ancestor's property at his death, to make a will naming the descendant as a beneficiary.

It is immaterial that a child was adopted prior to the effective date of the statute which bars the child from inheriting as a child of his natural parent. Consequently, a child who was adopted prior to the effective date of the statute was barred in the case of *In re Estate of Millward*[34] from inheriting from his natural father who died after the effective date of the statute.

The third case, *Campbell v. Musart Society of the Cleveland Museum of Art*,[35] involves the mortmain statute and the change in the adoption statute. In this case the grandfather executed a will and a codicil after the birth of his granddaughter and the death of his son. About a month

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[32] Ginder v. Ginder, 72 Ohio L. Abs. 277, 134 N.E.2d 603 (Prob. 1954).

[33] 72 Ohio L. Abs. 222, 131 N.E.2d 630 (C.P. 1954); see 17 OHIO ST. L. J. 558 (1956).

[34] 136 N.E.2d 649 (Ohio App. 1956).

[35] 72 Ohio L. Abs. 46, 131 N.E.2d 279 (Prob. 1956)