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Wills and Decedents' Estates

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WILLS AND DECEDENTS' ESTATES

Probate

NECESSITY OF PROBATE

It is a basic and general rule that a person cannot assert any right in a court of equity or law under a will which has not been probated. Therefore, in an action by a plaintiff to set aside a deed to land to which plaintiff claimed title under an unprobated will, the common pleas court in *Strawder v. Smith*[1] properly sustained the defendant's demurrer.

NOTICE TO RESIDENT HEIRS

In the case of *Vance v. Byerly*,[2] after testatrix' death in 1955, one of the heirs promptly presented testatrix' will for probate and notified all other heirs but one. The heir not notified was the adopted daughter of testatrix' deceased son. Apparently, no notice of probate was given to her because the personal representative's counsel believed that the amendments to the Ohio Code which authorized inheritance by an adopted child through his adoptive parents did not apply to a child adopted prior to the amendment.[3] Consequently, the person who applied for probate knew that the adopted daughter was a resident of Ohio, but apparently did not consider her an heir.[4] This adopted daughter died in June, 1955, three months after the will was probated. In September, 1956, the surviving husband of the adopted daughter instituted an action in equity in the common pleas court to have the probate of testatrix' will vacated. The defendant pleaded estoppel and laches but defendant's pleas could not be sustained on the facts. The common pleas court sustained plaintiff's demurrer to defendant's pleas, and vacated the probate of testatrix' will.

NATURE OF PROBATE

Although Section 2107.13 of the Ohio Revised Code requires the applicant for probate to give notice to the surviving spouse and to all heirs known by the applicant to be Ohio residents, the probate proceeding is basically ex parte. Therefore, only the applicant may present evidence.

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[1] 75 Ohio L. Abs. 186, 143 N.E.2d 327 (C.P. 1957).

[2] 76 Ohio L. Abs. 72, 140 N.E.2d 912 (C.P. 1957).

[3] Probate in Vance v. Byerly occurred prior to *In re* Estate of Millward, 166 Ohio St. 243, 141 N.E.2d 462 (1957) in which the court rejected the argument that the law in effect at time of adoption controlled the right of natural relatives to inherit from adopted person.

[4] Vance v. Byerly, 76 Ohio L. Abs. 72, 140 N.E.2d 912 (C.P. 1957).

Persons opposed to probate may cross examine the subscribing witnesses and proponent's other witnesses.[5]

By a four-to-three decision, the Ohio Supreme Court held in the case of *In Re Estate of Lyons*[6] that the probate court has no statutory authority to determine the fact that a document offered for probate was or was not properly executed. In the *Lyons* case, there was a full attestation clause and all three subscribing witnesses admitted subscribing their names. However, two of the subscribing witnesses testified that at the time they subscribed testator had not signed and that testator never signed nor acknowledged his signature in their presence. The third subscribing witness contradicted the other two. He testified that the testator declared the document to be his will, signed each page on the left margin, and signed the last page at the end in the presence of the three subscribing witnesses. The probate court believed the two subscribing witnesses who testified against the will and denied probate. The court of appeals affirmed this judgment of the probate court. But the Ohio Supreme Court reversed because the probate court had before it *substantial evidence* from which reasonable minds could have concluded that the will was properly executed.

Will Contest

Necessary Parties

Section 2741.02 of the Ohio Revised Code specifically provides that the executor or administrator is a necessary party to a will contest. There is some question as to the desirability of a strict construction of this statutory requirement.[7] However, the Ohio Supreme Court in a four-to-three decision in *Mangan v. Hopkins*,[8] prevented the contesting of a will because in the caption of the petition the name of the person who was the administrator with the will annexed appeared without any indication that he was a party in a representative capacity. In the body of the petition, this person was properly designated as the administrator but the precipe was issued and summons served upon him in his individual capacity only. The administrator was not, as in two Ohio Supreme Court cases decided

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[5] *In re* Will of Elvin, 146 Ohio St. 448, 66 N.E.2d 629 (1946).

[6] *In re* Estate of Lyons, 166 Ohio St. 207, 141 N.E.2d 151 (1957).

[7] "I am of opinion that the *Peters* and *Bynner cases* went to the extreme limit in the application of the statute, and that the application should not be extended beyond that limit." See Judge Stewart, dissenting in Mangan v. Hopkins, 166 Ohio St. 41, 44, 138 N.E.2d 872, 873 (1956). Mr. Judge Taft, concurring in Mangan v. Hopkins, 166 Ohio St. 41, 42, 138 N.E.2d 872 (1956).

[8] Mangan v. Hopkins, 166 Ohio St. 41, 138 N.E.2d 872 (1956).

in 1950,[9] an heir or a beneficiary under the will. For this reason, the dissenters believed these 1950 cases were distinguishable. They felt that the extension of the technical rule, established in 1950, to a situation where the personal representative was neither an heir nor a beneficiary under the will was an "unjustifiable technicality resulting in an unnecessary barrier in the path toward justice."

The recent case of *Abbott v. Dawson*[10] apparently marks a point beyond which the Ohio Supreme Court will not go in the application of technical rules of procedure which bar will contests. In the *Dawson* case, the executor was named in his representative capacity in both the caption and the body of the contestant's petition. The executor had no other relation to decedent's estate than as personal representative. For these reasons, the Ohio Supreme Court reversed the court of appeals and the common pleas court and held that the executor, as such, was a party to the will contest, though the precipe for service of summons named him only as an individual. The case of *Mangan v. Hopkins* was distinguished because in that case the administrator with the will annexed was named only as an individual in the caption of the contestant's petition.

The Ohio Supreme Court in *Andes v. Shippe*[11] refused to allow a contestant as plaintiff to dismiss a will contest to the prejudice of another contestant who had been joined as a defendant. Consequently, a common pleas court improperly refused to allow a plaintiff contestant to make an heir a party defendant after the common pleas court permitted this heir to withdraw as a plaintiff long after the expiration of the period for contest. Having refused to allow this heir to be made a party defendant, the common pleas court then dismissed the will contest for want of all necessary parties. Since other heirs were defendants, and the heir who was to be added as a defendant had been one of the plaintiffs, there was no bar to adding an additional heir as defendant.[12] The common pleas decision was reversed by the court of appeals.[13]

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[9] Peters v. Moore, 154 Ohio St. 177, 93 N.E.2d 683 (1950); Bynner v. Jones, 154 Ohio St. 184, 93 N.E.2d 687 (1950).

[10] 167 Ohio St. 238, 147 N.E.2d 609 (1958).

[11] 165 Ohio St. 275, 135 N.E.2d 396 (1956).

[12] Gravier v. Gluth, 163 Ohio St. 232, 126 N.E.2d 332 (1955); Cover v. Hildebran, 103 Ohio App. 413, 145 N.E.2d 850 (1957); Carnicom v. Murphy, 101 Ohio App. 416, 140 N.E.2d 3 (1956). *But cf.* Fletcher v. First National Bank, 167 Ohio St. 211, 147 N.E.2d 621 (1958); (a cousin and heir of decedent who was not named a defendant nor made a party by publication cannot be added as a defendant after expiration of six month period though other cousins who were heirs were named and served as defendants within this period.)

[13] Frederick v. Brown, 102 Ohio App. 117, 141 N.E.2d 683 (1956).

DIRECTED VERDICT FOR PROPONENT

In an action to set aside a will because of undue influence, the risk of non-persuasion is on the contestant to prove undue influence. If the contestant fails to introduce substantial evidence from which reasonable men might find undue influence, the judge may direct a verdict for the proponent.[14] In *Mohr v. Korte*,[15] a majority of the court of appeals found no error in the direction of a verdict for proponent by a common pleas judge. The dissenter construed the testimony of contestant's witness in such a way that the jury might have found that testatrix' daughter told testatrix that a trust fund had been established for a certain grandson when in fact there was no trust fund. The majority construed this testimony as relating solely to a conversation between testatrix' daughter and the mother of the grandson. The daughter who was alleged to have exerted undue influence would have received as her intestate share the same share in her mother's estate as she received under the will.

DISMISSAL FOR WANT OF PROSECUTION

If an action to set aside a will is properly instituted with service on all necessary parties and then is dropped by the court for want of prosecution, the case must be reinstated upon motion of plaintiff's counsel who were not notified before the case was dropped. Plaintiff's counsel were not notified because their names were not substituted as counsel after the death of plaintiff's original counsel who instituted the action. The common pleas court had failed to prepare the issue whether the writing produced at probate was the last will or codicial of testator. Under section 2741.04 of the Revised Code it is the duty of the court to make up this issue by a proper journal entry. Therefore, the plaintiff should not be penalized for the failure of the court to perform its duty.[16]

Rights of Surviving Spouse

ELECTION BY NONRESIDENT

Testatrix and her husband were American citizens domiciled in Bermuda. Testatrix owned personal property worth about $127,000 with its situs in Hamilton County, Ohio. Testatrix' will was probated only in Hamilton County. Testatrix' husband elected to take against the will. The executor opposed this election on the ground that the testatrix and her husband were domiciled in Bermuda and that under the laws of Bermuda, the surviving spouse has no right of election. The probate court

[14] 2 PAGE, WILLS §§ 659, 661, (3d ed. 1941).

[15] 143 N.E.2d 636 (Ohio Ct. App. 1957).

[16] Sharp v. Johnson, 103 Ohio App. 194, 144 N.E.2d 896 (1957).

held and the court of appeals affirmed in the case of *In re Estate of Gould*[17] that since the will was originally probated in Ohio where the personalty was located, the surviving spouse had the right to elect to take against the will. Section 2107.39 of the Ohio Revised Code does not exclude a non-resident surviving spouse from electing to take against the will.

Purchase of Mansion House

In the case of *In re Estate of Fouts*,[18] the intestate at her death owned an undivided one-fourth interest in a farm of 360 acres. This undivided interest was appraised at $13,500. The surviving spouse elected to buy this undivided interest at its appraised value under Section 2113.38 of the Ohio Revised Code. The probate court authorized the sale, but provided that the surviving spouse must pay to intestate's heirs one-fourth of any money subsequently received from the state of Ohio for a right of way. The court of appeals modified the order of the probate court because at intestate's death no one knew that a portion of the farm would be used as a highway. Having eliminated the claim of the heirs to a portion of the money to be paid for the right of way, and considering the appraised value as of intestate's death, the court of appeals found that the appraised value was neither so inadequate as to unconscionably prejudice the heirs nor the result of fraud.

The other issues in the case of *In Re Estate of Fouts* are discussed under the Administration section of this article.

The court of appeals in the case of *In Re Estate of Clark*[19] properly held that the right of the surviving spouse to buy the mansion house includes an entire farm consisting of three tracts of about 7, 28, and 65 acres but which were farmed as a unit. All buildings, except several old buildings used for storage, were located on the smallest of the three tracts.

Administration

The Ohio Revised Code in Section 2505.02 provides for review of "an order affecting a substantial right made in a special proceeding." It is difficult, therefore, to understand the decision of the majority of a court of appeals that an order of a probate court authorizing the presentation of a claim against a decedent's estate after the expiration of the four month period and pursuant to Section 2117.07 is not an appealable order. The Ohio Supreme Court properly reversed the court of appeals

[17] 75 Ohio L. Abs. 298, 140 N.E.2d 801 (Ct. App. 1956).

[18] 103 Ohio App. 313, 145 N.E.2d 440 (1957).

[19] 102 Ohio App. 200, 141 N.E.2d 890 (1956).

in the case of *In Re Estate of Wyckoff*,[20] thereby protecting the estates of decedents against improper authorizations by probate courts for the filing of claims after the expiration of the four month period.

In the case of *In Re Estate of Fouts*,[21] claims were submitted by an insurance company and a bank to intestate's administrator on two promissory notes which had been signed jointly by intestate and her husband. The husband is also intestate's administrator. The probate court disallowed these two claims because the one by the insurance company represented money borrowed to pay for the husband's undivided three-fourth interest in land; and the claim by the bank was for money borrowed by the husband to buy personalty. The court of appeals reversed this order of the probate court because under Section 2117.31 of the Ohio Revised Code the insurance company and the bank had the right to demand payment from the intestate wife's estate. Since the husband was the primary debtor and the administrator of his wife's estate, if the two claims were paid from the assets of his wife's estate, the court held that he as administrator had to be surcharged.

In the case of *In Re Estate of Bowman*,[22] the court of appeals sustained a claim for $3,125 by a daughter-in-law for caring for her aged father-in-law in her home. The court of appeals determined that there was no family relationship between claimant and her father-in-law.

When the person rendering the services and the one receiving it are both members of a family whether or not related by blood, there is a presumption that the services were rendered gratuitously. A family relationship exists when there is reciprocity or mutuality of benefits. Claimant in the *Bowman* case received neither money nor service from intestate prior to his death.

Upon motion of a claimant made within one year of the order settling the account of the administratrices, a probate court in the case of *In Re Estate of Douglass*[23] reopened the account. Claimant had filed his claim for $130.50 within the statutory period. The attorney for the administratrices had written claimant that the intestate was never satisfied with claimant's work and therefore the attorney would recommend payment of only $50 to claimant. The Schedule of Claims thereafter filed by the administratrices indicated that this claim had been rejected as of the date of the attorney's letter. Section 2117.11 of the Ohio Revised Code requires the personal representative to give the claimant written notice of rejection. Under this section, if the claimant in writing demands allowance of his

[20] 166 Ohio St. 354, 142 N.E.2d 660 (1957).
[21] 103 Ohio App. 313, 145 N.E.2d 440 (1957).
[22] 102 Ohio App. 121, 141 N.E.2d 499 (1956).
[23] 144 N.E.2d 924 (Ohio Prob. 1957).

claim within five days, the claim is rejected if the personal representative fails to give claimant within five days a written notice of the acceptance of his claim. Since there is no duty on claimant to demand an allowance, claimant was not prejudiced in the *Douglass* case by his failure to make such a demand. The probate court held that the attorney's letter was not an unequivocal rejection of the claim.

Section 2117.07 of the Ohio Revised Code provides that the probate court may authorize the presentation of a claim to the executor or administrator after the expiration of the period of the non-claim statute if the probate court finds "that the claimant did not have actual notice of the decedent's death or of the appointment of the executor or administrator in sufficient time to present his claim within the period prescribed by section 2117.06 of the Revised Code." The Ohio Supreme Court[24] has held that the word "or" in the phrase, "did not have actual notice of the decedent's death *or* of the appointment of the executor or administrator" does not mean "and." However, the Ohio Supreme Court has also stated that a claimant who knows of his debtor's death is "at once put upon inquiry as to the appointment of a fiduciary and if he learns of such appointment, or in the exercise of reasonable diligence could learn of the same, he must file his claim within the specified four-month period. . . ."[25] In the case of *In Re Estate of Lathrop*,[26] the court of appeals reversed the judgment of a probate court. The probate court had sustained demurrers to claimants' petitions and had refused to authorize the filing of claims after the four-month period because claimants knew of decedent's death shortly after it occurred and knew decedent's post office address. Claimants did not learn of the appointment of an executor until five months after his appointment. The issue which should have been considered by the probate court as stated by the court of appeals is whether under all the facts the claimants exercised reasonable diligence to learn of the appointment of the executor.

Claimants and decedent in the *Lathrop* case were involved in an automobile accident August 8, 1954, in Van Wert County. Decedent prior to his death was moved from the Van Wert County Hospital to a hospital in Lima, Ohio, which is in Allen County. Decedent died August 10, 1954, in this hospital. Newspaper articles in the Lima News on August 9, 10, and 11, 1954, gave decedent's address as Route 1, Lima, Ohio. Claimant employed an attorney in Lima who examined the records of the probate court of Allen County on October 18, 1954, and on January 28, 1955. On this latter date, the attorney learned from his employee that Route 1

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

[25] *Id.* at 100, 107 N.E.2d at 151.

[26] 103 Ohio App. 392, 141 N.E.2d 212 (1956).

out of Lima might include part of Auglaize County. The attorney immediately telephoned the probate court of Auglaize County and learned that an executor had been appointed for decedent's estate more than five months earlier. The court of appeals held that knowledge of decedent's death, and of decedent's post office address is not the same as knowledge of decedent's residence. For this reason, it reversed the probate court which had sustained demurrers to claimants' petitions.

A tort claim for injuries which were received in an accident between an automobile in which claimant was a passenger and an automobile driven by decedent is not a contingent claim which may be filed after the expiration of the four month period. Therefore, it is immaterial according to *Lewis v. Knight*[27] that the specific injury for which recovery is sought was not known to exist until after the expiration of the period for filing claims against decedent's estate.

A person who pays a note secured by a mortgage does not have to file a statement of payment within the four month period because there is no debt. Consequently, when in *Fox v. McCreary*[28] the mortgagee's administrator sued the mortgagor to foreclose the mortgage, the failure of the mortgagor to file a "claim" of payment was no bar to proving payment of the note which was secured by the mortgage.

Revocation By Operation of Law

The Ohio Revised Code in Section 2107.33 provides in general language that "this section does not prevent the revocation implied by law, from subsequent changes in the circumstances of the testator." This general language introduces into the Ohio law of wills an undersirable uncertainty. Revocation by change in circumstances should be allowed only on the grounds specifically set forth in the statute. For example, Section 53 of the Model Probate Code provides as follows:

> If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

Under this section of the Model Probate Code, the will in *Lang v. Leitey*[29] would have been revoked by testator's divorce.

The testator in 1936 married the person from whom he was divorced in 1953. The divorce was granted testator's wife because of his gross neglect of duty. Testator executed his will in 1948 in which he left all

[27] 75 Ohio L. Abs. 589, 144 N.E.2d 551 (Ct. App. 1955).
[28] 103 Ohio App. 73, 144 N.E.2d 546 (1957).
[29] 103 Ohio App. 119, 144 N.E.2d 332 (1956).

of his property to "my wife, Lucille M. Leiter" if she survived him. If she did not survive testator, then his property was to go to a niece and nephew. After the divorce in 1953, testator's former wife remarried. Testator died in 1954. There was no separate and full property settlement by testator and his former wife before, at the time of, nor after the divorce. However, the probate court held that the divorce revoked the will by operation of law. The court of appeals reversed the probate court because of the absence of a full property settlement, such as was made by the testator in *Younker v. Johnson*[30] where the divorce and the full property settlement together constituted a sufficient change of circumstances to revoke testator's will which was executed during the period of his marriage.

Construction

In the case of *Partridge v. Pidgeon*,[31] the Ohio Supreme Court had before it a contract for the disposition of testator's interests in two partnerships and also testator's will. The contract and will had been construed initially by a probate court in a declaratory judgment action. The contract for the disposition of the interests in the partnerships is considered in another portion of this annual survey.[32] Therefore, only the will of one of the partners will be considered by the writer.

At testator's death, he owned a fifty percent interest in one partnership and a thirty-five percent interest in another partnership. Testator purported to bequeath to his two sons all his interest in the assets of the two partnerships. Testator also provided in his will that if the contract for the sale of his partnership interests should not be carried out and if the bequest of the testator's interests in the two partnerships should not be effective, then his two sons should have the right to buy his interests in the partnerships. The Ohio Supreme Court held that the sons received the testator's interests in the partnerships subject to the right of the other partners to purchase them under the contract and that this specific bequest necessarily carried with it profits earned prior to testator's death but unpaid and profits from testator's death to the sale of the interests in the partnerships. Upon sale of the interests, the sons were entitled to the proceeds. Thus, there was no ademption and also the portion of the partnership profits payable to testator's estate did not pass under the residuary clause.

The probate court in *Bartels v. Bartels*[33] through the use of extrinsic

[30] 160 Ohio St. 409, 116 N.E.2d 715 (1954).

[31] 166 Ohio St. 496, 143 N.E.2d 840 (1957).

[32] See p. 352 *supra*.

evidence was able to arrive at a reasonable judicially ascertained intent as to the persons to whom testatrix intended to give legacies. Through inadvertence in drafting and the failure of testatrix to carefully read the will before signing it the testatrix's will inaccurately described a number of the beneficiaries and their relationship to her.

Joint Bank Accounts

In *Bartels v. Bartels*[34] and the case of *In re Schroeder*,[35] probate courts held that as to money in a joint bank account with no provision for survivorship, upon the death of one of the joint depositors, his estate is entitled to half of the money on deposit. Only the half payable to the estate of the deceased joint depositor is subject to the Ohio inheritance tax. It is interesting that it was also held in the *Schroeder* case that when the joint account provided for payment of any balance to the survivor, the entire balance was presumed to be taxable as property of the deceased joint tenant except to the extent the survivor could prove the contrary. Under Section 5731.02 of the Ohio Revised Code as to decedents who die on or after June 17, 1957, joint accounts in the name of husband and wife are taxable at one-half the balance in the account at the death of one without regard to their contributions.

Descent and Distribution

The probate court, court of appeals, and Ohio Supreme Court all properly held in the case of *In re Estate of Millward*[36] that there are no vested rights in an inheritance and therefore under the Ohio statute in force at an intestate's death, a natural son of an intestate cannot inherit from his natural father if the son has been adopted by another. The purpose of the statutes which make adopted children able to inherit from and through their adoptive parents and not from or through their natural parents is to increase the family solidarity of the adoptive parents, the adopted child, and any natural children of the adoptive parents. This policy is somewhat in conflict with custom and with the common law emphasis on inheritance by blood relationship, but the new policy is basically sound. Natural parents and blood relatives of persons who have been adopted should be stimulated by decisions of this type to will property to these persons if they desire the adopted persons to receive a portion of their estate at death. For the same reason, persons who have been adopted should be

[33] 75 Ohio L. Abs. 117, 139 N.E.2d 695 (Prob. 1956).
[34] *Ibid.*
[35] 75 Ohio L. Abs. 555, 144 N.E.2d 512 (Prob. 1957).
[36] 166 Ohio St. 243, 141 N.E.2d 462 (1957).