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Wills and Decedents' Estates

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up the necessity, where such an action is brought, of joining as a party to the suit, each person who has an interest, contingent or vested, in each facet of the questions at issue.[26]

TRUSTEE'S PERSONAL LIABILITY

In *Latell v. Walsh*[27] the question of the personal liability of the trustees of a charitable trust for injuries to third persons is discussed. A personal injury action was brought against both the Bishop of the Catholic Diocese of Youngstown and the pastor of the plaintiff's parish church alleging that the plaintiff had been injured because of deficiencies in the construction of an external stairway leading from the church. Both defendants were sued individually as the persons having control of the premises and the responsibility for its being a safe place. The court concluded that the immunity granted to a charitable institution extended to the defendants, who were in the position of trustees of a charitable trust, unless it could be shown that there was an act or omission which amounted to a violation of the trust. The court found no evidence that the defendants had been derelict in their official duties. The decision is consistent with the general rule respecting the personal responsibility of trustees of a charitable trust.[28]

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WILLS AND DECEDENTS ESTATES

WILL CONTEST

Commencement

Under the relevant Ohio statutes,[1] a will contest action must be commenced within six months after the probate of the contested will. It has been uniformly held that commencement requires that all necessary parties to the action be made parties within this six-month period.[2] In the recent case of *Williams v. Wilfong*,[3] an heir at law of the deceased testator was not made a party to the will contest action within the six-month period. When the case was set for trial, the heir at law filed a waiver of service and sought to enter an appearance and consent to the prayer of the petition.

The Summit County Court of Appeals affirmed the action of the lower court in dismissing the case for lack of jurisdiction. The dictates of the

26. OHIO REV. CODE § 2721.12.

27. 181 N.E.2d 729 (Ohio Ct. App. 1961).

28. RESTATEMENT (SECOND), TRUSTS § 402, comment *a* (1959).

statutes are conclusive, said the court, and a subsequent voluntary waiver of service by an heir at law will not "vitalize" the action.

Undue Influence

Two interesting decisions considered the question of undue influence as a ground for contesting the validity of a will. In the first case,[4] the contestants urged that undue influence had been exercised, as the result of which the testator had disposed of property to friends rather than to his next of kin. The court said that in the absence of other evidence the selection of friends in preference to relatives was not sufficient to show the exercise of undue influence.[5]

The second case reached the Ohio Supreme Court.[6] In an opinion replete with selected quotations from the record of the trial court, the Ohio Supreme Court made it clear that, contrary to the positions of the trial and appellate courts, the invalidation of a will on the ground of undue influence requires something more than a showing that persons with a motive to exercise undue influence may have done so. Rather, as the court points out, it is necessary that it be shown that "the undue influence resulted in the making of testamentary disposition which the testator would not otherwise have made."[7]

As a result of the application of this rule, the court said, in reversing the trial and appellate courts, a "will or codicil which, as finally executed, expressed the will, wishes and desires of the testator is not void because of undue influence."[8] The court's review of the record of the trial satisfied it that, if any undue influence had existed, it did not affect the manner of disposition of property selected by the decedent.

Improper Execution

Will the affixing of a "mark" to a writing intended as a will suffice as a valid execution of such a testamentary document? Must the testatrix acknowledge her mark to the witnesses as a condition of such validity? In *Kemp v. Matthews*[9] the court held that the affixing of a mark on a paper with writing intended as a will by the testatrix, an elderly and illiterate

1. OHIO REV. CODE §§ 2741.01-09. Section 2741.02 states: "All the devisees, legatees, and heirs of the testator, and all other interested persons . . . must be made parties to an action under Section 2241.01 of the Revised Code."
2. See Fletcher v. First Nat'l Bank, 167 Ohio St. 211, 147 N.E.2d 621 (1958).
3. 114 Ohio App. 183, 181 N.E.2d 314 (1961).
4. Golding v. Ohio Nat'l Bank, 115 Ohio App. 465, 185 N.E.2d 577 (1962).
5. *Id.* at 465, 185 N.E.2d at 578.
6. West v. Henry, 173 Ohio St. 498, 184 N.E.2d 200 (1962).
7. *Id.* at 511, 184 N.E.2d at 208.
8. *Ibid.*
9. 183 N.E.2d 259 (Ohio Ct. App. 1962).

person, was made with executing effect and was a sufficient and valid signature. Further, the court said that, since the testatrix made her mark in the presence of the witnesses, there was no need to acknowledge her signature to those witnessess.[10]

CONSTRUCTION OF WILL PROVISIONS

The testatrix's will provided for a disposition of a portion of her estate to "issue" of her son. This dispositive provision was contained in the portion of the will which established a trust which was to commence on the death of the testatrix and continue for a stipulated period of time, at the expiration of which this particular disposition of the trust assets was to occur.

Sixteen years after the death of the testatrix, her son adopted the daughter of his wife. Was this adopted daughter "issue" of the son for the purposes of the trust provision? In *Dollar Sav. & Trust Co. v. Musto*[11] the Mahoning County Court of Appeals answered this question in the affirmative.

In support of its decision, the court noted the Ohio statute which gives to adopted children all the rights of natural children with the exception that "such adopted child shall not be capable of inheriting . . . property expressly limited to the heirs of the body of the adopting parents."[12] Today, said the court, the word "issue" has an accepted meaning which is much broader than it had in the past. Although the term "issue" might, in the past, have been considered as synonymous with "heirs of the body," the term "has taken on a much broader meaning and [the court believed] . . . that it now, and . . . at the time the will was drawn, include[s] adopted children."[13]

The Ohio statute establishing the status of adopted children was in effect at the time the will was executed. Accordingly, the testatrix, in drawing her will, "was charged with the knowledge of statutes and law as they then existed."[14]

In *Roenick v. Dollar Sav. & Trust Co.*[15] the testator's will established a trust which provided for a future distribution of trust assets to his grandson "to be his absolutely and in fee simple, provided that he give and pay . . . ." certain specified cash amounts to certain designated charitable organizations. The testator died within one year of the execution

10. *Id.* at 261.
11. 181 N.E.2d 734 (Ohio Ct. App. 1961).
12. OHIO REV. CODE § 3107.13(A) (Supp. 1962).
13. Dollar Sav. & Trust Co. v. Musto, 181 N.E.2d 734, 735 (Ohio Ct. App. 1961).
14. *Ibid.*
15. 179 N.E.2d 379 (Ohio Ct. App. 1960).

of his will and the effect of the Ohio mortmain statute[16] on his testamentary provisions thus came into question.

The court held that the directions in the will to pay designated amounts to the charitable organizations were invalid because of the mortmain statute.[17] As a result, the distribution to the grandson was ordered to be made without obligation to make the payments to the charitable organizations. The court briefly considered the question of whether the entire testamentary dispositive plan should fall because of the invalid charitable gift. It concluded that the charitable gifts were not the primary objects of the testator's plan and could be ignored without doing violence to that plan. Therefore, the court held that the provisions of the will should be followed as if the directions relative to the payments to charity had not been included.[18]

PRETERMITTED HEIRS

A recent decision[19] provides an excellent reminder of the significance of section 2107.34 of the Ohio Revised Code, which deals with afterborn or pretermitted heirs. In this case, the testator, at the time he executed his will, had three living minor children. His will had no dispositive provision for the benefit of afterborn children, but did not express an intention to disinherit such children. After the execution of the will and prior to the death of the testator, he and his wife had a fourth child.

In the administration of the testator's estate, certain real estate, owned by the testator at his death, was transferred to the surviving spouse. Thereafter, the real estate was acquired by a purchaser for value. The guardian of the afterborn child claimed a fractional interest in the real estate in question equal to the interest which would pass to such a child under the statutes of descent and distribution. At issue was the effect to be given to the portion of Revised Code section 2107.34 which provides that:

> This section does not prejudice the right of any fiduciary to act under any power given by the will, *nor shall the title of innocent purchasers for value of any of the property of testator's estate be affected by any right given by this section to a pretermitted child or heir.* (Emphasis added.)

The court held that, although the purchase was for value, the purchaser was not innocent in that it had notice of the interest of the pretermitted child in the real estate.[20] It is not entirely clear from the opinion whether the purchaser received an abstract of title which specif-

16. OHIO REV. CODE § 2107.06.
17. Roenick v. Dollar Sav. & Trust Co., 179 N.E.2d 379, 381 (Ohio Ct. App. 1960).
18. *Id.* at 382.
19. Twitchell v. Alexander & Liggett, Inc., 115 Ohio App. 51, 184 N.E.2d 421 (1961).
20. *Id.* at 62, 184 N.E.2d at 429.

ically noted the claim in question or whether the abstract simply provided enough facts relative to the estate to permit the purchaser to determine the existence of such a claim.

As a result, the court held that the pretermitted child was the owner of a one-sixth undivided interest in the real estate, since the child's interest in the property had not effectively been sold or conveyed.[21] The court summarily rejected the view that the child's claim should only be satisfied out of the fund arising from the sale of the real estate.[22]

OHIO "HALF AND HALF STATUTE"

Ohio Revised Code section 2105.10, popularly known as the "half and half statute," has once again reared its hoary head. This statute, an anachronistic holdover of outmoded ancestral property concepts, continues to foster litigation over matters which become, more and more, examples of legal "hairsplitting."[23]

In the case of *In re Estate of Duswald*[24] the relict received real estate owned by her deceased spouse at his death. She demolished certain structures on the property and replaced them with new structures. She remained the owner of the property at the time of her death. If the real property remained "identical" with that received at her husband's death, the property would pass, when the relict died intestate, to relatives of the predeceased husband under the provisions of the "half and half statute."

The court held that the alteration of the structures on the property did not render the property nonidentical for purposes of the statute. The court's test of "identical" is quite simple: "[The] only thing that counts in determining whether the real property is the same, or 'identical,' is if the title is the same; was the title changed in any way, or was it not?"[25]

This writer submits that the concept of the "half and half statute" is out of step with contemporary theories. Since it stands alone on the plains of ancestral property doctrines, it will, so long as it continues to be the law, provide fuel and nurture for unnecessary litigation.

ADEMPTION

The testator specifically devised certain real estate owned by him at the time of the execution of his will. Subsequently, he sold the real

21. *Id.* at 62, 184 N.E.2d at 428-29.

22. *Id.* at 62, 184 N.E.2d at 429.

23. The problems created by the "half and half statute" were commented on by the author in a prior year. See Aronoff, *Survey of Ohio Law — Wills and Decedents' Estates*, 11 W. RES. L. REV. 444, 445 (1960).

24. 180 N.E.2d 307 (Ohio P. Ct. 1960).

25. *Id.* at 310.