

SUPREME COURT OF OHIO

CASE NO. 06-2343

ANDREA HELEN SANGRIK, TRUST
CAROLE M. RADEY, TRUSTEE

Appellant

v.

JESSICA R. STEVENS, ET AL

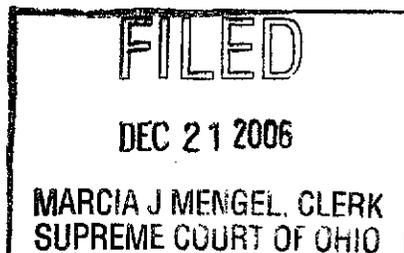
Appellees

On Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio
Case No. 87273

MEMORANDUM IN SUPPORT OF JURISDICTION

JOHN M. WIDDER (0017254)
PEGGY MURPHY WIDDER (0034239)
18231 Sherrington Road
Shaker Heights, OH 44122
*Attorneys for Appellees,
Jessica R. Stevens, Margaret Melko, Paul Kijewski,
Antionette Maruszak, David Sczepanski, and the
Estate of Mary Lou Stover*

ANGELA G. CARLIN (0010817)
ACarlin@westonhurd.com
Counsel of Record
GREGORY E. O'BRIEN (0037073)
GObrien@westonhurd.com
SHAWN W. MAESTLE (0063779)
SMAestle@westonhurd.com
Weston Hurd LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, OH 44114-1862
(216) 241-6602 (telephone)
(216) 621-8369 (facsimile)



JOHN P. KOSCIANSKI (0043852)
5700 Pearl Road, Suite 302
Parma, OH 44129
*Attorneys for Appellant,
Carole M. Radey, Trustee*

TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS.	5
LAW AND ARGUMENT.	7
I. <u>Proposition of Law No. 1</u> : A Testamentary Trust, With No Residuary Clause, Upon The Death Of The Trust Beneficiary, Passes To The Heirs At Law As Determined At The Death Of The Testator.	7
Conclusion.	14
Certificate of Service.	15

**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

As the so-called “baby-boomer” generation prepares to transmit its vast collective estate to its designated heirs and legatees, Ohio’s probate and appellate courts, as well as the attorneys who practice before them, must prepare for what, compared to previous generations, will seem like a virtual deluge of probate litigation. As this largest and wealthiest generation's estates are probated and settled, those responsible for the orderly administration of their affairs will likely encounter a level of litigation commensurate with the size and wealth of this generation as compared to those of the past.

Moreover, popular culture has “educated” this sizeable generation of Americans to believe that “probate avoidance” is the pre-eminent objective of estate planning, and that “trusts” are a one-size-fits-all vehicle for the accomplishment of that end. The consequent proliferation of the use of trusts in estate planning over the last twenty years will lead to an inevitable upswing in the number and complexity of probate conflicts involving wills, testamentary trusts and the like--indeed, this is likely one of the first of many such cases. Accordingly, as the “graying” of Ohio progresses, it is imperative that this Court assure that the lower courts have clear guidance for resolving these conflicts.

In Ohio, as in other states, probate law and the associated law of trusts and estates, is a mixture of statutory, common law and equitable rules and remedies that have, for the most part, withstood the test of time. As the accepted ground rules are tested by the coming barrage of probate litigation, it will be more important than ever for this Court to reaffirm the underlying principles and policies governing the passage of wealth from one generation to the next. Indeed, this Court appears to have recognized the need for its continuing guidance in this area, having already decided two probate cases this year: See, *In re: Estate of Mason*, 109 Ohio St.3d 532, 2006-Ohio-3256 (priority of judgment liens against a legatee’s interest in a probate estate); and, *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, (constructive trust in favor of one deceased spouse imposed over assets distributed to the children of the other deceased spouse from a joint and survivorship account held in the names of both).

Like the *Mason* and *Cowling* cases, the opinion of the Eighth District Court of Appeals in this case presents an issue of public or great general interest. This case represents a virtual “fork in the road” between the orderly application of time tested rules governing the administration of probate estates and a headlong rush into confusion---where legal and equitable rules, and the rules governing the interpretation of wills and trusts, can be interchanged without regard to established precedent. For example, this Court has always sought to preserve the sound public policy of ascertaining and carrying out the testator’s intentions in interpreting probate documents, as well as enforcing the legislature’s intent in interpreting clear and unambiguous statutes. Unfortunately, the court of appeals lost sight of those worthy objectives when it failed to recognize the simplicity of the issue before it. The appellate court’s error in this regard led it into an unnecessary and inappropriate application of the law of resulting trusts, that has sown the seeds of confusion in future cases.

The question presented to the Eighth District Court of Appeals here was a simple one: whether the “heirs at law” of a testator who failed to provide for the distribution of the residuary assets of a testamentary trust (established for the benefit of her father) are determined under R.C. § 2105.06, the statute of decedent distribution, as of the date of the testator’s death. Instead of simply affirming the trial court’s straightforward resolution of the issue in the affirmative, the court of appeals was enticed into an analysis of the law of resulting trusts (which has no application under the facts of the case), and concluded that the testator’s heirs were to be determined at the time the law implied a resulting trust---at the later death of the testator’s father.

Ohio’s interest in maintaining a stable and predictable body of probate law is greater now than ever. As Judge Rocco’s dissenting opinion points out, the issue presented in this case was concisely addressed by the First District Court of Appeals in *Williams v Ledbetter* (1950), 87 Ohio App. 171. In that case the court held that where a testator set up a testamentary trust, wherein two successive life beneficiaries were to receive the income from a trust, with the remainder to go to four specific devisees,

and the four specific devisees died before termination of the second life estate, a partial intestacy occurred, and the testator's next of kin at the time of his death were entitled to the trust fund. While not an opinion of this Court, the *Williams* decision was well reasoned and has well served the bench and bar for more than fifty years; it should have been followed below. In light of the burgeoning onslaught of probate litigation that will follow the baby-boomers' passage into history, the Eighth District's failure to correctly identify and resolve the issue in this case creates a quagmire of uncertainty that promises to reach far beyond the interests of the litigants in this case

For instance, aside from the incorrect result and the creation of a divergence among the appellate districts on the issue, the opinion below appears to elevate the equitable remedy of a resulting trust above the will of the legislature, as articulated in R.C. § 2105.06. As Judge Rocco protested in dissent, "naming [the testator's father] as the trust beneficiary in her will did not divest him of his rights under the statute of descent and distribution." Journal Entry and Opinion, p. 9, Rocco, J., dissenting. Similarly, the majority opinion below flies in the face of logic by imposing complexity where simplicity would suffice (e.g., requiring the imposition of an unnecessary resulting trust, when clear and time tested precedent---i.e., *Williams*---and binding statutory authority---i.e., R.C.2105.06---prescribed a different outcome). Finally, the lower court's majority opinion needlessly invites confusion into a settled area of the law by failing to simply apply the statute of descent and distribution as directed by the Legislature, and by using the equitable power of the Court where neither appropriate nor applicable.

This case presents an important question of probate law long deemed settled (albeit via a decision of another intermediate appellate court), and that has not been addressed by this Court in over one hundred years. Because of the relatively recent proliferation of the use of testamentary trusts, inter vivos trusts and similar estate planning devices, Ohio's probate and appellate courts will likely encounter conflicts like the one before the Court in the present case again and again in the coming years. By stepping into the breach now, much as it did in the *Mason* and *Cowling* cases, this Court has the

opportunity to forestall much indecision and uncertainty. By unequivocally establishing a clear rule to be applied in cases like this one, the Court can clarify the law and provide the guidance that is its constitutional function.

For all these reasons, this case presents an issue of great general or public interest and this Court should resolve that issue by exercising its discretionary jurisdiction to hear this appeal on its merits.

STATEMENT OF THE CASE AND FACTS

On August 19, 1993 Andrea Sangrik and her father Andrew Sangrik both executed Wills that had been drafted by the same attorney, with the same witnesses attesting each document. Andrea was unmarried, had no children, and was the only child of Andrew and Helen Sangrik. Helen had passed away earlier that year and Andrew never remarried.

Andrea's Will contained a testamentary trust, naming her cousin Carole Radey as trustee, directing Carole to use the trust assets to care for Andrew in the event Andrea predeceased him. Andrea's intent to benefit her father is explicit, as evidenced by her express "wish and desire to provide for and give to my father, Andrew Sangrik, the care and benefits herein as I would give him were I to survive. I, therefore, direct my Trustee to administer the entire trust estate for the benefit of my father." The Trustee was given broad powers "to use so much of the income and/or principal, of the trust estate for the support, care, and maintenance of my father, Andrew Sangrik, to be distributed to him in such proportion and at such times as my Trustee, in his (sic) sole and absolute discretion, shall determine." Perhaps due to a "scrivener's error," Andrea's Will did not contain a residuary provision for the distribution of any property remaining in the trust following her father's death.

Andrew Sangrik's Will provided that Andrea would inherit his entire estate if she survived him, but that if Andrea predeceased her father, then Andrew's estate would be distributed to his niece, Carole Radey.

Andrea Sangrik died on July 8, 1997, survived only by her father, Andrew. Andrea's executor ultimately transferred her remaining property to the testamentary trust created in the Will. Andrew survived his daughter by six years. During that time Carole, as Trustee, used the trust property for the benefit of Andrew, until his death on June 26, 2003.

Since Andrea's Will contained no residuary clause, the Trustee filed a complaint for Declaratory Judgment (Cuy. Cty. Case No. 2004 ADV 84678) to obtain the court's direction as to the distribution of

the remaining trust property following Andrew's death. In a Judgment Entry dated November 4, 2004, the Probate Court ordered that the corpus of the trust be distributed to Andrea's heirs in accordance with the law of descent and distribution.

Thereafter, Andrea's cousins filed an action in the Probate Court to determine the identities of her next of kin, (Jessica R. Stevens, et al. v. Carole M. Radey, et al., Case No. 2004 ADV 96385). In this "heirship" case, the magistrate initially decided that the residue of the trust should be distributed to Andrea's twelve cousins, notwithstanding that Andrea had been survived by her father. Carole, as Trustee, objected and on October 12, 2005, the Probate Court held that: (1) Andrea's heirs were determined at the time of her death; (2) Andrea was survived by her father, Andrew; (3) under Ohio R.C. 2105.06(F), her father's right to inherit was superior to that of her twelve cousins; and, (4) the corpus remaining in the trust would be distributed to Andrea's heir as if she had died intestate. In addition, the Probate Court determined that since Andrew had himself died in June 2003, the remaining corpus in Andrea's trust would be distributed to his niece Carole as the sole beneficiary under his Will.

Some of the cousins appealed the Probate Court's decision to the Eighth District Court of Appeals, Cuyahoga County. That appeal was consolidated with a related appeal from a Probate Court order refusing to remove Carole as Trustee (Andrea Helen Sangrik Trust, Case No. 1998 TST 280). In its November 6, 2006 decision, the appellate court held that where the testator failed to provide for the trust remainder, the law would imply a second trust, and that this second implied trust would be held for the benefit of the grantor's heirs at law. Further, the Court held that, since Andrew had predeceased the formation of the resulting trust, he could not be considered an heir at law. The appellate court defined "next of kin" as those remaining at the formation of the resulting trust and not those existing at the time the initial trust was settled. The appellate court also found that the Probate Court erred in finding Andrew to be the sole beneficiary "of the resulting trust", and determined that Andrea's surviving blood relatives at Andrew's date of death, i.e., her cousins should share the trust remainder.

In a dissenting opinion, Judge Rocco emphasized that Andrea's heirs at law would be determined at the time of her death under the law of descent and distribution, Ohio Revised Code 2105.06, and that naming Andrew as her trust beneficiary in her Will did not divest him of his right to inherit under the law of descent and distribution.

Carole, as Trustee, now requests this Court to exercise its discretionary jurisdiction to hear her further appeal on the merits.

LAW AND ARGUMENT

I. Proposition of Law No. I: A Testamentary Trust, With No Residuary Clause, Upon The Death Of The Trust Beneficiary, Passes To The Heirs At Law As Determined At The Death Of The Testator.

A decedent's property passes either through his Will or through intestacy, which is controlled by R.C. § 2105.06, the statute of descent and distribution. *Oglesbee v. Miller* (1924), 111 Ohio St. 426, syllabus. The statute of descent and distribution, R.C. § 2105.06, was enacted to fill the void where a decedent fails to draft a Last Will and Testament. The same statute has similarly been used to dispose of any remaining interest or assets not specifically devised by a testator's will. See, e.g., *Gilpin v. Williams* (1874), 25 Ohio St. 283; *Matthews v. Krisher* (1899), 59 Ohio St. 562; *Foreman v. Medina County Nat. Bank* (1928), 119 Ohio St. 17, 21-22; *In Re Estate of Underwood*, 1990 WL 54865, 4th Dist. No. 1838 (April 26, 1990) at *2. Thus, whether a testator dies without a Will, or the Will itself fails to dispose of the testator's entire estate, the statute of descent and distribution makes certain that all interests are conveyed.

In the instant matter, Andrea M. Sangrik's Last Will and Testament contained a testamentary trust for the sole benefit of her father, Andrew Sangrik:

It is my express wish and desire to provide for and give to provide for and give to my father, Andrew Sangrik, the care and benefits herein as I would give him were I to survive. I, therefore, direct my trustee to administer the entire trust estate for the benefit of my father, Andrew Sangrik, as follows:

However, Andrea's Will failed to specify or direct through a residuary clause or similar device what was to occur if her father died before all of her estate assets were consumed. In other words, when Andrew died, Andrea's estate still contained assets, but no instruction or direction as to how to distribute them. *Oglesbee, supra; Matthews v. Krisher* (1899), 59 Ohio St. 562.

While the statute resolves questions created by a lack of a residuary clause or failed condition, the question presented here is whether the heirs at law are created at the moment of the testator's death, under the well settled axiom set forth below, or at a future point in time when the devise, bequest, condition or the like fails, thereby realizing undisposed assets. In other words, where the beneficiary does not use the entire trust corpus, are the heirs at law entitled to the remaining estate assets determined at the death of the testator or upon the death of the trust beneficiary?

It is well settled that R.C. § 2105.06 determines a decedent's heirs at law at the moment a decedent dies:

A testator's 'heirs at law' can actually be determined only at the time of his death. Thus, if the words 'my heirs at law' in a testator's will are given their ordinary meaning, they will necessarily describe those who are actually the testator's heirs. Who they are will necessarily be determined by the law in effect at the testator's death.

Tiedtke v. Tiedtke (1952), 157 Ohio St. 554, 559-560.

Should this sound principle of Ohio jurisprudence be disregarded where the decedent dies testate but the Last Will and Testament fails to convey all interest in decedent's estate? Such "scrivener's errors" occur where the instrument does not contain a residuary clause, has lapsed legacies or devisees, or fails in some manner to dispose of any remainder or similar interests which may exist at any point in time while the executor is administering the estate.

This Court has not addressed these types of issues for over one hundred years. In fact, Appellant is unable to locate a specific decision where this Court examined a Will which created a testamentary trust that failed to dispose of any remainder interest. However, in analogous situations,

like Wills which create life estates, this Court has determined that the remainder interest vests immediately upon the death of the testator and not on some future event.

Notably, one hundred and thirty-two years ago, in the matter of *Gilpin v. Williams* (1874), 25 Ohio St. 283, this Court analyzed and construed a Will wherein Thomas Williams devised his entire interest in real estate in trust to certain individuals for a specific period of time. *Id.* at 294-295. Thereafter, the Will provided that the trustees release and surrender title to the real estate to his daughter, Euretta Williams, for her natural life and to her children after her death forever, creating a life estate. *Id.* The issue the Court was asked to resolve was upon Euretta's death, and if she was childless, "What has become of the fee simple title? Is it vested in anyone? If so, and whom?" *Id.* at 295.

In response to these inquiries, this Court held that the real estate remained titled "in the testator until his death" and if it did not pass by his Will to any devisee therein named, it either ceased to exist in anyone, or it passed by way of descent to his heirs at law." *Id.* at 295-296. The Court further held that the testator's heirs were immediately vested upon his death, with their remainder interest from the property conveyed in trust subject only to divestment upon the happening of a future uncertain event:

In our opinion, it descended to the heirs; subject, however, to be divested, by force of the will, in the event that Euretta shall die leaving children; but subsisting in the meantime in the heirs, for the purpose of drawing the possession to them in the event of her death without children. This right in the heirs is an estate in reversion. It is the residue of the whole estate as owned by their father not disposed of by his will. When the reversion takes place, the heirs will hold by virtue of the title ***which descended to them at the time of his death***, and not by virtue of any new title acquired by purchase. And although their estate may divested upon the happening of an uncertain event, it is now, nevertheless, a vested right.

Id. at 296. (Emphasis added).

The Court finalized this analysis by stating that the heirs at law have, in essence, a property right immediately vested upon the death of the testator unless and until the contingency divests them of same:

'that where a remainder of inheritance is limited in contingency by way of use, or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or *in the heirs of the testator*, until the contingency happens to take it out of them.'

Id. (Emphasis in opinion).

In *Matthews v. Krisher* (1899), 59 Ohio St. 562, this Court reached a similar result, without reliance on or reference to *Gilpin, supra*. In *Matthews*, Smiley Matthews provided in his Will that all of his property was bequeathed to his wife, Phebe, for her life:

I give and devise my beloved wife, as her dower, all my real estate, and all my chattel property, monies, and credits, as long as she shall live.

Id. 562.

Upon the death of Phebe, the plaintiffs contended that the estate's remainder passed to them as next of kin pursuant to the then existing statute of descent and distribution. Phebe's heirs contended that the remainder interest was vested in Phebe, which then passed through her. This Court, in examining the descent and distribution statute, determined that the statute controlled all of the decedent's property unless stated otherwise in a Will. Therefore, this Court concluded that the descent and distribution statute, as a matter of law, conveyed title to all of the property, including any remainder to Smiley's heir at law, his wife:

By its terms, the statute operates in every case 'when a person dies intestate having title or right to any real estate or inheritance in this state,' and there is no presumption of more obvious force or propriety than that the testator had knowledge of the change in the statute and acquiesced in the larger provision which it made for his wife.

Id. at 574.

This principle of law, that any remainder interest vests in the heirs at law immediately upon the death of the testator, has been addressed in other situations by this Court in subsequent opinions. For example, in 1942, this Court, in *Ohio Nat. Bank of Columbus v. Boone*, 139 Ohio St. 361, specifically noted that "the law favors the vesting of estates at the earliest possible moment, and it is well settled in Ohio

that a remainder after a life estate vests in the remaindermen at the death of the testator, unless an intention to postpone the vesting to some future time is clearly expressed in the will." *Id.* at 365, see also, *Bolton v. Ohio Nat. Bank* (1893), 50 Ohio St. 290; *Tax Commission v. Oswald, Ex'x* (1923), 109 Ohio St. 36; and *Tiedtke, supra*, at 563.

At least two Ohio appellate courts have reached like determinations. In *Williams v. Ledbetter*, 87 Ohio App. 171 (1st Dist. 1950), a testator created a testamentary trust which failed to include a provision devising the remaining trust corpus upon the life beneficiary's death. The appellate court, having considered the Will in its entirety and concluding that the testator failed to include any language or instruction disposing of the trust's remainder interest, concluded that it was not permitted under law to "interpolate a provision for the testator" to correct the defect. *Id.* at 183. Indeed, the appellate court held that there was a remainder undisposed of by the Will and it was to be distributed to the heirs at law as determined by the statute at the time of the testator's death:

As we construe this Will, the life estates of Sarah Sullivan and Marie Rockwell Smith, and the provision for the 'remaining principal devisees' did not exhaust the entire title of the testator in this trust fund. There remained a residuum undisposed of by the will. This residuum or reverter, resulting from the absence of 'principal devisees,' was cast upon his next of kin at the time of his death, as determined by the statutes of descent, and now belongs to those persons who can trace title from them.

Id. at 182.

The Fourth District in *In re Estate of Underwood*, 1990 WL 54865, 4th Dist. No. 1838 (April 26, 1990), further explained that a court was powerless to correct a testator's Will which failed to completely dispose of the assets:

We do not find support for that holding within the body of the will. The will was silent as to the disposition of the property if the decedent's spouse did not survive him. The court cannot create a residuary clause by changing the language of the will.

* * *

When a will has no residuary clause, lapsed legacies or devises go to those entitled to take under the laws of descent and distribution. See *Foreman v. Medina County National Bank* (1928), 199 Ohio St. 17.

It is therefore necessary to treat the residue of the estate as if the decedent died intestate. The court should have applied the law of descent and distribution, R.C. 2105.06.

Id. at *2.

The Eighth District in this matter, rather than follow these rules of law, engaged in a complex, confusing and ultimately pointless exercise when it imposed a resulting trust to bar Andrew's estate from taking the undistributed residue of the testamentary trust under the statute of descent and distribution, R.C. §2105.06. A resulting trust is an equitable trust, which seeks to enforce the intention of the parties. *Alieno v. Alieno*, 2002-Ohio-302 (11th Dist.). Preventing unjust enrichment is the primary purpose of a resulting trust. *Summers v. Summers*, 121 Ohio App.3d 263 (4th Dist. 1997). In this case, equity was not required or permitted through settled law either to enforce the testator's intent or to prevent unjust enrichment. As the Eighth District Court of Appeals noted in its majority opinion:

Neither party quarrels with the Court's first finding: that Andrea's failure to provide for the remainder of the trust, or to include a residual clause in her will, meant that the remainder of the trust should go to her heirs at law. The issue is whether the Court erred by considering Andrew an heir at law since he was also the beneficiary of the life trust.

Journal Entry and Opinion, p. 5.

The only conclusion that can logically follow from the Appellate Court's above quoted finding is that this case does not require the consideration of equitable principles at all. Whether Andrew was his daughter's "heir at law" is a purely legal (as opposed to an equitable) question. The purpose of R.C. §2105.06 is to ascertain the identity of any given intestate decedent's "heirs at law." Because R.C. §2105.06 and the cases interpreting it provide an adequate legal answer to the issue posed, there were no grounds for the intermediate appellate court to employ the tools of equity, such as a resulting trust. Under the statute of descent and distribution, the testator's heirs at law were determined on the date of

her death, and Andrew was her only heir. Because Andrea's Will did not completely dispose of her property, the intestacy statute determined the property's rightful owner. *Gilpin, supra; Olgesbee, supra; Matthews, supra.*

Moreover, the Eighth District Court's conclusion to the contrary is unsupported by legal authority. The Appellate Court cited Illustration 3 to Comment g of Section 430 of the Restatement of Trusts 2d (4th Ed. 2001) to describe a situation under which the law will imply the existence of a resulting trust. While the quoted passages are not incorrect statements, they simply do not subvert the statutory principle that an intestate decedent's heirs at law are determined according to the statutory scheme as of the date of the decedent's death. The Appellate Court only addressed that issue in the final paragraph of page 6 of the Journal Entry and Opinion, where it held:

“Next of Kin” for these purposes is defined as those next of kin remaining at the formation of the resulting trust, not those existing at the time the initial trust was settled. Were we to accept the Court's position, it would imply that Andrew's rights as an heir somehow vested before the creation of the trust which gave rise to a supposed right as an heir. Andrew's beneficial right as an heir did not, and could not, arise until such time as the resulting trust itself came into existence. Since Andrew predeceased the formation of the resulting trust, he cannot be considered an heir at law.

Journal Entry and Opinion, at p. 6.

Remarkably, the majority opinion cites no authority whatsoever in support of this conclusion. Nor does it explain why it ignored the clear mandate of the statute of descent and distribution---or this Court's decisions interpreting it, such as e.g. *Tiedtke v. Tiedtke* (1952), 157 Ohio St. 554. In attempting to shoehorn the facts of this case into the law of resulting trusts, the Appellate Court either lost sight of the governing legal principles or it simply refused to accept that Andrew's estate could lawfully possess a remainder interest in trust assets devised to benefit him during his lifetime. In either event, the decision was plainly wrong, but more importantly, it threw open wide the door to confusion, uncertainty, and future litigation.

CONCLUSION

Because the potential harm from the Appellate Court's failure to enforce the statute of descent and distribution, and its misguided reliance on the equitable remedy of a resulting trust is so great, this Court should accept jurisdiction over this appeal. By doing so, this Court can resolve the nascent conflict between the First and Eighth Appellate Districts before it becomes entrenched and prevent the Appellate Court's misguided reasoning from taking root and spreading to other judicial districts. For all these reasons, this Court should accept jurisdiction over this appeal.

Respectfully submitted,

Angela G. Carlin / per consent Wm. Charles Carley
ANGELA G. CARLIN (0010817) #0007447
GREGORY E. O'BRIEN (0037073)
SHAWN W. MAESTLE (0063779)
Weston Hurd LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, OH 44114-1862
(216) 241-6602 (telephone)
(216) 621-8369 (facsimile)
*Attorney for Appellant,
Carole M. Radey, Trustee*

CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction** was forwarded by First Class United States Mail, postage prepaid, this 21st day of December, 2006, to the following:

John M. Widder, Esq.
Peggy Murphy Widder, Esq.
18231 Sherrington Road
Shaker Heights, OH 44122

J. Ross Haffey, Esq.
5001 Mayfield Road, Suite 301
Lyndhurst, OH 44124

Timothy G. Dobeck, Esq.
Boyko & Dobeck
6742 Ridge Road
Parma, OH 44129

Clifford Gbur
3448 West 132 Street
Cleveland, OH 44111

Barbara Padden
4105 Crestview
Louisville, KY 40207

Richard Radey
4929 Grafton Road
Brunswick, OH 44212

Shawn W. Maestle / per consent
SHAWN W. MAESTLE *Wm. Charles Curley*
#0007447

NOV - 6 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 87273 & 87274

ANDREA HELEN SANGRIK, TRUST (#87273)
JESSICA R. STEVENS, ET AL. (#87274)

APPELLANTS

vs.

CAROLE M. RADEY, TRUSTEE &
INDIVIDUALLY

APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED

Civil Appeals from the
Cuyahoga County Court of Common Pleas
Probate Court Division
Case Nos. 1998 TST 280 and 2004 ADV 96385

BEFORE: Corrigan, J., Rocco, P.J., and Blackmon, J.

RELEASED: October 26, 2006

JOURNALIZED:

NOV - 6 2006

CA05087273

42284656



YOL@623 000563

-i-

ATTORNEYS

For appellants Jessica R. Stevens, Margaret Melko, Paul Kijewski, Antoinette Maruszak, David Szczepanski and the Estate of Mary Lou Stover

John M. Widder
Peggy Murphy Widder
Widder & Widder
18231 Sherrington Road
Shaker Heights, OH 44122

For appellee Carole M. Radey

John P. Koscianski
5700 Pearl Road, Suite 302
Parma, OH 44129

Trustee for suit

Timothy G. Dobeck
Boyko & Dobeck
6741 Ridge Road
Parma, OH 44129

For Wayne Fabian, et al.

J. Ross Haffey
Bernard, Haffey & Bohnert Co., LPA
5001 Mayfield Road, Suite 301
Lyndhurst, OH 44124-2610

For Clifford Gbur

Clifford Gbur, Pro Se
3448 West 132nd Street
Cleveland, OH 44111

VOL 623 PD0564

-ii-

For Barbara Padden

Barbara Padden, Pro Se
4105 Crestview
Louisville, KY 40207

For Richard Radey

Richard Radey, Pro Se
4929 Grafton Road
Brunswick, OH 44212

FILED AND JOURNALIZED
PER APP. R. 22(E)

NOV 06 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

OCT 26 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

CA05087273 42042036
[Barcode]

CA05087274 42042037
[Barcode]

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS-TAXED

980623 00565

-1-

MICHAEL J. CORRIGAN, J.:

This is an appeal from a declaratory judgment issued by the probate division as to the disposition of certain estate assets.¹

Decedent Andrea Sangrik left her entire estate to her niece, Carole Radey, in trust, to provide for the care of her father, Andrew Sangrik. The will stated that Radey was to "use so much of the income and/or principal of the trust estate for the support, care, and maintenance of my father, Andrew Sangrik, to be distributed to him in such proportion and at such time as my trust, in her sole discretion, shall determine." Andrea's will did not provide for any distribution of the remaining trust assets after the death of her father, nor did it contain a residual clause.

Andrew Sangrik executed a last will and testament at the same time as Andrea. His will provided that in the event he predeceased his daughter Andrea, all of his estate would go to her. The will further provided that in the event Andrea predeceased him, his estate would go to Radey.

Andrea died in 1997. Pursuant to the terms of her will, Radey became the trustee of Andrea's estate and transferred the estate into the Andrea Helen

¹ The cousins voluntarily withdrew their third assignment of error at oral argument. We only address assignments of error one and two.

VAL0623 000566

-2-

Sangrik Trust. When Andrew died, a question arose as to the distribution of the trust. In Case No. 2004 ADV 84678, the court ruled that, by operation of law, the trustee was required to distribute the corpus to the settlor's heirs at law as if the settlor had died intestate. No appeal was taken from this ruling.

Andrea's cousins filed a second declaratory judgment action in 2004 ADV 96385, asking the court to determine that they qualified as "next of kin" for purposes of sharing in the trust corpus. Radey opposed her cousins, arguing that Andrea's heirs were determined upon Andrea's death, and that at the time of death, her sole living relative was her father, Andrew. She maintained that Andrew inherited Andrea's estate and the heirs could take only through Andrew.

A magistrate decided, upon cross-motions for summary judgment, that Andrea did not die intestate. He found that her will established a trust for the sole purpose of providing for Andrew's care for the remainder of his life. He further found that Andrea did not leave the estate to her father in fee simple, and to find that he was the sole next of kin to the trust remainder would defeat the clear intention of the trust - to care for Andrew during his life only. The magistrate also denied a request by the cousins to have Radey removed as trustee.

The court sustained Radey's objections to the magistrate's decision. It accepted Radey's argument that Andrea's heirs had to be determined at the time

vol.0623 000567

-3-

of her death, which made Andrew the sole heir of her estate, including the trust. Because Andrew's will made Radey his sole beneficiary, the court ruled that she was entitled to the remainder of the trust. The court overruled the cousins' objections to the magistrate's decision refusing to remove Radey as trustee.

I

The cousins first argue that the court erred by finding Andrew to be the sole heir of Andrea's estate at the time of her death because that finding conflicted with the judgment in Case No. 2004 ADV 84678 which determined that Andrea's heirs at law were the beneficiaries of the trust remainder.

"A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction *** is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Norwood v. McDonald* (1943), 142 Ohio St. 299, paragraph one of the syllabus; *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 1995-Ohio-331.

Principles of res judicata do not apply to this case because the court did not issue a final judgment in the first case which fully determined who the heirs at law were. In the first case, the magistrate defined the issue as:

*** whether Andrew Sangrik could devise the assets of the Andrea Sangrik trust in his will to Carole Radey when he was only a life beneficiary or,

VAL0623 00568

-4-

should the remaining trust assets be distributed to Andrea's heirs at law under the laws of descent and distribution pursuant to Ohio Revised Code Section 2105.06 because Andrea's will lacks an expressed direction concerning the distribution of the remaining trust assets after Andrew's death?"

Civ.R. 54(B) requires the court to resolve all of the claims as to all of the parties, and its failure to do so means that there is no final order. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88. The magistrate decided, and the court agreed, that "the Court should order the corpus of the trust of Andrea Sangrik to be distributed to her heirs in accordance with the laws of descent and distribution." At no point in this ruling did the court determine with finality just who those heirs were. In fact, while there is no journal entry to this effect, the parties appear to agree that the magistrate told them that they would need to litigate that issue in Case No. 2004 ADV 96385. Consequently, the declaratory judgment in the first case did not completely resolve the issue of who would receive the remainder of the trust. *Res judicata* does not apply.

II

The cousins next argue that the court erred by finding Andrew to be the sole heir of Andrea's estate. They maintain that the formation of the trust for Andrew's benefit for the duration of his life meant that he could not be considered an heir at law under the will at the time of Andrea's death.

VAL0623 00569

-5-

When construing a will, the sole purpose of the court is to ascertain and carry out the intention of the testator. *Oliver v. Bank One, Dayton, N.A.* (1991), 60 Ohio St.3d 32, 34, citing *Carr v. Stradley* (1977), 52 Ohio St.2d 220, paragraph one of the syllabus. We derive the intent of a will from the words used, and those words must be given their ordinary meaning. *Polen v. Baker*, 92 Ohio St.3d 563, 565, 2001-Ohio-1286.

Item III of Andrea's will states, "I give, devise and bequeath my entire estate *** to my cousin, **CAROLE RADEY, IN TRUST**, for the objects and purposes thereafter specified ***." (Emphasis sic.) The will directed Radey to "administer the entire trust estate for the benefit of my father, **ANDREW SANGRIK *****." The "objects and purposes" of the trust was to provide for the "support, care and maintenance" of Andrew.

Neither party quarrels with the court's first finding: that Andrea's failure to provide for the remainder of the trust, or to include a residual clause in her will, meant that the remainder of the trust should go to her heirs at law. The issue is whether the court erred by considering Andrew an heir at law since he was also the beneficiary of the life trust.

In cases where the settlor fails to make arrangements for the remainder of a trust, the law implies a second trust. This second, implied trust is held for the benefit of the grantor or the grantor's heirs at law existing at the time the

YAL0623 000570

-6-

second trust is implied. Section 430 of the Restatement of Trusts 2d (4 Ed.2001) states the general rule:

“Where the owner of property gratuitously transfers it upon a trust which is properly declared but which is fully performed without exhausting the trust estate, the trustee holds the surplus upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust of the surplus should arise.”

Illustration 3 to Comment g of Section 430 is directly on point: “A bequeaths \$ 10,000 to B in trust to pay the income to C for life. There is a resulting trust of the principal of the trust fund after C's death to A's next of kin or residuary legatee.” See, also, IV Scott, The Law of Trusts (2 Ed.1956), Section 430, 2985-2986.

“Next of kin” for these purposes is defined as those next of kin remaining at the formation of the resulting trust, not those existing at the time the initial trust was settled. Were we to accept the court's position, it would imply that Andrew's rights as an heir somehow vested before the creation of the trust which gave rise to his supposed right as an heir. Andrew's beneficial right as an heir did not, and could not, arise until such time as the resulting trust itself came into existence. Since Andrew predeceased the formation of the resulting trust, he cannot be considered an heir at law.

VAL0623 000571

-7-

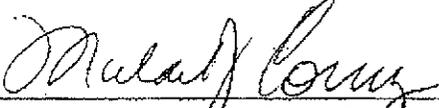
We find that the court erred in finding Andrew to be the sole beneficiary of the resulting trust. As a matter of law, only those heirs at law existing at the time the resulting trust came into being (that is, on the date of Andrew's death) can be considered heirs at law. It is undisputed that those heirs at law are Andrea's surviving blood relatives, including Radey. We therefore reverse the court's summary judgment and remand with instructions to divide the remainder of the trust consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Costs assessed against Trustee.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


MICHAEL J. CORRIGAN, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS
KENNETH A. ROCCO, P.J., DISSENTS WITH
SEPARATE OPINION

VEL0623 00572

-8-

KENNETH A. ROCCO, DISSENTING:

Andrea Sangrik's will did not completely dispose of her assets. She did not provide for the disposition of the remainder of the trust res after her father's death, nor did she include a residuary clause in her will. Because it was clear at the time of her death that there would be residual undisposed assets, these assets properly belong to her next of kin at the time of her death. See *Williams v. Ledbetter* (1950), 87 Ohio App. 171, 182.

"[W]here intestacy or partial intestacy results from the failure, in whole or in part, of a testamentary trust, the property remaining in the hands of the trustee upon termination of the trust passes by force of the statute of descent to the heirs of the testator *as of the date of his death*, or to those who can trace title through such heirs." *Estate of Roulac* (1977), 68 Cal. App.3d 1026, 1031-32 (citing *Williams v. Ledbetter*, supra, and authorities from several other jurisdictions).

The majority suggests that "Andrew's beneficial right as an heir did not, and could not, arise until such time as the resulting trust itself came into existence." I must disagree. As Andrea's next of kin, Andrew was the heir of the residue of her estate under the law of descent and distribution from the time of her death. R.C. 2105.06. This interest could not vest until the trust was fully performed and the extent of the residue became known, but it existed

VOL 0623 PG 0573

-9-

nonetheless. Naming Andrew as the trust beneficiary in her will did not divest him of his rights under the laws of descent and distribution. Cf. *In re Underwood* (April 26, 1990), Scioto App. No. 1838.

For these reasons, I would affirm the trial court's judgment.

VOL0623 000574