

SUPREME COURT OF OHIO

CASE NO. 2006-2343

ANDREA HELEN SANGRIK, TRUSTEE
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

MERIT BRIEF OF APPELLANT,
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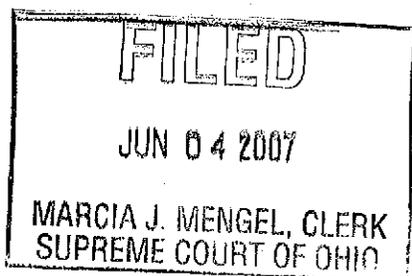


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STATEMENT OF THE CASE AND FACTS

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 and Testamentary Trust

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's Will

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.

The Administration of Andrea's Estate

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.

The Trustee's Suit for Declaratory Judgment

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. The defendants in this action were Andrea's paternal and maternal cousins. A Trustee for Suit, representing the interests of Andrea's unknown and unborn heirs at law, filed a summary judgment motion on behalf of the cousins (of which Carole is one), to receive the undistributed property in Andrea's testamentary trust. 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.

The Action for Determination of Heirs

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.

The Action to Remove Carole as Trustee

At about the same time, the cousins also filed a companion case captioned, *the matter of Andrea Helen Sangrik Trust*, Case No. 1998 TST 280. In that case the cousins requested the Probate Court to remove Carole as trustee. When the Probate Court refused to grant the cousins' Motion to remove Andrea as Trustee, the cousins filed a Joint "Contingent" Objection to a portion of the Magistrate's Decision in the action for the determination of heirs. The Probate Court likewise overruled the joint "Contingent" Objection and allowed Carole to remain as Trustee of Andrea's estate.

The Appeal to Eighth District

Some of the cousins appealed the Probate Court's orders to the Eighth District Court of Appeals, Cuyahoga County. On November 17, 2005 the appellate court consolidated the cousins' appeal from the Probate Court's decision in the action for determination of heirs (Appeal No. 87274) with their appeal from its decision in the action to remove Carole as Trustee (Appeal No. 87273). Those appeals thereafter proceeded jointly.

At oral argument, the cousins voluntarily withdrew their third assignment of error, addressing the order overruling the motion to remove Carole as trustee. The two remaining

assignments of error were, 1) that Probate Court erred in the "Heirship" case in determining that Andrew was the sole heir at law of Andrea when the "Heirship" case was filed by the Appellants to determine only the identities of the cousins of Andrea, and 2) that the Probate Court erred in not determining that the heirs of Andrea should be determined at the death of Andrew, the life beneficiary, and not at the death of Andrea.

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.

The Appeal to This Court

On December 21, 2006 Carole, as Trustee, filed her notice of appeal and memorandum in support of jurisdiction with the Clerk of this Court. On March 28, 2007

this Court exercised its discretionary jurisdiction to hear her further appeal on the merits, and on April 23, 2007 the record below was filed with the clerk of this Court.

LAW AND ARGUMENT

I. PROPOSITION OF LAW: 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. Heirs at Law are fixed and determined under R.C. § 2105.06, The Statute of Descent and Distribution at the time the testator dies.

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. Krisber* (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, in any manner, 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, intention or direction as to how to distribute them.

R.C. § 2105.06 fills the void created by the lack of a residuary clause in Andrea's Will. However, the question to be determined in this action is whether the heirs at law are determined upon the testator's [Andrea's] death, under the well settled axiom set forth below, or at a future point in time when the beneficiary [Andrew] died realizing undisposed assets. Stated differently, where a trust beneficiary does not use the entire trust corpus, are the statutory heirs at law to whom the remaining estate assets are entitled determined at the testator's death or upon the death of the trust beneficiary?

This Court's decision in *Tiedtke v. Tiedtke* (1952), 157 Ohio St. 554, answers the question and squarely holds that upon Andrea's death her heirs at law, as determined by R.C. § 2105.06, are fixed.

In *Tiedtke*, this Court held that a decedent's heirs at law are fixed and determined 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.

Id. at 559-560

At Andrea's death her sole heir under the statute was her father, Andrew. Absent any contrary intent set forth in Andrea's Will, her entire estate passed to her sole heir at law, her father, Andrew. See, *Wendell v. Ameritrust Co.*, 1992 W.L. 173304, 8th Dist. No. 59834 (July 23, 1992), rev. on other grounds in *Wendell v. Ameritrust Co.*, 69 Ohio St. 3d 74, 1994 Ohio 511 ("The general rule is that heirs are determined as of the date of death, except where a testator indicates that the heirs are to be determined at a later date. See, e.g. *Barr v. Denney* (1909), 79 Ohio St. 358; *Tiedtke v. Tiedtke* (1952), 157 Ohio St. 554.").

B. A Will which fails to distribute all of a decedent's assets leaves a remainder interest which is vested in the heirs at law as fixed at the testator's death.

Appellant has been unable to locate a specific decision where this Court examined a Will which *expressly* created a testamentary trust that failed to dispose the residuary or remainder interest. However, in analogous situations, like Wills which create life estates, or implicitly created a trust, this Court has consistently held that the remainder interest vests immediately upon the death of the testator and not on some future event.

One hundred and thirty-two years ago, in *Gilpin v. Williams* (1874), 25 Ohio St. 283, this Court analyzed and construed a Will which created a real estate trust and subsequent life estate. Therein, 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 must release and surrender title to the real estate to Thomas' daughter, Euretta Williams, for her natural life and to her children after her death forever, creating a life estate. *Id.* Thomas did not specify what would happen to the real estate if, upon Euretta's death, and she was childless. Thus, this Court was asked to answer the questions: "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 be 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. Krisber* (1899), 59 Ohio St. 562, this Court reached a similar result, without reliance on or reference to *Gilpin, supra.*, where a husband's Will implicitly created a Trust to benefit his wife, but failed to delineate the Trust's residue or remainder interest. 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, Phebe:

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.

C. Because the Descent and Distribution Statute conveys any remainder or residue interest Andrea's Will creates, the Appellate Court's invention, a Resulting Trust, was an unnecessary legal exercise.

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. *Alteno v. Alteno*, 2002-Ohio-302 (11th Dist.).

In this case, equity was not required or permitted through settled law either to enforce the testator's intent, because Andrea's intent as to the residuary or remainder disposition of the trust assets was absent from her Will. 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. Arguably, Andrea intended her Father to have her entire estate as she stated in the testamentary trust:

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

Indeed, Andrea's Will fails to include, expressly or implicitly, any other intent as to the remainder or residuary interests.

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 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 statutory 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 eliminating Andrew from the statutory definition of next of kin, R.C. § 2105.06. Nor does it explain why it ignored this Court's decisions interpreting it, such as e.g., *Tiedtke v. Tiedtke* (1952), 157 Ohio St. 554, or other decisions requiring application of the Statute of descent and distribution to place the remainder interest with Andrew. See *Matthews v. Krisber* (1899), 59 Ohio St. 562; *Gilpin v. Williams* (1874), 25 Ohio St. 283; *Williams v. Ledbetter*, 87 Ohio App. 171 (1st Dist. 1950); *In Re Estate of Underwood*, 1990 WL 54865, 4th Dist. No. 1838 (April 26, 1990).

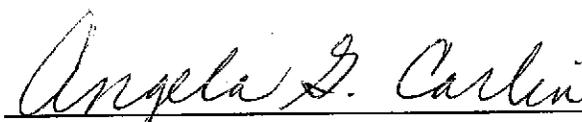
Rather than follow settled law, the Appellate Court, in attempting to shoehorn the facts of this case into the law of resulting trusts, either lost sight of the governing legal principles behind resulting trusts or it simply refused to accept that Andrew's estate could

lawfully possess a remainder interest in trust assets devised to benefit him during his lifetime as expressly held in these reasoned decisions. In either event, the decision was plainly wrong, but more importantly, it threw open wide the door to confusion, uncertainty, and future litigation.

CONCLUSION

For all these reasons, Appellant Carole M. Radey, Trustee, requests the Court to reverse the judgment of the Eighth District Court of Appeals and to enter judgment in her favor holding that a testamentary trust, with no residuary clause, upon the death of the trust beneficiary, passes to the testator's heirs at law as determined at her death.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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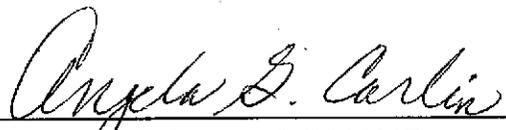
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SUPREME COURT OF OHIO

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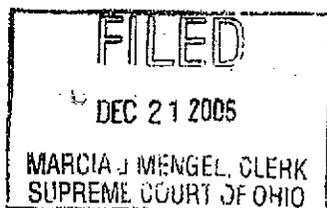
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NOTICE OF APPEAL

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Carole M. Radey, Trustee*



000001

Appellant, Andrea Helen Sangrik Trust, Carole M. Radey, Trustee, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Case No. 87273 on November 6 2006..

This case is one of public or great general interest.

Respectfully submitted,

Angela G. Carlin / per consent
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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was forwarded by First Class United States

Mail, postage prepaid, this 21st day of December, 2006, to the following:

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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

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VL0623 RB0563

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-ii-

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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


CA05087274 42042037


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

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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.

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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

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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 P00568

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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.

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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 hereinafter 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

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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.

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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

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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

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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.

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PROBATE COURT
22 FILED 21
OCT 12 2005
CUYAHOGA COUNTY, OH.

IN THE PROBATE DIVISION
OF THE COURT OF COMMON PLEAS,
CUYAHOGA COUNTY, OHIO

JESSICA R. STEVENS, et al.,)

Plaintiffs,)

vs.)

CAROLE M. RADEY, et al.,)

Defendants.)

CASE NO. 2004 ADV 96385

JUDGE JOHN E. CORRIGAN

JUDGMENT ENTRY

This matter is before the Court on **Objections To the Magistrate's Decision** filed July 20, 2005, by Carole Radey through her then attorney William H. Thesling. Attorney William H. Thesling filed a Notice of Withdrawal as counsel on September 2, 2005. A Hearing was held before this Court on August 23, 2005. "Contingent" Objections To that Portion of the Magistrate's Decision Which Permits Carole M. Radey To Remain As Trustee were also filed in the related Trust Case Number 1998 TST 0000280. The July 12, 2005 Magistrate's Decision addresses matters within both cases. This Court will address each set of objections separately within the requisite case.

A previous Magistrate's Decision was entered October 18, 2004, in Case Number 2004 ADV 84678 determining that the corpus of the trust should be distributed to the heirs of the Estate of Andrea Helen Sangrik in accordance with the laws of descent and distribution as set forth in Ohio Revised Code Section 2105.06. No objections to that Magistrate's Decision were filed. The above captioned matter was filed in accordance with that decision to determine the heirs of the Estate of Andrea Helen Sangrik.

The heirs of the Estate of Andrea Helen Sangrik are determined at the time of her death in 1997. Williams v. Ledbetter, 87 Ohio App. 171 (Ohio Ct. App. 1st Dist. 1950). In 1997 Andrea

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Sangrik was survived by her father, Andrew Sangrik, and twelve cousins. According to the statute of descent and distribution, her father, as the surviving parent, has the superior right to inherit before her cousins. (Ohio Revised Code Section 2109.06(F)).

The Court further finds that Andrew Sangrik does not lose his right to inherit the trust corpus remaining by virtue of having made use of the corpus during his lifetime, to do so would effectively be a disinheritance. An heir at law can only be disinherited by a devise of the property to another. Oglesbee v. Miller, 111 Ohio St. 426, 435 (1924). Here, the property was not devised to another. There was no residuary clause, specific or general, directing title of the corpus remaining to another person. The omission of any direction for the disposition of the remaining trust corpus is not an ambiguity the probate court can correct. Nord v. Brandenburg, 1998 WL 72258 (Ohio App. 2nd Dist. 1998). Upon the termination of the trust by virtue of the life beneficiary's death, the trustee is required to distribute the corpus remaining according to the expressed direction of the settler. Id. Lacking an expressed direction, the corpus remaining is to be distributed to the settler's heirs at law according to the statute of descent and distribution as if the settler had died intestate. In re Underwood, 1990 WL 54865 (Ohio App. 4th Dist. 1990).

The Court further finds that Andrew Sangrik died June 26, 2003. Therefore, the remaining corpus of the trust should pass to his estate for distribution according to his Last Will and Testament. His Last Will and Testament names Andrea Sangrik as the primary beneficiary of his estate, unless she predeceases him, and then Carole Radey the secondary beneficiary. Since Andrea Sangrik did predecease her father, Carole Radey is the beneficiary of the Estate of Andrew Sangrik.

The Court further finds that the remaining trust corpus from the Andrea Sangrik Trust should be distributed to Carole Radey in her capacity as the Executrix of the Estate of Andrew Sangrik to pass according to his Last Will and Testament.

The Court further finds that the objections to the Magistrate's Decision filed in the above captioned matter are well-taken and should be sustained. Defendant's Motion For Summary Judgment should be granted, Plaintiffs' Motion For Summary Judgment should be overruled, and the Complaint For Determination of Heirship should be dismissed as moot.

Therefore, it is **ORDERED** that the **Objections To the Magistrate's Decision** filed in the above captioned matter are **SUSTAINED** pursuant to Civ. R. 53.

It is further **ORDERED** that judgment entries on the Complaint For Determination of Heirship, Plaintiffs' Motion For Summary Judgment, and Defendant's Motion For Summary Judgment be filed *instanter* in accordance with this entry.

It is further **ORDERED** that the Clerk of the Court shall serve upon all parties notice of the judgment and date of entry pursuant to Civ. R. 58(B).

Oct 12th, 2005
DATE

John E. Brown
PROBATE JUDGE

PROBATE COURT
 FILED
 NOV - 9 2005
 CUYAHOGA COUNTY, O.

IN THE PROBATE DIVISION
 OF THE COURT OF COMMON PLEAS,
 CUYAHOGA COUNTY, OHIO

JESSICA R. STEVENS, et al.,)	CASE NO. 2004 ADV 96385
)	
Plaintiffs,)	JUDGE JOHN E. CORRIGAN
)	
vs.)	FINDINGS OF FACT
)	
CAROLE M. RADEY, et al.,)	CONCLUSIONS OF LAW
)	
Defendants.)	

This matter is before the Court on a **Joint Request For Findings Of Fact And Conclusions Of Law** (Pursuant to Civil Rule 52) filed October 20, 2005, by Plaintiffs Jessica Stevens, Margaret Melko, Paul Kijewski, Antoinette Maruszak, David Szczepanski and the Estate of Mary Lou Stover through their attorneys John M. Widder and Peggy Murphy Widder, and by Defendants Jan Anifantakis and Wayne Fabian through their attorney J. Ross Haffey.

The above mentioned parties filed the joint request pursuant to this Court's judgment entry on the objections to the magistrate's decision wherein the Court determined that the remaining trust corpus from The Andrea Helen Sangrik Trust should be distributed to Carole Radey in her capacity as the Executrix of the Estate of Andrew Sangrik to pass according to his Last Will and Testament.

Findings of Fact

1. Carole Radey is a surviving cousin of Andrea Helen Sangrik, deceased, and a niece of Andrew Sangrik, deceased. She is the named Executrix in both the Estate of Andrea Helen Sangrik and the Estate of Andrew Sangrik. She is also the named Trustee of The Andrea Helen Sangrik Testamentary Trust (the "Trust") established under the Last Will and Testament of Andrea Helen Sangrik.
2. Andrea Helen Sangrik died July 8, 1997, survived by her father, Andrew Sangrik, and twelve first cousins including: Carole Radey, Jessica Stevens, Rick Radey, Margaret

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Melko, Jan Anifantakis, Paul Kijewski, Barbara Padden, Antoinette Maruszak, Wayne Fabian, David Szczepanski, Clifford Gbur, and the Estate of Mary Lou Stover.

3. The Trust came into existence upon the death of Andrea Helen Sangrik in 1997. The Last Will and Testament of Andrea Helen Sangrik devised all her assets to Carole Radey as Trustee for the care of her father, Andrew Sangrik, during his lifetime. Andrew Sangrik benefitted from the Trust until his death on June 26, 2003. At the time of his death, approximately \$680,000 remained in the Trust.
4. Andrea Helen Sangrik failed to direct the distribution of any assets remaining after her father's death. Her Last Will and Testament lacks a residuary clause and fails to name an alternate beneficiary.
5. The Court determined in Case Number 2004 ADV 84678 that the remaining assets were to be distributed to the next-of-kin of the Estate of Andrea Helen Sangrik in accordance with the statute of descent and distribution as set forth in Ohio Revised Code Section 2105.06.
6. The Last Will and Testament of Andrew Sangrik devised his entire estate to his daughter Andrea Helen Sangrik. He named Carole Radey as the secondary beneficiary in the event his daughter predeceased him. Andrea Helen Sangrik predeceased her father and Carole Radey is the sole beneficiary of the Estate of Andrew Sangrik.

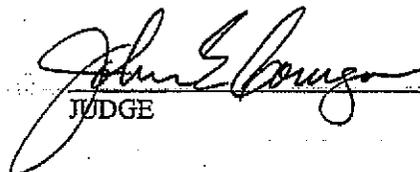
Conclusions of Law

7. Andrew Sangrik was a lifetime beneficiary of the trust corpus. However, the trust that was created failed to provide for distribution of the corpus remaining after his death, which terminated the Trust. *Nord v. Brandenburg*, 1998 WL 72258 (Ohio App. 2nd Dist. 1998).
8. Upon the termination of a trust, the trustee is required to distribute the corpus remaining according to the express direction of the settler, or lacking an express direction, to the settler's heirs-at-law as if the settler had died intestate, according to the statute of descent and distribution. Ohio Revised Code Section 2105.06; *Id.* at 2.
9. The omission of any direction for the disposition of the remaining corpus is not an ambiguity the probate court can correct. *Id.*
10. The Trust lacks an express direction as to distribution of the corpus remaining. There is no person entitled to it under the terms of the Trust. It therefore loses its identity as trust corpus and becomes absorbed into the Estate of Andrea Helen Sangrik as residue. *Central National Bank of Cleveland v. McMunn*, 12 Ohio Misc. 1, 14 (Probate Court of Cuyahoga County, Ohio, 1967).

11. The Last Will and Testament of Andrea Helen Sangrik does not contain a residuary clause and fails to provide any direction for the distribution of residue remaining in the estate.
12. "A person who leaves a will may be considered as dying intestate as to property not disposed of by the will." *Central National Bank* at 8.
13. The statute of descents operates upon all intestate property. *Mathews v. Crasher*, 59 Ohio St. 562 (1899). The remaining intestate assets in the Estate of Andrea Helen Sangrik pass to her heirs-at-law determined under the statute of descent and distribution. Ohio Revised Code Section 2105.06.
14. The heirs-at-law are determined at the time of Andrea Helen Sangrik's death in 1997. *Williams v. Ledbetter*, 87 Ohio App. 171 (Ohio Ct. App. 1st Dist. 1950).
15. In the determination of intestate succession, next-of-kin shall be determined by degrees of relationship computed by the rules of civil law. Ohio Revised Code Section 2105.03.
16. Intestate assets shall descend and be distributed to a decedent's heirs-at-law according to the law of descent in the following order: (1) surviving spouse, (2) children, (3) parents, (4) siblings, (5) grandparents, (6) lineal decedents of grandparents, (7) next-of-kin of the intestate, (8) step-children, (9) the state. Ohio Revised Code Section 2105.06.
17. Andrea Helen Sangrik's father has a superior right under §2105.06(F) than her cousins under §2105.06(I) to inherit the intestate assets from her estate according to the order of descent and distribution.
18. Ohio Revised Code Section 2105.06(F) states, "If there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent."
19. Ohio Revised Code Section 2105.06(I) states, "If there is no paternal grandparent or no maternal grandparent, one-half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin."
20. Having survived his daughter in 1997, Andrew Sangrik is the next-of-kin of the Estate of Andrea Helen Sangrik under the law of descents and his Estate is now entitled to the assets remaining.
21. The course which the statute directs can only be changed through a testamentary disposition. There was no testamentary disposition of the assets remaining. To change the statutory course and pass the inheritance over her father would be to disinherit him from his statutory right of inheritance.

22. An heir-at-law can be disinherited by a devise of the property to another. *Oglesbee v. Miller*, 111 Ohio St. 426, 435 (1924). There was no devise of the remaining corpus to anyone and Andrew Sangrik cannot, therefore be disinherited. Andrew Sangrik is not disinherited by virtue of having made use of the trust corpus during his lifetime.
23. Andrew Sangrik was entitled to make use of the trust corpus during his lifetime through the testamentary devise of the assets to him as the named trust beneficiary. By virtue of the unique facts and circumstances in this case and the applicable law, the Estate of Andrew Sangrik is also entitled to the intestate assets remaining after his lifetime.
24. Assets in the Estate of Andrew Sangrik pass according to his Last Will and Testament. Andrea Helen Sangrik was the primary beneficiary of his Last Will and Testament. However, since she predeceased her father, the named secondary beneficiary is entitled to the assets of his estate.
25. Carole Radey is the secondary beneficiary named under the Last Will and Testament of Andrew Sangrik and therefore entitled to the assets of the Estate of Andrew Sangrik.
26. This Court ordered the remaining trust corpus from the Andrea Sangrik Trust to be distributed to Carole Radey in her capacity as Executrix of the Estate of Andrew Sangrik to pass according to his Last Will and Testament. It is unnecessary to order distribution first to the Estate of Andrea Helen Sangrik and then to the Estate of Andrew Sangrik since the interests in this case merge to the benefit of Carole Radey.
27. Since the interests merge to the benefit of Carole Radey, movants have no standing to raise issues regarding the Trust.

Nov. 9, 2005
DATE


JUDGE

IN THE PROBATE COURT
DIVISION OF THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

PROBATE COURT
FILED
OCT 18 2004
CUYAHOGA COUNTY, O.

Carole M. Radey,
Plaintiff

Case No. 2004 ADV 84678

vs

Carole M. Radey, et al.,
Defendants

MAGISTRATE'S DECISION

OCT 18 2004

This matter came to be heard on July 27, 2004 on the Trustee for Suit's Motion for Summary Judgment. Present at the hearing was the Trustee for Suit, John O'Toole, Esquire; Gordon Schmid, Esquire, representing Carole Radey, Trustee; Peggy and John Widder, Esquires, representing the maternal first cousin; William Thesling, Esquire, representing the Trust; and J. Ross Haffey, representing two paternal cousins. Service was perfected according to law. No transcript of the hearing was taken.

FACTS

On August 19, 1993, Andrea Helen Sangrik executed a Last Will and Testament. Andrea Sangrik died on July 8, 1997. The decedent's Last Will and Testament left her entire estate to "Carole Radey, in trust, to provide for and give her father, Andrew Sangrik, the care and benefits as she would give him were she to survive." Andrea Sangrik's Last Will and Testament further directs the trustee to "administer the entire trust estate for the benefit of Andrew Sangrik as follows: 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 trustee, in her sole discretion, shall determine.”

Andrew Sangrik, the beneficiary of Andrea’s trust, died on June 26, 2003. At the time of Andrew’s death, the trust had assets with a fair market value of approximately \$683,000.00.

The Trustee for Suit, acting on behalf of the defendants, now moves this Court pursuant to Rule 56 of the Ohio Rules of Civil Procedure to grant summary judgment in their favor and to declare their right to receive the corpus of the trust remaining at the time of Andrew Sangrik’s death.

LAW

Rule 56(c) of the Ohio Rules of Civil Procedure provides in part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The stated controversy in the case at bar is 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, 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?

It is undisputed that Andrea Sangrik’s Last Will and Testament fails to provide for the distribution of any remaining trust assets after the death of her father, the life

beneficiary. Likewise, it cannot be disputed that Andrea Sangrik's will contains no residual clause. "When a will has no residual clause, lapsed legacies or devisees go to those entitled to take under the laws of descent and distribution." *In Re Underwood* (April 26, 1990), Scioto App No. 1838. Upon the termination of a trust, the trustee is required to distribute the corpus remaining according to the expressed direction of the settlor or, lacking an expressed direction, to the settlor's heirs at law as if the settlor died intestate, according to the laws of descent and distribution. See *Nord v. Brandenburg* (Feb. 6, 1998), Darke App. No. 97-CA-1437.

Carole Radey, Trustee, argues that "in an action to construe a will, the court assumes the validity of the will and seeks to ascertain the intentions of the testator as to its dispositive provisions." This, however, is not a will construction case. The clear and unambiguous terms of the Last Will and Testament of Andrea Sangrik requires no construction. Carole Radey further argues that the trust was created for the "care, support, and benefit of Andrew Sangrik". In reality, however, the trust reads that its purpose is to benefit Andrew "as follows: for the support, care, and maintenance of Andrea's father." The term "benefit" is clearly limited to Andrew's support, care, and maintenance DURING HIS LIFETIME. It is equally clear that as a life beneficiary of the trust assets that were established for his support, care, and maintenance, those assets could only be used for Andrew during his life. At his death, the need for support, care, and maintenance obviously ended.

The Trustee's reliance on *Summers v. Summers*, (1997), 121 OH App. 3rd 263 is also misplaced. In *Summers*, the testatrix devised her entire estate to her son in trust until he turned twenty five at which point the trust would terminate and he would receive its

remaining assets. Thus, in *Summers*, the son received a vested interest in his mother's entire estate upon her death, although it was subject to complete defeasance in the event he did not reach the age of twenty five. He did not. The testamentary trust in *Summers* is critically different than the terms of the one created by Andrea's will. Andrea did not give her father any interest, vested or unvested, in any asset that might remain in the trust upon his death. Andrew has no power to invade the trust or dispose of it through his will or during his lifetime.

Trustee Carole Radey further argues that the "intent" of the trust settlor was to give the remaining trust assets at Andrew's death to the estate of Andrew Sangrik which in turn would pass to the Trustee, Carole Radey. There is absolutely no case law to support this self-serving argument in light of the unambiguous language of the trust document. These remaining trust assets are still trust assets at his death. There was no provision in the trust that would allow Andrew to invade the trust principal during his lifetime. Neither is there any trust language that would now allow the trustee to invade the trust principal after his death and allow her to pour these trust assets into Andrew Sangrik's probate estate. Simply stated, he did own these funds during his life and he clearly does not own them after his death.

RECOMMENDATION

Based on the foregoing facts and applicable law, it is the opinion of this Magistrate that the moving party has demonstrated that there are no genuine issues of material fact concerning an essential element of the non-moving party's claim and that the defendants are entitled to summary judgment as a matter of law.

It is therefore the recommendation of this Magistrate that the Trustee for Suit's

Motion for Summary Judgment be granted and that this 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.

Pursuant to Civil Rule 53(E)(2), a party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law unless the party timely objects to that finding or conclusion as required by Civil Rule 53(E)(3).

Respectfully submitted,

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RICHARD L. GEDEON
Magistrate

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R.C. § 2105.06

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

* Chapter 2105. Descent and Distribution (Refs & Annos)

* Descent and Distribution; Rights of Surviving Spouse

⇒2105.06 Statute of descent and distribution

When a person dies intestate having title or right to any personal property, or to any real estate or inheritance, in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;

(C) If there is a spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, the first twenty thousand dollars plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, per stirpes;

(D) If there is a spouse and more than one child or their lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first twenty thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

(E) If there are no children or their lineal descendants, then the whole to the surviving spouse;

(F) If there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;

(G) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;

(H) If there are no brothers or sisters or their lineal descendants, one-half to the paternal grandparents of the intestate equally, or to the survivor of them, and one-half to the maternal grandparents of the intestate equally, or to the survivor of them;

(I) If there is no paternal grandparent or no maternal grandparent, one-half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin;

(J) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;

(K) If there are no stepchildren or their lineal descendants, escheat to the state.

(2000 S 152, eff. 3-22-01; 1986 S 248, eff. 12-17-86; 1976 S 466; 1975 S 145; 128 v 155; 1953 H 1; GC 10503-4)