

IN THE SUPREME COURT OF OHIO

08-1728

CHESTER WIREMAN, <u>et al.</u> ,)	
Appellants,)	On Appeal from the Hardin
v.)	County Court of Appeals,
)	Third Appellate District
KATHY S. MILLINGTON, <u>et al.</u> ,)	
Appellees.)	Court of Appeals
)	Case No. 6-08-02

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS CHESTER WIREMAN, et al.

John M. Tudor (0014762)(COUNSEL OF RECORD)

Tudor Law, LLC

22 North Main Street

Kenton, Ohio 43326-1552

(419)673-1292

Fax No. (419) 675-2145

tudorlaw@kenton.com

COUNSEL FOR APPELLANTS, CHESTER WIREMAN, et al.

Terry L. Hord (0025979)

810 S. Main Street

Ada, OH 45810

(419)634-9485

Fax No. same as phone

COUNSEL FOR APPELLEES, KATHY S. MILLINGTON, et al.

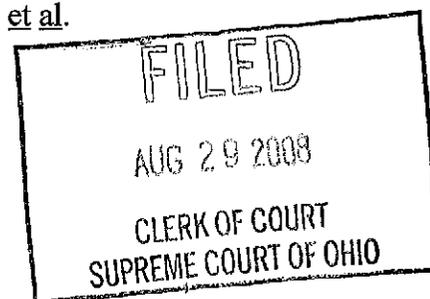


TABLE OF CONTENTS

	<u>Page #</u>
EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1.
STATEMENT OF THE CASE AND FACTS	7.
ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW:	9.
<u>PROPOSITION OF LAW No. 1</u> The probate division of the Court of Common Pleas does not have concurrent jurisdiction with the general division in a case involving the constitution of a civil contract having nothing to do with an estate asset just because it involves the determination of a particular issue also before it in the administration of a decedent's estate.	9.
<u>PROPOSITION OF LAW No. 2</u> A probate court cannot acquire jurisdiction to decide a case simply by assuming to make an order in the case if the case is not "properly before the Court".	12.
CONCLUSION	14.
PROOF OF SERVICE	14.
APPENDIX:	Following 14.
Ex. A Judgment Entry of the Hardin County Court of Appeals (July 21, 2008)	
Ex. B Opinion of the Common Pleas Court of Hardin County (January 17, 2008)	
Ex. C Decision of the Magistrate (September 25, 2007)	

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST

Section 4 of Art. IV of the Ohio Constitution of 1851, as modified by the “Modern Courts Amendment” adopted May 7, 1968, creates the court of common pleas “and such divisions thereof as may be established by law” and, at sub-section (B), provides:

The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law. (Emphasis Supplied)

The section goes on at sub-section (C) to provide in part:

Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. (Emphasis Supplied)

As observed by the Court in *Unger v. Wolfe*, 134 Ohio St. 69, page 73, 15 NE2d 955 (1938), although construing this section before the modern courts amendment, the probate court [now division] is a creature of the constitution, but “its jurisdiction is both constitutional and statutory”. As the court found in *Klucar v. Hull*, 82 Ohio Law Abs. 305, 165 NE2d 246 (Cuy. Com. Pl., 1959), only the state legislature can limit or provide for the jurisdiction of a court of this state. Seemingly inconsistent with this finding is the language of O.R.C. §2101.24(B)(1)(a), which provides in relevant part:

The probate court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division . . . :

(a) If jurisdiction relative to a particular subject matter is stated to be concurrent in a section of the Revised Code or has been construed by judicial decision to be concurrent, [in] any action that involves that subject matter. (Emphasis Supplied)

The Revised Code does not provided the probate division with concurrent jurisdiction to construe an insurance contract, or any contract other than one specifically impacting the

probate of a decedent's estate or some other fiduciary activity as to which it has statutory jurisdiction. In the decision herein appealed, the court of appeals specifically found concurrent jurisdiction which, if the statutory language next above quoted is applied as it seems to require, this act of the court of appeals has just expended the jurisdiction of the probate divisions of Ohio's common pleas courts.

The attention of the Supreme Court is specifically directed to the language of the decision hereby appealed, beginning at page 8, where the appellate court said:

“In this case, the probate court clearly has the jurisdiction and authority to determine whether Kathy is the surviving common law spouse, and to determine who are the heirs at law. These matters were pending in the Probate Court of Hardin County before Appellants filed the declaratory judgment action in the Hardin County Court of Common Pleas. While both these courts have concurrent jurisdiction to determine these matters, the probate court has priority of jurisdiction. The trial court did not err in dismissing the declaratory judgment action and finding that the Probate Court of Hardin County is the proper forum to resolve the parties' dispute regarding the existence of a common law marriage and Kathy's status as the surviving spouse.” (Emphasis Supplied)

What the court of appeals is saying, never mind that it makes no sense, is “since either the general division and probate division could determine heirs at law or the existence of a common law marriage in a proper case, those courts have concurrent jurisdiction to construe an insurance contract”. The issue below, subject to resolving the jurisdictional issue, was not the identity of “heirs at law”, but whether decedent's surviving siblings or appellee Kathy Millington (by virtue of her being his surviving spouse) are the beneficiaries of a life insurance policy, the proceeds of which are not a probate asset. ¹Clearly that decision will turn on whether Kathy is the spouse, by common law or otherwise, as that fact may be

¹The life insurance policy on the life of decedent was payable to his surviving spouse if and only if he should have a surviving spouse, otherwise to his surviving siblings.

determined by a court with jurisdiction to construe the insurance contract. Although the probate court has authority to determine whether Kathy is the common law spouse for purposes of applying the probate code (particularly the right to the family allowance), that is not to say that the probate court has any jurisdiction (of necessity in this case concurrent jurisdiction) to determine her status as a surviving spouse by common law for purposes of applying the terms of a life insurance policy which makes no reference to “heirs at law” and has nothing to do with decedent’s probate estate. If there would be any question about this, consider the circumstance if this life insurance policy had been decedent’s only property and that there was no necessity of opening a probate estate. The only issue would be, who receives the benefit of this policy, decedent’s one and only asset surviving his death. No one would be heard to say that the probate court had any jurisdiction whatsoever, concurrent or exclusive, and therefore any utterance by that court as to the proper construction of that life insurance policy would be a nullity. The mere fact that there was a probate estate as well as this non-probate asset does not change the result; the life insurance policy is a civil contract between decedent, entered into in his lifetime, and the insurer as to which appellants claim to be third party beneficiaries. Just because the probate court has jurisdiction to determine whether or not Kathy Millington is surviving spouse by common law for purposes of applying the probate code as to rights of surviving spouses, does not mean that the court can run wild over the entire legal landscape determining her marital status for every other conceivable purpose.

What we have here is a broken syllogism. Appellant has no argument with the major premise, which could be stated something to the effect that “Courts with concurrent jurisdiction can be petitioned for redress as to matters falling within that jurisdiction and the court first petitioned shall have priority of jurisdiction”. The minor premise is faulty which is “The probate division has concurrent jurisdiction with the general division as to construction of a life insurance policy not payable to decedent’s estate.” The result “Ergo, the probate division has concurrent jurisdiction to determine whether Kathy Millington is

surviving spouse for the purpose of construing a life insurance policy which is no part of decedent's probate estate" is faulty.

Indeed, by one reading of the above referenced O.R.C. §2101.24(B)(1)(a), the fact that the court of appeals has now "construed by judicial decision" such activity to be within the concurrent jurisdiction of probate courts means that from here and ever after, by the decision of a court of appeals, the jurisdiction of probate courts is expanded and the constitution relative thereto is amended to provide this additional jurisdiction. Such certainly cannot be a proper reading of the statute and, if it is, it constitutes an improper delegation of legislative power to the judiciary.

The obvious scheme of the Ohio Constitution as amended by the modern courts amendment is to create a court of common pleas with broad general jurisdiction to be subdivided into a probate division, a general division and other relevant divisions which do not share jurisdiction unless specifically so provided. They operate fairly independently of each other. See e. g., Ohio Constitution of 1851, Title IV, Section 4(C) where it is provided that "Judges shall be elected specifically to such probate division and to such other divisions". Clearly the probate division has plenary powers over decedents' estates and the acts of fiduciaries, but the general division has exclusive jurisdiction over the construction and enforcement of general contracts (including insurance contracts). To say, as the court of appeals did in the decision from which this appeal is taken, that the general division and the probate division have concurrent jurisdiction to construe an insurance contract (because such construction involves the question of the presence or absence of a common law spouse which is also a question relevant to the probate proceedings), is to extend the jurisdiction of probate courts thus creating two separate courts (and two or more specifically elected judges or sets of judges) competent to determine the result. So doing creates a choice in the litigant as to the court or the judge that he feels would more likely decide the case in his favor. Such "forum shopping" is not to be encouraged.

That a woman may be determined to be a common law wife for probate purposes and

not the common law wife for purposes of receiving benefits under a civil contract of life insurance is not necessarily an undesirable consequence as different sets of considerations may exist bearing on the justice and propriety of her being the spouse for one purpose and not for the other. The opinion herewith appealed could be cited for the proposition that the probate court, having concurrent jurisdiction to decide any rights under an insurance policy purchased on the life of a decedent whether or not the asset is a probate asset, vastly extends the jurisdiction of the probate court and indeed extends it into an area of law as to which the probate judge may not particularly be well versed. Indeed, had the probate court already decided that a party is a common law wife for probate purposes (under all kinds of considerations that would make that fair and reasonable in a probate context), he might be hesitant to find that she is not a common law wife for purposes of construing the right to the proceeds of an insurance contract even though far different considerations of fairness and justice may prevail in that case. The effect of the decision herein appealed is to blur the distinction between the general and the probate divisions of the court and to move away from the purpose of creating the separate divisions in the first place, which purposes must include providing some modicum of specialization among the divisions.

The decision from which this appeal is taken could be cited for the proposition that the probate division has concurrent jurisdiction with the general division of the court of common pleas to determine rights under life insurance even though the proceeds are not a probate asset. Such is no part of the specific expertise of the probate court and only creates the opportunity for prospective litigants to "forum shop".

Submitted further than O.R.C. 2101.24(B)(1)(a), if so construed, is an unconstitutional delegation of legislative power on the courts. Not having concurrent jurisdiction thereover, the probate court has no power to determine the proper recipient of benefits under a civil life insurance policy and, therefore, having assumed jurisdiction (if such it be) by ordering such proceeds held in an interest bearing account until the person entitled thereto be identified, the court does not boot strap itself into jurisdiction, much less

priority jurisdiction, to decide the issue of who should receive the insurance benefits. The decision of the court of appeals below creates a constitutional question and is of general interest to the Ohio scheme for the division of general jurisdiction among somewhat specialized divisions of a common court.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

The action under appeal was filed in the Common Pleas Court of Hardin County, Ohio as Case No. 20071058-CVH, seeking a declaratory judgment as to the rights of the Plaintiffs to the proceeds of a life insurance policy as the “surviving siblings”. The policy provided that the surviving spouse would be the sole beneficiary if there was a surviving spouse and, if there were not, the beneficiaries would be the surviving siblings. The insured has four surviving siblings, but no surviving spouse unless Appellee was his spouse by common law. The issue will ride on a determination by the courts as to the presence or absence of a “surviving spouse” as that phrase is used in the insurance policy. The probate court under authority of which the decedent’s estate is being settled had, on motion of Appellees, ordered the proceeds of the policy held in escrow pending determination of the legal beneficiaries. Under no circumstances, however, will any of the proceed of the insurance policy be distributable in the course of the administration of the decedent’s probate estate or pursuant to the terms of his will.

The defendants in the trial court and appellees below (being Kathy S. Millington and also Kathy S. Millington as administrator of decedent’s estate) filed their motion to dismiss the action filed in the general division. The hearing on the motion involved only the issue of the court’s jurisdiction and was not to be evidentiary. Nonetheless, defendants’ counsel shows up with witnesses as to the merits of the issue, *i.e.* presence or absence of a surviving spouse. Over objection of plaintiffs’ counsel, the magistrate let defendants proceed for a short time before returning to his original feeling that such was not relevant to the only issue raised by the motion and shut down defendants’ circus. Considering the arguments advanced at the motion hearing, the magistrate recommended that the motion be granted and judgment was entered by the court in accordance with its magistrate’s decision. The magistrate found as undisputed facts (see Exhibit C to this brief):

“Pursuant to the policy the proceeds were payable to the surviving heirs of the deceased in the following order of preference: surviving spouse, surviving children in equal share, surviving parents in equal share, surviving siblings in equal share, the estate.”

The magistrate found the general division to be “without jurisdiction to rule on the complaint in that the Hardin County Probate Court has jurisdiction over the issues presented” because it was

“first involved in [the] controversy, that court retains the exclusive right to adjudicate that matter” and that “Plaintiffs [sic] argument ignores the fact that the Hardin County Probate Court by its entry of February 8, 2007 “Exercised jurisdiction over the proceeds of the policy by ordering Plaintiff to deliver the same to the administrator” (also incorrect as a matter of what the entry ordered).

The recommendation of the Magistrate “that Defendant’s [sic] motion to dismiss be granted” was based on two older decisions in cases where two courts clearly had concurrent jurisdiction (although he did not expressly decide that concurrent jurisdiction existed in the instant case). The court of appeals took the final step and found concurrent jurisdiction and, because whichever court of two courts with concurrent jurisdiction first assumes jurisdiction has “priority jurisdiction” [see page 9 of the appellate decision Exhibit A], the other court with concurrent jurisdiction is precluded from hearing and deciding any issue remotely relating to the controversy.

Statement of Facts

John M. Wireman (“Decedent”) died a resident of Hardin County, Ohio and his estate is being administered by the probate division of the Hardin County common pleas court under case No. DE- 06-1-020. Defendant Kathy S. Millington was duly appointed and continues to act as administrator and was named below in her fiduciary capacity as well as personally. Decedent in his life time was employed by a company that covered its employees with life insurance. The policy on decedent’s life, having a \$39,000.00 death benefit, was payable as all the parties agree, “[T]o the surviving heirs of the deceased in the following order of preference: surviving spouse; surviving children in equal shares; surviving parents in equal shares; surviving siblings in equal shares; the estate.”

Whether or not decedent died with a surviving spouse is a question that must be determined by the probate court for purposes of settling his estate. Although there was no ceremonial marriage, Defendant Kathy Millington, who is said to have co-habitated with decedent, claims to be wife by common law. The probate court has not specifically ruled on the question and no determination of heirship has been made. Under the language of the policy quoted above, she will receive the entirety of the death benefit if she is surviving spouse. Decedent had no children and was not survived by either parent. He was survived by four siblings, three of which are Appellants herein. Clearly, therefore, under no circumstance will the estate be a beneficiary of the policy.

The question is whether Kathy S. Millington is the sole beneficiary of decedent's said policy and the issue is whether the probate court has the exclusive power (jurisdiction) to determine the question. Submitted that the probate division not only lacks exclusive power, it has no power to construe the insurance contract at all.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law Number 1

The probate division of the Court of Common Pleas does not have concurrent jurisdiction with the general division in a case involving the constitution of a civil contract having nothing to do with an estate asset just because it involves the determination of a particular issue also before it in the administration of a decedent's estate.

The probate division of a court of common pleas ("probate court") has no jurisdiction to make any order with respect to insurance proceeds as to which the estate is not the beneficiary. This follows from the fact that the probate court is clearly a court of limited jurisdiction, see Ohio Rev. Code §2101.24 and *In re Brunskill*, 63 Ohio App. 529, 27 N.E. 2d 492 (Sum. App.1940). Probate courts do not have jurisdiction to determine title to a decedent's real estate and personal property transferred prior to her death, citing *Richardson, Admn. v Richardson* 28, Ohio Law Abs. 497 (Med. App., 1938), where an estate administrator successfully brought such an action in general division, not probate division, for that purpose.

An early case clearly establishing the proposition for which Appellants argue is *Goodrich v. Anderson*, 136 Ohio St. 509 (1940), wherein a proceeding to discover concealed assets of an estate was found not to provide a substitute for a civil action in the common pleas court for the recovery of money; rather it was found to provide a speedy method of discovering assets belonging to an estate and to secure possession of them. The second paragraph of the syllabus is that when the defendant is found not guilty of concealing or embezzling assets, the probate court may not proceed to other issues, but must dismiss the matter of the issue involving the mental capacity of decedent to have gifted certain notes to the maker thereof. Although the action arose from the common pleas court, the Supreme Court found (page 511 of the official report) the character of the proceedings at bar to be the same as in the probate court. The Supreme Court found:

“While the authority of the court under such proceedings is very broad for the propose of discovering concealed or embezzled asset, it is not broad enough to

litigate all the issues in the instant case, where the ultimate objective is a money judgment and where there has been no concealment of assets. To that extent there is a limitation upon the "plenary power" granted to the probate court"

Appellant Chester Wireman received the insurance proceeds upon his application, made in good faith and on advice of the insurer and at the request of Appellees' attorney, and holds such proceeds for the benefit of all decedent's surviving siblings (or whomever is entitled to them); there is no embezzling or concealment. In oral argument to the court of appeals, Appellees' counsel argued the merits of the case to the near exclusion of the jurisdictional issue. Although tempted to counter Appellees' assertions (which were as wrong as they were irrelevant), Appellants decided to stick to urging the jurisdictional issue because questions and comments to Appellees' counsel by the court seems to demonstrate that the court knew that Appellees' counsel was off in irrelevancies and to suggest he get back to the issue. This tactic by Appellants appears to have been a mistake as the court of appeals discusses at length the irrelevant factual assertions of Appellees' counsel [see Exhibit A from page 3] as to which it had no record before it (the court below even decries the lack of a transcript) and appears out to punish the evil Mr. Wireman [see appellate opinion, Exhibit A beginning at the bottom of page 3].

The limitation of the jurisdiction of the probate court is further examined *In re Estate of Etzensperger*, 9 Ohio St.3d 19, 457 NE2d 1161 (1984). In the *Etzensperger* Case, the administrator sought to have the probate court impose a constructive trust on certain Series E United States Savings Bonds which he saw fit to inventory. The bonds had been purchased by decedent with the funds of a partnership operated by decedent and her husband, appointed fiduciary, and placed in her name joint and survivor with certain of her nieces and nephews (apparently decedent had no children) without the knowledge and consent of her husband and business partner. The Ohio Supreme Court ruled that the probate court was not empowered to impress a constructive trust upon the bonds, notwithstanding the provision of Ohio Rev. Code §2101.24 "the probate court shall have plenary power . . . to dispose of any matter properly before the court" The Supreme Court pointed out at page 21 of its decision that these Series E bonds were not "properly before the court" and that "appellant's claim is not directed at the bonds themselves, but is focused on one-half of the funds and the increment thereon, of which he was allegedly defrauded". The finding of the

Court is contained in the penultimate paragraph on page 22: “Thus, the probate court was without authority . . . to impress a constructive trust on the bonds and, as previously noted, the matter is not properly before the court”

In the case at bar, the probate court, upon hearing upon exceptions to the inventory in the decedent’s estate (a summary proceeding designed to expedite estate administration which does not bar non participants or even participants as to matters outside strict probate estate administration), proceeded upon the assumption (without expressly so finding) that a common law marriage had occurred between decedent and Millington. As courts applying the statute have consistently ruled, although the powers of the probate division are plenary, they are plenary only with respect to matters “properly before the court”. An example is *Oncu v. Bell*, 49 Ohio App.2d 109, 359 NE2d 712 (1976), a case in which the probate division was found to be without jurisdiction to reform a deed executed by decedent prior to his death. The probate court has also been found without jurisdiction to pass on the validity of a contract where such contract had no bearing on the assets of the estate, *In re Martin*, 115 Ohio App. 515, 185 NE2d 785 (Fay. App., 1962). At issue in the *Martin* Case was the jurisdiction of the probate court in a declaratory judgment action to declare the validity of a contract among the heirs and devisees of the will of decedent to divide the estate other than as provided in the will. Because the purported contract had no bearing upon the assets of the estate, the duties of the executor or the court’s administration of the estate (apparently, the executor had sought a judgment declaratory of his duties under that contract), the court was found to lack jurisdiction to render the declaratory judgment. Because the declaratory judgment authorizing statute provided “courts of record within their respective jurisdictions shall have power to declare right”, Appellant had argued that it was unnecessary for the court to make a determination with respect to the contract because neither the assets of the estate nor the duties of the executor were affected thereby. The cases to the date of that decision are well and thoughtfully collected at page 521 of the official report of the case. The Martin Court then concluded at, page 522:

“The purported contract having no bearing upon the assets of the estate, the duties or the executor or the court’s supervision of the administration, it is our opinion that a declaratory judgment with respect to the validity of the contract was not within the jurisdiction of the Probate Court”.

To the issue of whether or not Kathy Millington is surviving spouse of the decedent by

common-law for purposes of application of the language of the insurance contract will be found relevant the case of *Cole v. Ottawa Home & Savings Assn.*, 18 Ohio St.2d 1, 246 NE2d 542 (1969). If her status as surviving spouse be raised in a court not of competent jurisdiction, the parties will not be found barred by *res judicata* from seeking a judgment from a court with jurisdiction. In the *Cole* Case, exceptions were filed to decedent's inventory citing failure to include a joint and survivor account with the savings association. The surviving tenant on that account was served with notice that an exception to inventory had been taken, but she seems not to have received notice of the subject matter of the exception. On hearing, the probate court ruled the exception well taken on its finding that decedent was incompetent to have established the joint and survivor account and ordered the account balance transferred to the executor and the savings association complied. The surviving tenant then sued the savings association for the amount of the account on date of death. The savings association defended on the grounds that the probate court had acquired exclusive jurisdiction, had determined the issue, and that the surviving tenant's action against it was precluded by *re judicata*. The court of appeals reversed, finding that the probate court's judgment did not bar the case against the savings association. The issue on appeal was whether a hearing on exceptions to inventory is a proper proceedings to ascertain title to the account and, if so, whether that determination is subject to collateral attack in any subsequent action. The probate court was found to be without jurisdiction and the savings association was stuck. The insurance company in the case at bar, not being a party to any probate proceedings, would be in the same sorry shape as this loan company, it having already paid out the insurance proceeds on the application of Appellant Wireman.

Proposition of Law No. 2

A probate court *cannot* acquire jurisdiction to decide a case simply by assuming to make an order in the case of the case is not "properly before the Court".

The decision of the magistrate, adopted and approved by the trial court and the court of appeals below, argues in a circle. On page 3 of his decision [Exhibit C hereto], the magistrate states:

Plaintiffs' argument ignores the fact that the Hardin County Probate Court by its entry of February 8, 2007 . . . exercised jurisdiction over the proceeds of the policy

In short, the magistrate's argument is that "the probate court has jurisdiction because it exercised

jurisdiction”, a classic “argument from the conclusion” which assumes as a necessary proposition that which is at issue. The point is that the probate court’s exercise of jurisdiction, if it did so, is a nullity because the issue was not “properly before the court”. The magistrate might as well have said that a municipal court would acquire exclusive jurisdiction over the question of granting a divorce if it entered an order granting temporary alimony pending the hearing for divorce while presiding over a traffic case.

The magistrate cites *Merrill v. Lake*, 16 Ohio Reports. 374, as authority for the proposition that the first court to involve itself in a controversy retains the exclusive jurisdiction, but that case involved the circumstance where two courts, the common pleas and the Supreme Court, enjoyed concurrent jurisdiction and the holding was that the first to take up the case prevents the other from getting involved. The instant case does not involve concurrent jurisdiction of the probate court, but no jurisdiction of the probate court - i.e., concerns an issue not “properly before the court”.

The magistrate also cited for the same proposition *Parkison v. Victor, Judge*, 105 Ohio App. 200 (Sum. App. 1957), which also involves jurisdiction between two courts with concurrent and co-extensive jurisdiction (between a common pleas court and a municipal court), holding simply that one such court can not enjoin the proceedings of another with equal jurisdiction.

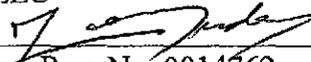
Finally the magistrate cited *In re Estate of Soeder*, 7 Ohio App.2d 271, 220 N.E.2d 547 (Cuy. App., 1966), for the proposition that, by simply entering an order that the proceeds of an insurance contract (as to which the estate is not a party) be held in escrow for safe keeping until the insurance contract be construed, a probate court acquires jurisdiction to determine the rights of all parties to that contract (including third-party beneficiaries of that contract not parties to the estate proceedings) and, pursuant to such acquired jurisdiction, may determine the existence of a common law marriage (to which plaintiffs agree to the extent it impacts the question of whom shall inherit from the probate estate). The *Soeder* case involved the question of whether the purported common law wife shall receive the rights of a surviving spouse as to admitted estate assets (it involved exceptions filed to the inventory as to spousal year’s allowance); the case did not involve, as now before the court, anyone’s rights as to non-probate assets.

CONCLUSION

The Supreme Court should reverse the court of appeals which upheld the trial court's judgment and the *ratio decidendi* of its magistrate on which it is based, as the magistrate failed to find and to base his decision on the fact that the issue of entitlement to participate in the proceeds of this life insurance policy was not "properly before the probate court" even though the probate court assumed the power to cause the insurance proceeds to be held in escrow which Defendants below claim has somehow bootstrapped the probate court into exclusive jurisdiction herein. The case should be remanded to the trial court with instruction to accept jurisdiction and grant the declaratory relief to which it may find Appellants entitled.

Respectfully submitted,

Tudor Law, LLC

By: 

John M. Tudor, Reg. No. 0014762

22 North Main Street

Kenton, OH 43326-1552

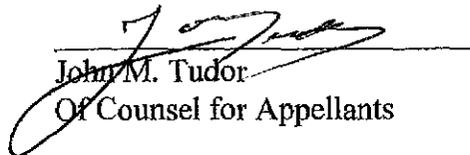
(419) 673-1292

(419) 675-2145 - Fax

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the forgoing Brief of Appellants was served upon Defendants-Appellees by mailing a true copy thereof to their attorney of record, Terry L. Hord, Esq., addressed 810 South Main Street, Ada, OH 45810, by ordinary U. S. mail, postage prepaid, this 29th day of August, 2008.


John M. Tudor

Of Counsel for Appellants

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE ORIGINAL.
Entry FILED IN THIS OFFICE
Lori J. Stevenson
HARDIN COUNTY CLERK

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

HARDIN COUNTY

FILED
HARDIN COUNTY
COURT OF APPEALS
3rd APPELLATE DIST.

JUL 21 2008

CHESTER WIREMAN, ET AL.,

Lori J. Stevenson Clerk
Hardin Co. Court of Appeals
3rd Appellate Dist.

PLAINTIFFS-APPELLANTS,

CASE NO. 6-08-02

v.

KATHY S. MILLINGTON, ET AL.,

JOURNAL
ENTRY

DEFENDANTS-APPELLEES.

This appeal, having been heretofore placed on the accelerated calendar, is being considered pursuant to App.R. 11(E) and Local Rule 12. Pursuant to Local Rule 12(5), we have elected to render a memorandum decision by summary journal entry.

Plaintiffs-Appellants, Chester Wireman, et al.,¹ appeal the judgment of the Hardin County Court of Common Pleas dismissing their complaint for declaratory judgment as to the rights of Appellants and Defendant-Appellee, Kathy Millington, aka Kathy Wireman, to the proceeds of a life insurance policy. On appeal, Appellants assert that the trial court erred in dismissing the case and finding that the probate court was the proper forum to determine the issues presented. Based upon the following, we affirm the judgment of the trial court.

¹ The named plaintiffs in this case are Chester and three of his siblings, George Wireman, Eugene Wireman, and Juanita Pinks. Juanita died in May 2007 and a Suggestion of Death was filed. The named defendants are Kathy S. Millington, individually and as Administrator of the Estate of John Wireman, and Alonzo Wireman. Alonzo is also a sibling of the decedent, but Chester stated that he could not be reached to determine whether he wished to join the case as a plaintiff. Alonzo has not appealed. Prudential Life Insurance was not a party to the declaratory judgment action.

Chester was the brother of John Wireman ("the decedent"), who died intestate in June 2005. Kathy maintains that she was the decedent's common-law wife. At the time of his death, the decedent was insured under a group term life insurance policy with Prudential Life Insurance Company of America in the amount of \$39,000. Because the decedent did not name a beneficiary for his insurance, the distribution of proceeds is governed by the "Beneficiary Rules" set forth in the policy. According to the policy, the proceeds are payable to the surviving heirs of the deceased in the order of preference, payable to the first of the following: surviving spouse, surviving children in equal share, surviving parents in equal share, surviving siblings in equal share, the estate. The decedent had no children and was not survived by either parent. There were five surviving siblings at the time of his death.

In March 2007, Appellants filed a complaint for declaratory judgment in the Hardin County Court of Common Pleas seeking a determination as to the rights of the parties to the proceeds of this life insurance policy. In the complaint, Appellants acknowledge that the Probate Court of Hardin County has found Kathy to be the common law surviving spouse, but contend that this was for "limited probate purposes" only. Appellants maintain that the life insurance proceeds are not an asset of the estate, and therefore, the court of common pleas is the proper forum for determining whether a common law marriage existed and whether Kathy is the surviving spouse.

Kathy filed a motion to dismiss, arguing that the probate court is the proper forum for determining the issues in this case because the matter is already before the probate court, “In the matter of Case No. DE-06-1-020, The Estate of John M. Wireman,”² where Kathy was appointed the Administrator of the Estate in March 2006. Kathy is listed as the “surviving spouse” on the death certificate and several other documents before the probate court. Several of the deceased’s siblings and heirs have filed waivers with the probate court, acknowledging that Kathy is the surviving spouse and waiving any rights that they might have under the statutes of descent and distribution. Kathy has also filed an inventory of the estate and has included the value of the Prudential Life Insurance proceeds on the schedule of assets. An exception to the inventory has been filed in the probate court. Kathy also represents that the probate court has pending a “Petition Pursuant to Ohio Revised Code Section 2123.01, et seq.” (proceeding for determination of heirship).

In February 2007, the probate court ordered Chester to deposit the life insurance proceeds into an interest-bearing escrowed account pending the resolution of this matter. Kathy requested that the funds be placed in a secure account after she learned that Prudential Life Insurance had already distributed the life insurance proceeds to Chester. Kathy submitted exhibits at the hearing showing that Chester obtained the life insurance money after he represented himself to be the Administrator of the estate. Chester had submitted a sworn

² Kathy also states that Chester unsuccessfully attempted to probate a lost unsigned will in probate court.

affidavit to Prudential stating that there was no surviving spouse and that he was the only surviving sibling of the decedent.

Kathy contends that all of the above matters are already properly before the probate court and, therefore, under the jurisdictional priority rule, the probate court is the correct forum to decide these issues. She maintains that Appellants filed the declaratory judgment in the common pleas court in an attempt to “forum shop.”

In August 2007, the court of common pleas held a hearing on Kathy’s motion to dismiss. The parties did not provide a transcript of this hearing.³

Subsequently, the magistrate issued a decision finding that the Probate Court of Hardin County was the proper forum to determine the issues which were the subject matter of the complaint. The trial court overruled Appellants’ objections to the magistrate’s decision and dismissed the case.⁴

It is from this dismissal that Appellants appeal, presenting the following assignments of error for our review.

³ Many of the relevant facts and details as to what has transpired in this case are not available to this Court because Appellants did not provide a transcript of the proceedings below. Therefore, we can only decide generally according to the law, and presume regularity in the proceedings below. See *Crane v. Perry Cty. Bd. of Elections* (2005), 107 Ohio St.3d 287, ¶37 (if the appellant fails to provide a transcript including all relevant evidence pertaining to the issues raised on appeal, the appellate court will assume that the evidence supported the trial court’s findings.); App.R. 9.

⁴ The original August 2007 judgment entry was vacated due to the lack of a written report from the magistrate. The magistrate then filed a written decision in September 2007 recommending that the motion to dismiss be granted and, thereafter, Appellants filed objections. In November 2007, the trial court overruled the objections and approved and adopted the magistrate’s decision. Appellants appealed, in Case No. 6-07-24. In January 2008, this Court dismissed the appeal for lack of a final appealable order pursuant to R.C. 2505.02. On January 27, 2008, the trial court issued its final judgment entry, adopting the decision of the magistrate and dismissing the declaratory judgment action. Appellants timely filed this appeal, Case No. 6-08-02.

Assignment of Error No. I

THE COURT BELOW ERRED IN FINDING THAT THE PROBATE DIVISION HAS JURISDICTION TO DETERMINE THE RIGHTS OF INDIVIDUALS WHO ARE INTERESTED PARTIES TO A DECEDENTS [sic] ESTATE TO A CONTRACT AS TO WHICH THE ESTATE OR DECEDENT HAD NOT [sic] CONTRACTUAL RIGHTS.

Assignment of Error No. II

THE TRIAL COURT ERRED IN APPROVING THE DECISION OF ITS MAGISTRATE THAT, BY ASSUMING JURISDICTION OVER THE PROCEEDS OF LIFE INSURANCE ON DECEDENT TO THE EXTENT OF ORDERING IT HELD IN AN ESCROW ACCOUNT HAS THEREBY OBTAINED JURISDICTION TO TURN [sic] RIGHTS TO THOSE PROCEEDS WHEN NEITHER DECEDENT OR HIS ESTATE COULD CONCEIVABLY BE A BENEFICIARY OF THAT POLICY.

Due to the nature of Appellants' assignments of error, we elect to address them together.

Assignments of Error Nos. I & II

In the first and second assignments of error, Appellants argue that the probate court does not have jurisdiction to determine the distribution from the life insurance policy because this is a contractual matter and the proceeds are not a part of the decedent's probate estate. Appellants further maintain that the probate court did not acquire proper jurisdiction over the life insurance proceeds simply because it ordered the money to be placed in a secure account until the rightful distribution could be determined. Essentially, both of the assignments of error revolve around the issue as to whether or not the probate court has jurisdiction to

determine: (1) whether Kathy is the surviving spouse; and, (2) who is entitled to receive the proceeds from the decedent's insurance policy.

Probate courts are courts of limited jurisdiction, and probate proceedings are restricted to actions permitted by statute and the Ohio Constitution. *Corron v. Corron* (1988), 40 Ohio St.3d 75, paragraph one of the syllabus. R.C. 2101.24(C) grants probate courts the "plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by statute." Specific matters that may be properly before the court are enumerated in R.C. 2101.24, including:

(A)(1) Except as otherwise provided by law, the probate court has exclusive jurisdiction:

*** * ***

(c) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

*** * ***

(l) To render declaratory judgments, including, but not limited to, those rendered pursuant to section 2107.084 of the Revised Code;

*** * ***

(2) In addition to the exclusive jurisdiction conferred upon the probate court by division (A)(1) of this section, the probate court shall have exclusive jurisdiction over a particular subject matter if both of the following apply:

(a) Another section of the Revised Code expressly confers jurisdiction over that subject matter upon the probate court.

(b) No section of the Revised Code expressly confers jurisdiction over that subject matter upon any other court of agency.

Thus, "taken together these sections give the probate court exclusive jurisdiction over declaratory actions brought 'to determine any question arising out of the administration of the estate.'" *Lamar v. Washington*, 3d Dist. No. 1-05-54, 2006-Ohio-1414, ¶15.

R.C. 2123.01 sets forth occasions when a probate court may conduct a proceeding to determine heirs. Further, a probate court has jurisdiction over actions falling under R.C. 2721.05:

Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or the estate of a decedent * * * may have a declaration of rights or legal relations in respect thereto in any of the following cases:

(A) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others;

*** * ***

(C) To determine any question arising out of the administration of the estate or trust, including questions of construction of wills and other writings.

A probate court also has jurisdiction to determine the issue of a common-law marriage, and who is the surviving spouse, as incident to the determination of issues before the court. *In re Estate of Soeder* (1966), 7 Ohio App.2d 271, 276; *In re Estate of Shepherd* (1994), 97 Ohio App.3d 280; *Pickett v. German*, 7th Dist. No. 87 C.A. 14, 1988 WL 70870; see, also, *Bajurczak v. Estate of Bajurczak*

(2000), 139 Ohio App.3d 78, 80 (probate court made the determination as to whether wife #1 or wife #2 was the surviving spouse and heir).

Probate courts and common pleas courts have concurrent jurisdiction to determine heirship. *Kane v. Kane* (1946), 146 Ohio St. 686, syllabus. Consequently, the court first acquiring jurisdiction of the parties for that purpose has exclusive jurisdiction to make that determination. *Id.*

Likewise, under the rule of judicial priority, when litigation involving the same parties and issues is commenced in two courts of concurrent and coextensive jurisdiction, the court whose power is first invoked by the institution of proper proceedings and service of process acquires the authority to adjudicate and settle the rights of the parties to the exclusion of all other tribunals. *Miller v. Court of Common Pleas of Cuyahoga Cty.* (1944), 143 Ohio St. 68, 70. Furthermore, because the case before the common pleas court and the case before the probate court both revolve around the same issues, the risk of multiple, conflicting judgments exists if they were to be tried separately. See *United Family Life Ins. Co. v. Brogan*, 8th Dist. No. 83272, 2004-Ohio-1133, at ¶16.

In this case, the probate court clearly has the jurisdiction and authority to determine whether Kathy is the surviving common law spouse, and to determine who are the heirs at law. These matters were pending in the Probate Court of Hardin County before Appellants filed the declaratory judgment action in the Hardin County Court of Common Pleas. While both of these courts have

concurrent jurisdiction to determine these matters, the probate court has priority of jurisdiction. The trial court did not err in dismissing the declaratory judgment action and finding that the Probate Court of Hardin County is the proper forum to resolve the parties' dispute regarding the existence of a common law marriage and Kathy's status as the surviving spouse.

Although the Probate Court of Hardin County may eventually find that the life insurance proceeds are not a part of the estate, it clearly has the jurisdiction to determine whether Kathy was the decedent's common law wife, and therefore, his surviving spouse. Appellants will have the opportunity to appeal from any decision of the Probate Court if they feel the decision is incorrect.

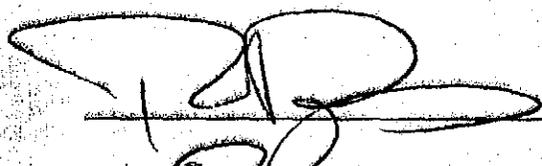
Although both courts have concurrent jurisdiction, we find that the Probate Court of Hardin County has priority of jurisdiction. Therefore, we affirm the decision of the trial court dismissing the case.

Accordingly, we overrule Appellants' first and second assignments of error.

For the aforementioned reasons, it is the order of this Court that the judgment of the Common Pleas Court of Hardin County be, and hereby is affirmed at the costs of Appellants for which judgment is rendered, and the cause be, and hereby is, remanded to the trial court for the execution of the judgment of costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by App.R. 27 or by any other

provision of law, and also furnish a copy of this journal entry to the trial judge and parties of record.



J. Preston

John B. Williamson

JUDGES

DATED:

FILED
HARDIN COUNTY
COMMON PLEAS COURT
2008 JAN 17 A 8:15
LORI J. STEVENSON
CLERK

IN THE HARDIN COUNTY COMMON PLEAS COURT
KENTON, OHIO

CHESTER WIREMAN, ET AL.,

PLAINTIFF,

CASE NO: 20071058 CVH

VS.

KATHY S. MILLINGTON,

ENTRY

DEFENDANT.

.....
In accordance with the Third District Court of Appeals decision in Case number 6-07-24, this Court rules as follows:

This matter came before the Court to consider the Objections to Magistrate's Decision dated September 25, 2007. No transcript of the hearing was filed by either party as required by Ohio Rule of Civil Procedure 53(D)(3)(b)(iii). The Court, pursuant to Ohio Civil Rule 53, after independent review and analysis of said decision, finds that the objections thereto are without merit. The objections are hereby overruled. The Court hereby adopts

and approves said decision and makes it the Order of this Court. Therefore Defendant's Motion to Dismiss this action is hereby Granted at Plaintiff's costs. Judgment for same is Granted.

IT IS SO ORDERED.

This is a final appealable Order and there is no just reason for delay.

-ORIGINAL SIGNED

Judge William D. Hart

cc: Attorney John M. Tudor
Attorney Terry L. Hord

FILED
HARDIN COUNTY
COMMON PLEAS COURT

2007 SEP 25 AM 10:24

LOP... HENSON
CLERK

IN THE COMMON PLEAS COURT OF HARDIN COUNTY, OHIO
DOMESTIC RELATIONS DIVISION

CHESTER WIREMAN, et al., : Case No. 20071058 CVH

-Plaintiffs,

-vs-

MAGISTRATE'S DECISION

KATHY S. MILLINGTON aka
WIREMAN, et al.,

-Defendants.

This cause came on for hearing before the Magistrate this 17th day of August, 2007 on the motion to dismiss complaint filed by Defendant, Kathy S. Millington aka Wireman, individually and in her official capacity as Administrator of the Estate of John M. Wireman and the memorandum in opposition filed on behalf of Plaintiffs, Chester Wireman, et al.

Plaintiffs were represented by Attorney John M. Tudor and Defendant was represented by Attorney Terry L. Hord.

Statement of Facts

The undisputed facts of the case are as follows:

Defendant is the duly appointed and acting Administrator of the Estate of John M. Wireman, Hardin County Probate Court, Case No. DE-06-1-020.

At the time of his death John Wireman was insured under a group term life insurance policy with Prudential Life Insurance Company of America (Defendant's Exhibit D).

Following the death of John Wireman, Plaintiff, Chester Wireman, made application for and received the proceeds payable on the life of decedent under the policy.

Because decedent failed to name a beneficiary for his insurance the distribution of proceeds were governed by the Beneficiary Rules set forth in the policy.

Pursuant to the policy (Defendant's Exhibit E) the proceeds were payable to the surviving heirs of the deceased in the following order of preference: surviving spouse, surviving children in equal share, surviving parents in equal share, surviving siblings in equal share, the estate.

Defendant listed the proceeds received by Plaintiff as an asset of the estate of decedent (Defendant's Exhibit C) and exception thereto was filed by Plaintiffs.

Statement of Case

Plaintiffs seek declaratory judgment as to the rights of the parties to this action to share in the proceeds of the policy and a determination as whether Defendant is, in fact, the common law wife of the decedent.

Defendant properly contends that this Court is without jurisdiction to rule on the complaint in that the Hardin County Probate Court has jurisdiction over the issues presented.

Under the jurisdictional priority rule where the power of a Court, as in this case, is first involved in a controversy, that court retains the exclusive right to adjudicate the matter.¹

Plaintiffs contend that since there are surviving heirs of the decedent that the proceeds are not an asset of the estate by reason that same under the clear and unambiguous terms of the life insurance contract are not payable to the estate.

Plaintiffs argument ignores the fact that the Hardin County Probate Court by its entry of February 8, 2007 (Defendant's Exhibit F) exercised jurisdiction over the proceeds of the policy by ordering Plaintiff to deliver same to the administrator.

Further the Hardin County Probate Court having exercised jurisdiction

¹Merrill v. Lake(1847), 16 Ohio 373; Parkinson v. Victor(1957), 105 Ohio App. 200

over the insurance proceeds prior to the filing of the herein complaint may in the exercise of its jurisdiction hear exceptions to an inventory, determine the parties dispute regarding the existence of a common law marriage.²

Because the Hardin County Probate Court is the proper forum to determine the issues which are the subject matter of the complaint for declaratory judgment it is recommended that Defendant's motion to dismiss be granted at Plaintiff's cost.

ORIGINAL SIGNED

Magistrate Robert T. Maison

OBJECTIONS TO THIS DECISION SHALL BE FILED WITH THE COURT, IN WRITING, WITHIN FOURTEEN DAYS OF THE DATE OF THE FILE-STAMPED DATE OF THIS DECISION PURSUANT TO OHIO CIVIL RULE 53.

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION OF LAW UNDER OHIO CIVIL RULE 53(D)(3)(ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY OHIO CIVIL RULE 53(D)(3)(b).

cc: Attorney John M. Tudor
Attorney Terry L. Hord

²In re Estate of Soeder(1966), 7 Ohio App. 2d 271; 220 N.E. 2d 547