

ORIGINAL

IN THE SUPREME COURT OF OHIO

**Richard R. Heslet, Trustee of the
Raymond W. Artz Trust,**

Plaintiff/Appellee,

v.

**Edgar Artz, Jr., Administrator WWA
Of the Estate of Raymond W. Artz, et
al.,**

Defendants/Appellees.

**[Hayes Memorial United Methodist
Church - Defendant/Appellant]**

11-1306

Case number _____

**On Appeal from the Sandusky
County Court of Appeals,
Sixth Appellate District**

**Court of Appeals Consolidated
Case Nos. S-10-046 and S-10-047**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT HAYES MEMORIAL UNITED METHODIST CHURCH**

Bryan B. Johnson (0003981) (COUNSEL OF RECORD)
Of Counsel to Adams, Babner & Gitlitz, LLC
5003 Horizons Drive, Suite 200
Columbus, OH 43215-5292
Tel: 614-560-4719
Fax: 614-569-3352
bbj@abglawyers.com

John L. Zinkand (0002814)
211 South Park Avenue
Fremont, OH 43420
Tel. 419-332-5579
Fax. 419-332-5570

FILED
AUG 01 2011
CLERK OF COURT
SUPREME COURT OF OHIO

ZinkandLAW@aol.com
COUNSEL FOR DEFENDANT/APPELLANT
HAYES MEMORIAL UNITED METHODIST CHURCH

William A. Wingard (0023840) (COUNSEL OF RECORD)
414 Croghan St.
Fremont, OH 43420
Tel. 419-334-9501
wingard@sbcglobal.net
COUNSEL FOR PLAINTIFF/APPELLEE RICHARD R. HESLET,
TRUSTEE OF THE RAYMOND W. ARTZ TRUST

James H. Ellis, III (0072223) (COUNSEL OF RECORD)
Ellis Law Office, LLC
212 S. Park Ave.
Fremont, OH 43420
Tel. 419-332-4722
Fax. 419-334-8590
jellis@elo-law.com
COUNSEL FOR DEFENDANT/APPELLEES EDGAR ARTZ, JR., INDIVIDUALLY,
AND AS ADMINISTRATOR WWA OF THE ESTATE OF
RAYMOND W. ARTZ, DECEASED, AND GLADYS ARTZ

Meghan K. Fowler (0080775) (COUNSEL OF RECORD)
Milton Sutton (0083130)
Assistant Attorneys General
Charitable Law Section
150 E. Gay St.
Columbus, OH 43215
Tel. 614-466-3181
mfowler@ag.state.oh.us
COUNSEL FOR DEFENDANT/APPELLEE STATE OF
OHIO CHARITABLE LAW SECTION

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES | ix |
| EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION | 1 |
| STATEMENT OF THE CASE AND FACTS | 5 |
| ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW | 9 |
| <u>PROPOSITION OF LAW NO. 1:</u> | 9 |
| R.C. 2107.081, R.C. 2107.084(A) AND (E), AND R.C. 2107.71(B) ARE UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE BECAUSE THEY BIND APPELLANT TO A DECISION IN A PRIOR PROCEEDING TO WHICH APPELLANT WAS NOT JOINED AS A PARTY, AND IN WHICH APPELLANT WAS NOT IN PRIVACY WITH ANY PARTY TO THAT PRIOR PROCEEDING | |
| <u>PROPOSITION OF LAW NO. 2:</u> | 14 |
| IT IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS OF LAW FOR A COURT TO ISSUE A RULING AFFECTING THE SUBSTANTIVE PROPERTY RIGHTS OF THE PARTIES WITHOUT GIVING THOSE PARTIES THE OPPORTUNITY TO PRESENT EVIDENCE AND LEGAL AUTHORITY IN SUPPORT OF PROTECTION OF THEIR RIGHTS | |
| CONCLUSION | 16 |
| CERTIFICATE OF SERVICE | 16 |
| APPENDIX OF EXHIBITS | |

June 17, 2011 Decision and Judgment from the Sixth Appellate District

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|--------------|
| <u>Cases:</u> | |
| <i>Baldwin v. Hale</i> (1863), 1 Wall. 223, 17 L.Ed. 531 | 13 |
| <i>Boddie v. Connecticut</i> (1971), 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 | 2, 12 |
| <i>Bounds v. Smith</i> , 430 U.S. 817 (1977) | 2 |
| <i>Douglas v. California</i> , 372 U.S. 353 (1963) | 2 |
| <i>Fuentes v. Shevin</i> (1972), 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 | 13 |
| <i>Gano Farms, Inc. v. Estate of Kleweno</i> (1978), 2 Kan.App.2d 506, 582 P.2d 742, | 12 |
| <i>Grava v. Parkman, Twp.</i> (1995), 73 Ohio St.3d 379, 653 N.E.2d 226 | 9 |
| <i>Greene v. Lindsey</i> , 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) | 3 |
| <i>In re Estate of Barnes</i> (1973), 212 Kan. 502, 512 P.2d 387 | 12 |
| <i>Lindsey v. Normet</i> , 405 U.S. 56, (1972) | 8 |
| <i>Lloyd v. Wayne Circuit Judge</i> , 56 Mich. 236, 23 N.W. 28 (1885) | 3, 13 |
| <i>McKnight v. Boggs</i> (1984), 254 Ga. 537, 322 S.E.2d 283 | 12 |
| <i>Mullane v. Central Hanover Bank & Trust Co.</i> (1950), 339 U.S. 306, 319, 70 S.Ct. 652, 660, 94 L.Ed. 865 (1950) | 3, 13, 14 |
| <i>Nationwide Ins. Co. v. Steigerwalt</i> , 21 Ohio St.2d 87, 255 N.E.2d 570 (1970) | 10 |
| <i>Ortein v. Schwab</i> , 410 U.S. 656 (1973) | 2 |
| <i>Palazzi v. Estate of Gardner</i> , 32 Ohio St.3d 169, 512 N.E.2d 971 (1987) | 3, 4, 11, 14 |

| | |
|---|-------------------|
| <i>Ross v. Moffit</i> , 417 U.S. 600, (1974) | 2 |
| <i>Schroeder v. City of New York</i> (1962), 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 | 12 |
| <i>Tomasik v. Tomasik</i> , (2006), 111 Ohio St.3d 481, 857 N.E.2d 127, 2006-Ohio-6109 | 4, 11, 14 |
| <i>Tulsa Professional Collection Services, Inc. v. Pope</i> (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 | 14 |
| <i>United States v. Kras</i> , 409 U.S. 434 (1973) | 2 |
| <i>Whitehead v. Gen. Tel. Co.</i> (1969), 20 Ohio St.2d 108, 49 O.O.2d 435, 254 N.E.2d 10 | 9 |
| <u>Constitution:</u> | |
| United States Constitution | 1, 2, 4, 5, 10-15 |
| United States Constitution - Fourteenth Amendment | 1, 2, 4, 5, 10-15 |
| <u>Statutes:</u> | |
| R.C. 109.30 | 4 |
| R.C. 2103.14 | 4 |
| R.C. Chapter 2105 | 7, 10 |
| R.C. 2107.081 | 1, 7-11 |
| R.C. 2107.081(A) | 7, 8 |
| R.C. 2107.084(A) | 1, 8-11 |
| R.C. 2107.084(E) | 8, 10 |
| R.C. 2107.13 | 4 |
| R.C. 2107.14 | 4 |
| R.C. 2107.18 | 4 |
| R.C. 2107.19 | 4, 11 |
| R.C. 2107.22 | 4 |
| R.C. 2107.27 | 4 |
| R.C. 2107.71 | 1, 8, 9, 10, 11 |
| R.C. 2107.71(B) | 1, 8, 9, 10, 11 |
| R.C. 2107.75 | 4 |
| R.C. 2115.16 | 4 |
| <u>Legislation:</u> | |
| 1990 HB 346 | 4 |
| <u>Ohio Civil Rules:</u> | |
| Ohio Civ.R. 12(C) | 15 |

Ohio Civ.R. 19 10

Law Review Articles:

Alexander and Pearson, *Alternative Models of Ante-Mortem Probate Procedural Due Process Limitations on Succession*, 78 Mich. L. Rev. 89 (1979) 1

Fink, *Ante-Mortem Probate Revisited: Can An Idea Have A Life After Death*, 37 OSLJ 264 (1976) 2

Langbein, *Living Probate: The Conservatorship Model*, 77 Mich. L. Rev. 63 (1978) 1

Note, *The Constitutionality of the No-Notice Provisions of the Uniform Probate Code*, 60 Minn. L. Rev. 317 (1976) 2

Note, *Validity of Probate Statutes in Ohio*, 29 U. Cin.L.Rev. 76 (1958) 3

Other Authority:

Day, Jennifer Cheeseman, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050*, U.S. Bureau of the Census, Current Population Reports, P25-1130, U.S. Government Printing Office, Washington, DC, 1996 5

Insurance Journal West Magazine, *Baby Boomer Wealth Transfer*, February 23, 2004 issue 5

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

This procedural due process case involves several issues. The lower court decisions herein contradict the rulings of the United States Supreme Court and Ohio courts regarding procedural due process and causes significant financial harm to the appellant, Hayes Memorial United Methodist Church.

The appellant church's first proposition of law confronts as unconstitutional Ohio's current probate legislation contained in R.C. 2107.081, 2107.084(A) and (E), and 2107.71(B), as applied by the lower courts to bind the church bar its challenge to the validity of a pre-probated Will of one of its lifelong members, Raymond Artz. The church proposes that since it was not joined as a party in the prior pre-probate proceeding in which Raymond's Will was declared valid, and it was not in privity with any of its parties, it cannot be bound by the judgment entry issued therein. The church is simply proposing that this Supreme Court apply its long standing doctrines of collateral estoppel, res judicata, and constitutional due process of law to establish that it is not bound by those prior proceedings. For this Court to do so, it must strike down these probate statutes that expressly bind the church to the results of that pre-probate proceeding.

These challenged probate statutes currently allow a testator to file a declaratory judgment proceeding in Probate Court during his or her lifetime to have his or her Will declared valid, so as to bar a post-death will contest. It "is essentially an accelerated will contest." See Alexander and Pearson, *Alternative Models of Ante-Mortem Probate Procedural Due Process Limitations on Succession*, 78 Mich. L. Rev. 89 (1979), citing Langbein, *Living Probate: The Conservatorship Model*, 77 Mich. L. Rev. 63, 66 (1978). These proceedings are known generically as "ante-mortem" or "pre-probate" proceedings to declare a Will valid.

Professors Alexander and Person emphasize what the lower courts failed to recognize,

e.g. that "[t]he findings are not controlling, however, on issues for which there was no opportunity to litigate in the ante-mortem proceeding." *Ibid*, 78 Mich. L. Rev. 89, at 91, note 9, citing Fink, *Ante-Mortem Probate Revisited: Can An Idea Have A Life After Death*, 37 OSLJ 264 (1976). These professors note that since pre-probate proceedings follow the adjudicative model, e.g. plaintiffs and defendants, "[m]ost of the academic commentary has found the no-notice feature incompatible with constitutional due process requirements, supposing that any form of ante-mortem probate is, like conventional probate procedures, subject to the notice and appearance obligations of the fourteenth amendment due process clause." *Ibid*, 78 Mich. L. Rev. 89, at 97, citing Note, *The Constitutionality of the No-Notice Provisions of the Uniform Probate Code*, 60 Minn. L. Rev. 317 (1976). They also note that by including only certain affected parties to these proceedings "the traditional probate notice requirements may originate not from due process fairness concerns, but from the equal protection notion of treating similarly situated persons similarly. The parallel between due process and equal protection analysis is particularly close when a classification restricts the availability or exercise of procedural rights within the judicial system." *Ibid*, 78 Mich. L. Rev. 89, at 111, note 88, citing the majority and dissenting opinions in *Douglas v. California*, 372 U.S. 353 (1963); and *Ross v. Moffit*, 417 U.S. 600, 609-618 (1974); *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1972); *Bounds v. Smith*, 430 U.S. 817 (1977); *Ortein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973); and *Boddie v. Connecticut*, 401 U.S. 371 (1971).

In the case *sub judice* the probate statutes' defects are brought to the forefront because the testator followed them exactly as written in having his Will pre-probated, yet those procedures resulted in the unconstitutional denial of the church's property rights without due process of law. They did not require the church be joined as a party since it was only a beneficiary named in a

prior Will, and it was not joined, and was not in privity with any party to the proceeding. Then, when it later tried to challenge the validity of the Will barred by the lower courts herein from doing so.

Although the laws governing Wills and property rights are hundreds of years old, pre-probate legislation is still in its infancy. Michigan was the first state to enact pre-probate legislation in 1883, however it was struck down by the Michigan Supreme Court two years later in *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N.W. 28 (1885). It took almost a hundred years for states to try again. Ohio was then among the first states to try it again, but it did not enact its pre-probate legislation until 1978. And, because pre-probate proceedings are relatively rare, and contested proceedings even rarer, our courts nationwide have not had many opportunities to evaluate them. To the best of this author's knowledge this case *sub judice* is a case of first impression in the United States since *Lloyd*.

Although this Court has analyzed the concepts raised in this case in other cases with similar fact patterns dealing with post-death probate notice statutes, it has never had the opportunity to confront these pre-probate notice statutes.

In *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, 512 N.E.2d 971, which was denied for other reasons, this Supreme Court stated that lack of actual notice to heirs of post-death Will probate proceedings whose whereabouts are known or ascertainable was "questionable under the [due process] doctrines announced in *Mullane* and its progeny." *Palazzi*, *Id.* at 175, citing *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 319, 70 S.Ct. 652, 660, 94 L.Ed. 865; and *Greene v. Lindsey* (1982), 456 U.S. 444, 455, 102 S.Ct. 1874, 1880, 72 L.Ed.2d 249; and Note, *Validity of Probate Statutes in Ohio*, 29 U. Cin.L.Rev. 76, 86-87 (1958). This Court concluded by suggesting "[t]he time appears ripe for this issue to receive

the attention of the General Assembly," *Palazzi, Ibid.* at 175, which the legislature gave it in 1990 HB 346, 3, eff. 5-31-90, which stated:

"(B) It is the intent of the General Assembly in the outright repeal of sections 2107.13 and 2107.14 of the Revised Code and the amendments to sections 109.30, 2107.18, 2107.19, 2107.22, 2107.27, 2107.75, 2115.16, and 2103.14 of the Revised Code by this act, to respond to the dicta of the of the Supreme Court in *Palozzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169 and to enact statutory provisions relating to notice of probate proceedings that are not unconstitutional as potentially violative of the due process of law rights of non-residents of this state."

This Court examined these post-death notice statutes again in 2006, in *Tomasik v. Tomasik*, (2006), 111 Ohio St.3d 481, 857 N.E.2d 127, 2006-Ohio-6109, wherein this Court determined that the will contest statute of limitations did not apply to a person named in a prior Will who did not receive actual notice of the admission of the Will to probate when that person's whereabouts are known or ascertainable. Those post-death probate statutes did not require actual notice to that contestant.

Since the notice provisions in the pre-probate statutes mirror those in the post-death probate proceedings criticized by this Court in *Palazzi* and *Tomasik* this Supreme Court now has the opportunity to finish what it started, and analyze these pre-probate notice provisions head on. Lack of notice to interested persons in these pre-probate proceedings has been an issue simmering for decision by this Supreme Court since these pre-probate statutes were enacted in 1978.

This case is a case of public and great general interest because it affects how persons may transfer their property after their death by way of a Will. "The question of testamentary capacity is central to Anglo-American probate law and for that reason the state has the strongest of interests in its accurate resolution." *Ibid*, 78 Mich. L. Rev. 89, at 108, note 76.

Additionally, the number of people, and the amount of wealth, affected by probate law is

immense. It has been projected by the U.S. Bureau of the Census that between the years 1995 and 2050, the total number of annual deaths in the United States will increase over 70%, from 2.3 million deaths in 1995 to 4 million in 2050. See Day, Jennifer Cheeseman, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050*, U.S. Bureau of the Census, Current Population Reports, P25-1130, U.S. Government Printing Office, Washington, DC, 1996. A vast majority of the wealth of these 4 million decedents will most probably pass by way of a Will. It is estimated that by the year 2052 this wealth could total \$40.6 trillion which will change hands as Baby Boomers and their parents pass it on to their heirs. See Insurance Journal West Magazine, *Baby Boomer Wealth Transfer*, February 23, 2004 issue. So, millions of Americans, with trillions of affected dollars, obviously have great interest.

The church's second proposition of law simply asks this Supreme Court to re-affirm what constitutional guarantees a party has to due process of law in a civil legal proceeding, by being afforded the opportunity to present evidence and legal argument to a trial court to prove its ownership interest in assets. Instead the trial court *sua sponte* issued rulings based only on the complaint and answers, and without advance notice, and without giving the parties the opportunity to present evidence or brief the legal issues, and which resulted in prejudice to the church's property rights.

STATEMENT OF THE CASE AND FACTS

Raymond Artz was a lifelong member of the Memorial United Methodist Church of Fremont, Ohio. On September 22, 1982 he executed a Will bequeathing one-half of his estate outright to the church, if then existing, otherwise to the West Ohio Conference of the United Methodist Church for the Ministers' Retirement Fund, and the other half to be held in trust for the benefit of his brother and sister-in-law, Edgar Artz, Sr., and Gladys Artz, whereby they

would receive income for their lives, and upon their death the corpus was then to be distributed outright to the church or its retirement fund. He confirmed these bequests in a Codicil he executed on July 27, 1984.

On September 1, 1988, Raymond executed and partially funded an inter vivos, irrevocable and non-amendable Declaration of Trust, in which he appointed Richard Heslet as his trustee. In it he instructed his trustee to pay his church a \$400 monthly tithe from the trust during Raymond's lifetime. Upon his death the monthly tithes were to cease, the church was to be paid \$10,000 outright, any bequests in his probated Will which the estate could not pay were then to be paid from the trust, and the balance was to be held in trust for the benefit of Raymonds' brother, Edgar, who was to receive the income for his lifetime. Upon Edgar's death the balance of the trust corpus was to be distributed outright to the church. Essentially, Raymond retained a power of appointment over his trust assets which could only be exercised by his Will.

Raymond's health then began to deteriorate, although he continued to live independently in his own home. On January 16, 1991 Edgar Artz, Sr. died, and that same month his son, Edgar Artz, Jr. (Raymond's nephew), removed Raymond from his home and moved him into an upstairs bedroom in Edgar, Jr.'s home. He and his family thereafter isolated Raymond from his friends at the church. In April 1991, Edgar, Jr. filed for guardianship over Raymond, and was appointed as Raymond's guardian. Six months later, on October 15, 1991, Edgar, Jr. had the guardianship abruptly terminated. On the next day, October 16, 1991, Raymond executed a new Will, naming Edgar, Jr. and his mother, Gladys Artz (Raymond's sister-in-law) as sole beneficiaries, thereby disinheriting the church from his entire probate estate and from almost all of his non-probate trust assets.

On February 6, 1992, a pre-probate petition was then filed in the Probate Court requesting a judgment declaring the October 16, 1991 Will to be valid. The only parties named were Raymond, Edgar, Jr., and Gladys, because R.C. 2107.081(A) only required the testator as party plaintiff, and as parties defendant "all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 2105. of the Revised Cod had the testator died intestate on the date the petition was filed." Edgar, Jr. and Gladys were both named in the Will, and were also the only blood relatives entitled to inherit from Raymond's probate estate if he died intestate. The church was not named in this Will, and was not a blood relative as identified in Chapter 2105, however, it was entitled to inherit from Raymond's non-probate trust if he died intestate, in that its distributions from the trust were affected by what Raymond's probate Will said.

That Will was apparently lost by the Probate Court, because Raymond executed a new Will on May 1, 1992, again naming Edgar, Jr. and Gladys as sole beneficiaries. The church was not listed as a beneficiary in this Will either. In it Raymond exercised his power of appointment over the trust assets to pay them all over to this estate for inheritance by Edgar, Jr. and Gladys. An amended petition was then filed requesting the court declare the May 1, 1992 Will valid. Once again the only parties named were Raymond, Edgar, Jr., and Gladys. The church again was omitted as a party, was not notified, and was not even aware of this proceeding. By judgment entry filed June 2, 1992, the Probate Court declared the valid.

Raymond died on May 9, 2008, and on June 16, 2008 his May 1, 1992 pre-probated Will was admitted to probate in the Probate Court. On June 22, 2009, trustee Heslet filed a complaint for declaratory judgment in the Probate Court seeking a judgment construing the provisions of Raymond's September 1, 1988 trust as affected by the exercise of his power of appointment in

his May 1, 1992 pre-probated Will, and the effect of the June 2, 1992 judgment entry in the pre-probate action which declared that Will valid. The trustee sought the court's determination of the rights of the parties resulting therefrom. He also asked the court to declare the rights of the parties in and to various securities Raymond had delivered to the trustee during his lifetime but which the trustee had never re-titled into the name of the trust. Joined as defendants were Edgar, Jr., Gladys, the church, and the Ohio Attorney General. The church filed an answer denying the validity of the May 1, 1992 Will, and asserting in a cross-claim that the Will should be set aside.

Edgar, Jr. and Gladys filed a motion for summary judgment arguing that the church was bound by the decision in the pre-probate action declaring the Will valid, since R.C. 2107.71(B) permits a post-death challenge to a pre-probated Will only by those who should have been, but were not, named as party defendants in the pre-probate proceeding, and since R.C. 2107.081(A) did not require the church to be named as a party defendant in that pre-probate proceeding, it did not fall within this statutory exception and was bound by the decision rendered therein. They argued that as to all of these other excluded persons R.C. 2107.084(A) mandates that the "judgment declaring the will valid is binding in this state as to the validity of the will on all facts found, and that R.C. 2107.084(E) mandates that the pre-probated Will "is not subject to collateral attack." The church then filed a separate will contest action pursuant to R.C. 2107.71, and dismissed its defenses and cross-claims in the declaratory judgment action which challenged the validity of the Will.

By judgment entries filed June 22, 2010, and September 8, 2010, the Probate Court ruled in relevant part, that since the church was not a party required by R.C. 2107.081 to be joined to the pre-probate proceeding, it was barred by R.C. 2107.084(A) and (E) and by R.C. 2107.71(B) from challenging the pre-probated Will, and was bound the judgment entry issued therein which

determined the Will to be valid. Also, even though the issue of the ownership of the securities had not been brought before the court by motion or hearing, the court *sua sponte* determined those assets were properly estate, and not trust, assets. Finally, also *sua sponte*, the court ordered the trustee to loan \$50,000 to the estate and take back as security a note and mortgage from Edgar, Jr. and Gladys.

The Church appealed both of these judgment entries, which were consolidated by the Sixth District Court of Appeals. On June 17, 2011, the Court of Appeals issued a decision. This appeal is taken from the June 17, 2011 decision of the Court of Appeals.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: R.C. 2107.081, R.C. 2107.084(A) AND (E), AND R.C. 2107.71(B) ARE UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE BECAUSE THEY BIND APPELLANT TO A DECISION IN A PRIOR PROCEEDING TO WHICH APPELLANT WAS NOT JOINED AS A PARTY, AND IN WHICH APPELLANT WAS NOT IN PRIVACY WITH ANY PARTY TO THAT PROCEEDING

The lower courts error is evident by first analyzing the lower courts' decision in the context of collateral estoppel and res judicata. *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 49 O.O.2d 435, 254 N.E.2d 10; *Grava v. Parkman, Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226.

“Collateral estoppel (issue preclusion) prevents parties or their privies from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit. Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.”

Whitehead, Id.

It is undisputed that the church was not a party to that pre-probate proceeding, and that it was not in privity with any of its parties.

The errors in the lower courts' decisions are also evident from an analysis of the Ohio

Rules of Civil Procedure. Ohio Civ.R. 19 requires joinder of all persons needed for just adjudication. The church was clearly such a party and should have been joined for this reason alone, irregardless of the limits to necessary parties set forth in R.C. 2107.081. See also *Nationwide Ins. Co. v. Steigerwalt*, 21 Ohio St.2d 87, 255 N.E.2d 570 (1970).

Finally, and most importantly, the lower courts' errors are most evident when analyzed in terms of the Fourteenth Amendment to the United States Constitution. When one considers that the sole purpose of the pre-probate proceedings is to bar a later will contest, it is curious that its governing statutes limit who is required to be joined to the proceeding. It only requires the testator as plaintiff, and "... all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 2105 of the Revised Code if the testator died intestate on the date the petition was filed." R.C. 2107.084(A) then states that "[a]ny such [pre-probate] judgment declaring a will valid is binding in this state as to the validity of the will on all facts found...[and] shall give the will legal effect as the instrument of disposition of the testator's estate..." R.C. 2107.084(E) states that such pre-probated Will is "not subject to collateral attack." Finally, R.C. 2107.71(B) only allows an exception if the challenger "... is one who should have been named a party defendant in the [pre-probate] action [under R.C. 2107.081] ... and was not named a defendant and properly served in such action...[otherwise]... no person may contest the validity of any will or codicil as to facts decided [in the pre-probate action]..."

So, even though the church was not even aware of that proceeding, the lower courts determined in error that it is bound by it. That simply does not make constitutional sense. If the purpose of the statutes are to bar a later will contest then all who could file a will contest, e.g. persons named in prior Wills, should be mandatory parties. Under the lower courts' strict and

narrow reading of these statutes if the testator divorces, or his or her spouse dies and he or she remarries, after the pre-probate proceeding, the new spouse would also be bound by that prior proceeding in which that Will obviously would have made no provision for him or her. And, an after born child, perhaps of a second marriage, would also be barred. Clearly, the statute is not intended to lead to these results.

As stated previously herein, this Court in *Palazzi* concluded that the lack of notice violated the due process guarantees of the Fourteenth Amendment. Also, as stated previously herein, almost identical notice provisions in post-death probate proceedings were again struck down by this Court in *Tomasik, Ibid*, where notice was sent to only those persons required to be notified by R.C. 2107.19, to wit: the surviving spouse, those named in that Will, and those who would inherit if the testator had died intestate. A person named in a prior Will, who had not been served notice, then filed a will contest action beyond the statutory limitation period, and the trial court dismissed it as untimely. This Court questioned whether the General Assembly unintentionally omitted language requiring notice to a person in appellant's position, and reversed and remanded the case, finding that since that appellant had not been served with the statutory notice the will contest statute of limitations did not apply to that appellant.

R.C. 2107.19, which was analyzed by this Court in *Tomasik* and *Palazzi*, has almost the same notice requirements as pre-probate statute R.C. 2107.081, which requires notice to only those named in the Will and those who would inherit if the testator had died intestate. Neither statute requires notice to those named in prior Wills. So, under the same rationale applied in *Tomasik* and *Palazzi* the church should not be bound by the preclusive effect of R.C. 2107.081, 2107.084(A) and (E), and 2107.71(B).

Under the state of the law today, for the church to prevail in its constitutional challenge it

must show (1) that it had a constitutionally protected property right, and (2) that it was denied either substantive or procedural due process of law. It is clear that the church established for the lower courts the first test for its constitutional challenge, in that it had, and still has, a property interest in Raymond's estate because it was named as a beneficiary in his prior Wills, Codicil, and in his trust; and even if it is determined Raymond died intestate the church's interest in the trust assets is further increased. If the church proves Raymond's May 1, 1992 pre-probated Will invalid, it benefits by then inheriting all of Raymond's estate. The church thereby clearly has a property interest to protect. It has long been recognized that a person's right to contest a will is a "legally protected interest" entitled to constitutional protection. See *Schroeder v. City of New York* (1962), 371 U.S. 208, 212, 83 S.Ct. 279, 282, 9 L.Ed.2d 255; *Boddie v. Connecticut* (1971), 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113. It is immaterial whether the person's property interest is characterized as vested or contingent, it is still entitled to constitutional protection. See *McKnight v. Boggs* (1984), 254 Ga. 537, 322 S.E.2d 283; *Gano Farms, Inc. v. Estate of Kleweno* (1978), 2 Kan.App.2d 506, 509, 582 P.2d 742, 745; *In re Estate of Barnes* (1973), 212 Kan. 502, 511, 512 P.2d 387, 395 (Schroeder, J., concurring). The church has therefore established it had a constitutionally protected property interest in Raymond's estate at the time of the pre-probate proceeding and at all times thereafter.

It is also clear that the church met the second test for its constitutional challenge, in that it was unconstitutionally denied procedural due process of law when the lower courts erroneously found that it was bound by the judgment rendered in the pre-probate proceeding. Again, as stated previously, what is most curious about the lower courts' interpretations is that the sole and exclusive purpose Ohio's pre-probate statutes is only to prevent a post-death will contest, yet the way the lower courts interpreted them they do not require joinder of all those persons who could

later file such an action.

It has long been the law that the most elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated under the circumstances to apprise interested parties of the action to give them sufficient opportunity to participate in it to protect their interests. *Baldwin v. Hale* (1863), 1 Wall. 223, 233, 17 L.Ed. 531; *Fuentes v. Shevin* (1972), 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556. The church did not receive this required notice.

This notice requirement has even been specifically recognized in the context of a will pre-probate proceeding as early as 1885. There, the nation's first pre-probate statute was a Michigan 1883 law, which was almost immediately struck down as by the Michigan Supreme Court in *Lloyd v. Wayne Circuit Judge*, *Ibid*. In that case the decedent had filed a pre-probate of will action, but did not join his wife or son as parties because the statute only required those persons named in the Will to be joined, and his Will did not name them. The widow and son were unaware of the pre-probate action until after his death, when they then filed a will contest to challenge the Will. That trial court also dismissed that will contest action, citing as its authority that the Will had already been declared valid in the pre-probate action. On appeal the Supreme Court of Michigan reversed, struck down those pre-probate statutes because of their lack of notice requirement denied them of their property interests in that decedent's estate without due process of law.

In *Mullane*, *Ibid*, the United States Supreme Court struck down as unconstitutional a New York statute which permitted a trustee to file and proceed with an adversarial court proceeding against the trust's beneficiaries without providing them with actual notice. It adversely affected their beneficial interest in that trust. The Supreme Court held that notice

statute amounted to state action which adversely affected the trust beneficiaries' property interests, so it should have been accompanied by such notice as would reasonably apprise the beneficiaries of the proceeding so that they could appear and protect their interests.

Then, as discussed previously, in 1987, in *Palazzi* this Ohio Supreme Court applied *Mullane* to note the deficiencies in Ohio's probate post-death notice statutes.

Then, in 1988 the United States Supreme Court struck down as unconstitutional an Oklahoma probate statute which did not require actual notice to creditors of a decedent's estate. *Tulsa Professional Collection Services, Inc. v. Pope* (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565. The court there found that those creditors had a property interest in the estate's assets, which were entitled to constitutional protection. The lack of actual notice to them of the probate proceedings denied them due process such that they could not timely participate to file their claims to protect their interests. So, the Supreme Court struck down that statute as unconstitutional.

Finally, as discussed previously, in 2006, in *Tomasik* this Ohio Supreme Court refused to apply the will contest statute of limitations to a contestant who had not received actual notice of the admission of the Will to probate due to the deficiencies in Ohio's probate post-death notice statutes.

Ohio's pre-probate statutes have the same notice deficiencies as the post-death notice statutes in *Palazzi* and *Tomasik*, and therefore cannot pass constitutional when applied to the facts of this case.

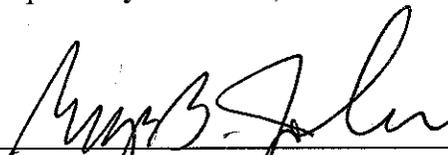
PROPOSITION OF LAW NO. 2: IT IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS OF LAW FOR A COURT TO ISSUE A RULING AFFECTING THE SUBSTANTIVE PROPERTY RIGHTS OF THE PARTIES WITHOUT GIVING THOSE PARTIES THE OPPORTUNITY TO PRESENT EVIDENCE AND LEGAL AUTHORITY IN SUPPORT OF PROTECTION OF THEIR RIGHTS

The lower courts also erred by holding it proper that the trial court's *sua sponte* determination of the ownership of the decedent's securities, and ordering the trustee to loan \$50,000 to the estate, without giving the parties the opportunity to present evidence. In fact, the trial court had not even given them notice it intended to rule on these issues. There were no motions pending for these issues, and there was nothing in the trial court record or court file except for the plaintiff trustee's complaint and the answers of the various defendants. The trial court improperly granted judgment *sua sponte* on these pleadings alone.

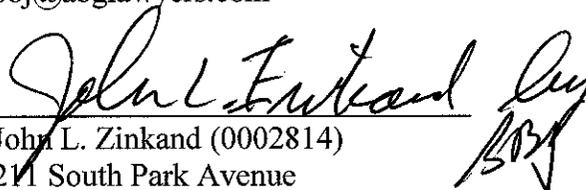
Ohio Civ.R. 12(C) governs judgments on the pleadings, and requires a motion be filed to bring the matter before the court. However, here none of the parties had moved for judgment on these issue, and they were not given any opportunity to present evidence in support of their claims.

Additionally, it is clear that the church had, and still has, a property interest in Raymond's trust because it was named as a primary beneficiary. Which assets are included or excluded from the trust it directly and adversely affects the church. Without rehashing all of the constitutional arguments set forth previously herein, it is also clear that the church was unconstitutionally denied procedural due process of law when the trial court erroneously found that certain assets held by the trustee were estate assets, and ordered their distribution to the estate without giving appellant the opportunity to first brief, argue, or present evidence on this issue. This issue was not even pending before the court, so could not properly be ruled on at that time. The church was also unconstitutionally denied procedural due process of law when the trial court erroneously ordered the trustee to loan \$50,000 of trust funds to Raymond's estate and take back a note and mortgage from Edgar, Jr. and Gladys without first giving the church the opportunity to present evidence at a hearing on this issue.

Respectfully submitted,



Bryan B. Johnson (0003981)
(COUNSEL OF RECORD)
Of Counsel to Adams, Babner & Gitlitz, LLC
5003 Horizons Drive, Suite 200
Columbus, OH 43220-5292
Tel. 614-560-4719
Fax. 614-569-3352
bbj@abglawyers.com



John L. Zinkand (0002814)
211 South Park Avenue
Fremont, OH 43420
Tel. 419-332-5579
Fax. 419-332-5570
zinkandlaw@aol.com

COUNSEL FOR DEFENDANT/APPELLANT
HAYES MEMORIAL UNITED METHODIST
CHURCH

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true copy of the foregoing pleading was served upon the following legal counsel, by ordinary U.S. Mail, postage pre-paid, this 1st day of August, 2011:

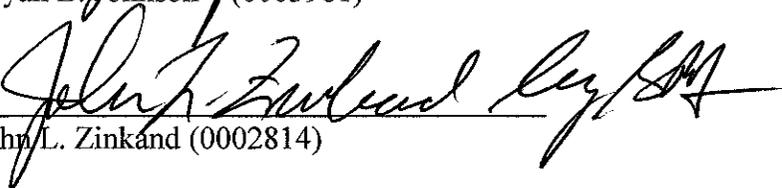
James H. Ellis, III, Esquire
Ellis Law Office, LLC
212 So. Park Ave.
Fremont, OH 43420

William A. Wingard, Esquire
414 Croghan St.
Fremont, OH 43420

Meghan K. Fowler, Esquire
Milton Sutton, Esquire
Assistant Attorneys General
Charitable Law Section
150 E. Gay St.
Columbus, OH 43215



Bryan B. Johnson (0003981)



John L. Zinkand (0002814)

COUNSEL FOR DEFENDANT/APPELLANT
HAYES MEMORIAL UNITED METHODIST
CHURCH

APPENDIX OF EXHIBITS

Exhibit

June 17, 2011 Decision and Judgment from the Sixth Appellate District

**SANDUSKY COUNTY
COURT OF APPEALS
FILED**

JUN 17 2011

State of Ohio, Sandusky County, SS:
I hereby certify that this is a true copy of
the original document now on file in my
office this 17 day of June,
2011

TRACY M. O'NEAL
Sandusky County Clerk of Courts
By: Tracy M. O'Neal
Deputy Clerk

**IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY**

Richard R. Heslet, Trustee

Plaintiff

Court of Appeals Nos. S-10-046
S-10-047

Trial Court No. 20099002 A

v.

Edgar Artz, Jr., Administrator WWA
of the Estate of Raymond W. Artz, et al.

Appellees

DECISION AND JUDGMENT

[Hayes Memorial United Methodist
Church—Appellant]

Decided: **JUN 17 2011**

James H. Ellis III, for appellees.

John L. Zinkand and Bryan B. Johnson, for appellant.

OSOWIK, P.J.

{¶ 1} This is a consolidated appeal from two judgments of the Sandusky County
Court of Common Pleas, Probate Division, following trustee Raymond Heslet's

1.

JOURNALIZED
6-17-11 UKH
706996

complaint for declaratory judgment seeking guidance concerning the distribution to be made following the death Raymond Artz, Sr. For the following reasons, the judgments of the trial court are affirmed.

{¶ 2} Appellant Hayes Memorial United Methodist Church sets forth the following assignments of error:

{¶ 3} "I. First Assignment of Error – The trial court erred in paragraph eight of its June 22, 2010 judgment entry by its declaration that assets in the possession of the trustee are estate assets, and ordering the trustee to deliver those assets to the estate.

{¶ 4} "II. Second Assignment of Error – The trial court erred in paragraphs ten and twelve of its June 22, 2010 judgment entry by its finding and order that the June 1, 1992 last will and testament of Raymond W. Artz was valid.

{¶ 5} "III. Third Assignment of Error – The trial court erred in paragraph fourteen of its June 22, 2010 judgment entry by dismissing appellant's counterclaim and crossclaim relating to claims for past due farm rent.

{¶ 6} "IV. Fourth Assignment of Error – The trial court erred in paragraph seven of its September 3, 2010 judgment entry by ordering the trustee to loan \$50,000 to the estate."

{¶ 7} The undisputed facts relevant to the issues raised on appeal are as follows. In September 1988, decedent Raymond Artz executed a Declaration of Trust. Richard Heslet was appointed trustee. In the trust, Raymond directed the trustee to pay Memorial United Methodist Church of Fremont, Ohio, \$400 per month from the trust interest. This

payment was to cease upon Raymond's death. The trust further directed that, upon Raymond's death and in compliance with certain other conditions in the trust, the trustee was to pay the church the sum of \$10,000. Then, after payment of any bequests in Raymond's probated will not paid out of funds or property in Raymond's estate (and payment of all fees and expenses), the balance of the trust principal was to be distributed to the church.

{¶ 8} Raymond's brother, Edgar J. Artz, Sr., an income beneficiary under the Raymond W. Artz Trust, died on January 16, 1990. The terms of the trust provide that the trust shall terminate upon the deaths of both Raymond and his brother.

{¶ 9} In April 1991, a guardianship was established for Raymond after his physical and mental health deteriorated due to an addiction to amphetamines. Appellee Edgar Artz, Jr., Raymond's nephew, was named guardian. The guardianship was terminated on October 15, 1991. On October 16, 1991, Raymond executed a Last Will and Testament. On February 6, 1992, Raymond filed a petition with the Sandusky County Court of Common Pleas, Probate Division, pursuant to R.C. 2107.081 requesting a judgment declaring the validity of the October 1991 will. However, for reasons not documented in the trial court record before us, Raymond executed a new will on May 1, 1992, directing the bulk of his estate to the surviving members of his family. The church was not listed as a beneficiary of the second will. In his will, Raymond directed in relevant part as follows: "I give and bequeath to the wife of my deceased brother, Gladys Artz, and to Edgar Artz, Jr., the sum of \$700,000, share and share alike. I acknowledge

that I presently have no money, however, under Paragraph IV.(b) of the Declaration of Trust dated September 1, 1988, the Trustee has a duty to pay any bequest in my probated Will not paid out of funds or property of my estate."

{¶ 10} An amended petition was then filed requesting a judgment as to the validity of the May 1, 1992 will and, by judgment entry filed June 2, 1992, the Sandusky County Probate Court declared the will to be valid in accordance with R.C. 2107.084. In so doing, the trial court found that the will was properly executed, that Raymond had the requisite testamentary capacity when he executed the will, and that Raymond was free from undue influence in the execution of his will.

{¶ 11} In May 1999, Memorial United Methodist Church and the Hayes United Methodist Church consolidated to become Hayes Memorial United Methodist Church. Once the churches consolidated, trustee Heslet discontinued making the monthly payments.

{¶ 12} Raymond died testate on May 9, 2008. The May 1992 will was admitted to probate on June 16, 2008 in Sandusky County. On June 22, 2009, trustee Heslet filed a complaint for declaratory judgment seeking a judgment construing the provisions of the Raymond W. Artz Trust dated September 1, 1988, and determining the rights of appellees Edgar Artz Jr. and Gladys Artz,¹ and appellant Hayes Memorial United Methodist Church ("the church"). On March 18, 2010, appellees filed a motion for summary

¹Gladys Artz is the sister-in-law of decedent Raymond Artz and mother of Edgar Artz, Jr.

00/17/2011 00:22 4132104077 COURT OF APPEALS 00/11

judgment concerning allegations made by the church in its answer, counterclaim and cross-claim to the trustee's complaint. On May 10, 2010, the church filed a notice of dismissal without prejudice of certain claims and defenses concerning the validity of the will.

{¶ 13} By judgment entries filed June 22, 2010, and September 8, 2010, the trial court ruled on 19 pleadings that had been filed since the June 22, 2009 complaint for declaratory judgment. In relevant part, the trial court ordered the trustee to pay to Hayes Memorial United Methodist Church the sum of \$400 per month for each month from March 1999 (when the two churches were consolidated) until May 2008, when Raymond died, which amounted to \$44,000 plus interest. The trial court further ordered the trustee to pay the sum of \$10,000 to the church in satisfaction of the specific bequest in the trust. The trustee was ordered to then pay any specific bequests listed in Raymond's will that the fiduciary of the estate could not pay with estate assets. If there were any trust assets remaining after the specific bequests of the will were paid, the trustee was ordered to pay the remainder of those assets to the church.

{¶ 14} Appellant's first three assignments of error arise from the June 22, 2010 judgment entry. His fourth assignment of error arises from the September 8, 2010 judgment entry.

{¶ 15} In its first assignment of error, appellant Hayes Memorial United Methodist Church asserts that the trial court erred by ordering the trustee to distribute "certain assets" to the estate. The assets to which appellant refers appear to be certain savings

bonds and securities in the name of the decedent that were not titled in the name of the Raymond W. Artz Trust. The church believes that Raymond Artz intended that those assets be registered in the name of the trust since Raymond delivered them to the trustee.

{¶ 16} In his complaint for declaratory judgment, trustee Heslet stated that a dispute existed between Heslet, appellees and the church as to the registration of various assets and that, until the dispute was resolved, Heslet could not properly perform his duties as trustee. The trustee asked the court for guidance as to whether those assets were properly assets of the trust or assets of the estate. The following assets were at issue: 76 United States Savings Bonds, approximate redemption value \$250,000, registered variously in the names of Raymond Artz, Raymond W. Artz and Raymond W. Artz P.O.D. Estate; a \$20,000 State of Ohio Mental Health Facilities Bond, maturity date December 1, 1999, registered in the name of Raymond W. Artz; and miscellaneous shares of stock in Lin-Mor, Inc., and Rural Serv, Inc., value unknown, registered in the name of Raymond W. Artz.

{¶ 17} The trial court agreed that although Raymond delivered the assets set forth above to Heslet, Raymond had not transferred title to any of them to the trustee. The trial court concluded that if Raymond had intended for the bonds and securities to be added to the trust he would have transferred title before his death. Therefore, the trial court ordered that "any savings bonds, securities, or any other property, whether real or personal, tangible or intangible, titled or registered in the name of Raymond Artz, Raymond W. Artz, or Raymond W. Artz P.O.D. Estate, shall be delivered to Edgar Artz,

Jr., Administrator WWA of the Estate of Raymond W. Artz, so that they can be properly distributed as assets of the Estate of Raymond W. Artz."

{¶ 18} Appellant argues that none of the parties had moved for judgment on this issue so it was therefore not before the trial court. As stated above, this issue was clearly raised in the trustee's complaint for declaratory judgment and was therefore properly before the trial court.

{¶ 19} Appellant also claims that it did not receive notice that the issue of distribution of the assets listed above was before the trial court. The record reflects, however, that whether the assets described above were properly a part of the trust or the estate was clearly raised in paragraphs 19 and 20 of the trustee's complaint for declaratory judgment as set forth above. The record reflects that appellant was properly served with the trustee's complaint and thus received adequate notice of the action, including the issue of registration of and distribution of the assets. Further, appellant filed an answer to the trustee's complaint on September 15, 2009. This argument is without merit.

{¶ 20} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 21} In its second assignment of error, appellant asserts that the trial court erred in its June 22, 2010 judgment entry by finding that the June 1, 1992 will was valid. In support, appellant argues that the issue of the validity of the will was no longer pending before the trial court and that by upholding the will's validity the court prevented appellant from receiving a substantial portion of its inheritance under the trust.

{¶ 22} The trial court's June 22, 2010 judgment does not contain a finding that Raymond's 1992 will was valid; that issue had already been determined. Rather, in paragraph 12 of the June 22, 2010 judgment entry, the trial court found that the June 2, 1992 judgment regarding the validity of the will was binding on all parties. In his complaint for declaratory judgment, the trustee asks for a judgment construing the provisions of the trust and determining the rights of the parties under the terms of the trust, including the trustee's duties and obligations with respect to the distribution of the assets under his control. Section IV(b) of the declaration of trust requires the trustee to "pay any bequests in Donor's Probate Will not paid out of funds or property in Donor's estate." Therefore, the trial court's construction of the will was central to the court's determination of the rights of the parties. The trial court's finding that the 1992 judgment regarding the will's validity was binding on the parties was a necessary step in the process of addressing the complaint for declaratory judgment. The probate court was bound by its previous judgment. *Baily v. McElroy* (1963), 120 Ohio App. 85, 95. Having recognized the validity of the 1992 judgment, the trial court was able to proceed with rendering a declaratory judgment regarding the application of the provisions of the trust.

{¶ 23} Appellant's second assignment of error is not well-taken.

{¶ 24} In its third assignment of error, appellant asserts that the trial court erred in its June 22, 2010 judgment entry by dismissing appellant's counterclaim and cross-claim because appellant had already dismissed both on May 10, 2010. Appellant has not shown how he was prejudiced by the trial court's dismissal. The trial court did not err by

including the dismissal in its judgment entry and appellant's third assignment of error is not well-taken.

{¶ 25} In its fourth assignment of error, appellant asserts that the trial court abused its discretion in its September 8, 2010 judgment entry by ordering the trustee to loan \$50,000 to the estate. Appellant argues that the probate court did not have jurisdiction to order the trustee to make such a distribution. In the paragraph in question, the trial court granted appellees' request for the trustee to distribute the sum of \$50,000 to the estate of Raymond Artz due to financial hardship this litigation has caused the estate. The trial court further ordered that Edgar Artz, Jr., in his individual capacity as well as in his capacity as Administrator WWA of the estate and Gladys Artz, in her individual capacity, sign a promissory note in favor of the trustee promising repayment of the distribution in the event that the church prevailed in its appeal and pending litigation action and also was able to produce a will signed by Raymond Artz giving the residue of his estate to the church. Payment of the note was to be secured by real property owned individually by Gladys Artz and not subject to any existing or future claim by the church.

{¶ 26} The probate court in Ohio is a court of limited and special jurisdiction and thus has only those powers specifically granted to it by statute. *Corron v. Corron* (1988), 40 Ohio St.3d 75, 77. R.C. 2101.24(B)(1)(b) authorizes the probate court to "hear and determine * * * any action that involves an inter vivos trust." R.C. 2101.24(C) confers broad authority to the probate court to address collateral matters, including "plenary power at law and in equity to dispose fully of any matter that is properly before the

court." R.C. 2101.24(C); *Rinehart v. Bank One Columbus* (1998), 125 Ohio App. 3d 719, 728, citing *Wolfrum v. Wolfrum* (1965), 2 Ohio St.2d 237, paragraph one of the syllabus. This plenary power authorizes the probate court to exercise complete jurisdiction over the subject matter to the fullest extent necessary. *In re Ewanicky*, 8th Dist. No. 81742, 2003- Ohio-3351, ¶ 8, citing *Johnson v. Allen* (1995), 101 Ohio App.3d 181, 185. See, also, *Zahn v. Nelson*, 170 Ohio App.3d 111, 2007-Ohio-667; *State ex rel. Sladoje v. Balskis* (2002), 149 Ohio App.3d 190.

{¶ 27} Accordingly, appellant's argument that the probate court in this case did not have jurisdiction to order a distribution by the trustee is without merit. The \$50,000 distribution made to appellees was significantly less than they were entitled to under the terms of the declaration of trust and will. Appellant's fourth assignment of error is not well-taken.

{¶ 28} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Heslet v. Artz
C.A. Nos. S-10-046
S-10-047

Peter M. Handwork, J.

Peter M. Handwork

JUDGE

Arlene Singer, J.

Arlene Singer

JUDGE

Thomas J. Osowik, P.J.

Thomas J. Osowik

JUDGE

CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.