

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.)

Case No. 11-1306
On Appeal from the Sandusky
County Court of Appeals,
Sixth Appellate District

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

**MEMORANDUM IN OPPOSITION OF
DEFENDANT/APPELLEES, EDGAR ARTZ, JR., INDIVIDUALLY AND AS
ADMINISTRATOR WWA OF THE ESTATE OF RAYMOND W. ARTZ,
DECEASED, AND GLADYS ARTZ,
TO MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
HAYES MEMORIAL UNITED METHODIST CHURCH**

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I. Introduction.

In its excitement to make “new law” and invalidate the statutory scheme for the validation of wills in Ohio, Appellant fabricates facts to support its position and misstates applicable law based on these fabricated facts. Upon this illusory foundation, Appellant argues that it is appropriate for this Court to throw out the current will validation procedures for both pre-probate and post-death proceedings. Yet as will be shown below, even if the facts were as Appellant has imagined them, the Appellant would not have standing to challenge the constitutionality of Ohio probate law.

It is undisputed in the record below, that the decedent, Raymond Artz, attended the Memorial United Methodist Church in Fremont, Ohio for many years. It is also undisputed that Mr. Artz left the Memorial Church in the early 1990’s. Finally, it is undisputed that Mr. Artz never set foot in the Appellant church, never was a member of the church and never donated any money to it. Yet, just because the Appellant merged with the Memorial Church many years after Mr. Artz left it, Appellant feels free to claim the membership and financial support of Mr. Artz.

More egregiously, Appellant claims that, “[o]n September 22, 1982 a [Raymond Artz] executed a Will bequeathing one-half of his estate outright to the Church...” There is nothing in the record that supports this factual assertion. In the Probate Court, Appellant attached as an exhibit to its initial pleading, what purports to be an unauthenticated draft of an unsigned will dated 25 years before decedent’s death. Not only is this draft unsigned, but it does not mention Appellant as a legatee, but only the Memorial Church. To compound its fraud upon this Court, Appellant then claims that Raymond Artz “confirmed these bequests in a codicil he executed on July 27, 1984.”

Once again, this claim is not supported by any evidence in the record and is merely based on another unsigned draft attached to a pleading in the Probate Court that does not name Appellant as a legatee.

In addition to the improper citation of facts that are not in evidence, Appellant neglects to inform the Court that, in addition to the present proceeding, it filed a will contest case that was dismissed by the Probate Court pursuant to a Summary Judgment filed by Appellees. The Probate Court's decision was affirmed on appeal. The basis of the dismissal and affirmation by the Court of Appeals was the failure of Appellant to file its will contest action in a timely manner. As will be discussed further below, Ohio law precludes the Appellant from collaterally attacking the Artz Will outside of a statutory procedure.

The result that Appellant seeks in this action, that every person or firm who was ever named in a will would be entitled to notice of a proceeding to determine the validity of a will, would not even apply to Appellant since it has never been named in a will executed by Raymond Artz.

II. STATEMENT OF APPELLEES' POSITION.

A. There is no substantial constitutional question involved in the present matter.

1. Appellant fails to present a fundamental protective property interest subject to the constitutional protection that is claimed.

2. Appellant is precluded from raising a constitutional challenge in the present action.

B. The present case is not of public or great general interest.

The present case merely presents the routine application of well-settled statutory and case law concerning the validation of a will in a pre-probate proceeding.

III. ARGUMENT IN SUPPORT OF APPELLEES' POSITION

A. Appellant Has No Standing to Assert a Constitutional Challenge to the Statutory Scheme.

As stated above, the Appellant filed a will contest case in the Sandusky County Probate Court. This case was dismissed by the Probate Court pursuant to a Summary Judgment filed by Appellees. The Probate Court's decision was affirmed by the Sixth District Court of Appeals. The present action is, therefore, yet another attempt on the part of Appellant to challenge the validity of the Artz Will.

1. *The Present Declaratory Relief Action is Not The Proper Proceeding to Challenge the Validity of a Will.*

Over 20 years ago in the case of *Corron v. Corron*, (1988) 40 Ohio St. 3d 75, this Court set out the rule that the "exclusive method of challenging a will alleged to be invalid on the ground of undue influence is by a will contest action brought pursuant to [Revise Code 2107.71 et seq.], and that in such instance an action for a declaratory judgment under R.C. Chapter 2721 does not lie." *Id.* at pages 78 -79. By analogy this holding is properly extended to a will challenge based on a lack of testamentary intent on the part of the testator.

In establishing this rule, the Court apparently adopted the holding of the First District Court of Appeals in *Davidson v. Brate*, (1974) 44 Ohio App.2d 248. In the *Davidson* case a declaratory judgment action was brought by the decedent's family members seeking a declaration that a will was invalid because of the undue influence of the decedent's lawyer. The Butler County Court of Common Pleas granted the Defendant's motion to dismiss the complaint and an amended complaint, finding that both failed to state a claim upon which relief could be granted. The basis of the lower

court's decision was its belief that Revised Code Chapter 2741 (now §§2107.71 et seq.) provides the exclusive remedy for contesting the validity of a will which has been admitted to probate. *Id.* at page 249.

In ruling on the appeal of the lower court's decision, the Court of Appeals affirmed and held that the exclusive method for challenging a will allegedly invalid because of undue influence was by a will contest action and not an action for declaratory judgment, despite its recognition of this Court's previous mandate established by paragraph one of the syllabus in *Sessions v. Skelton*, (1955) 163 Ohio St. 409, that the remedy afforded by the Declaratory Judgments Act is to be liberally construed and freely applied. *Id.* at page 251.

To support its holding the Court in *Davidson* discussed the decision of the Court of Appeals for Cuyahoga County in *State ex rel. Cleveland Trust Co. v. Probate Court*, (1960) 113 Ohio App. 1, stating:

The court [in the *Cleveland Trust* case] concluded that 'numerous authoritative pronouncements of our Supreme Court clearly establish' that the will contest statutes afford the exclusive remedy for challenging the validity of a will that has been admitted to probate. See, *State, ex rel. Cleveland Trust Co. v. Probate Court*, supra, 165 N.E.2d at 674, 12 Ohio Op.2d at 312. The judgment of the Court of Appeals was affirmed by the Supreme Court in an opinion reported in 172 Ohio St. 1, 173 N.E.2d 100. Attention of the reader is directed, generally, to 55 Ohio Jurisprudence 2d 724, Wills, Section 329, and cases there cited, for a restatement of the same principle. *Id.*

Application of the rule established for all Ohio courts in the *Corron* case clearly precludes assertion of the allegations made by the Church in its Answer and Crossclaim attacking the validity of the Will, which are clearly an improper and frivolous effort to circumvent the application of §§2107.71(B) and 2107.084(A) in this action for declaratory relief.

2. *Appellant's Failure to File a Will Contest Action Within the Time Period Required By §2107.76 Bars Its Constitutional Challenge.*

In the case of *Palazzi v. Estate of Gardner, Supra*, 32 Ohio St.3d 169, discussed above, this Court held as follows:

[I]t is our determination that the present [will contest] action was commenced more than four months after appellant had actual knowledge of the death of his grandfather. He therefore lacks standing to challenge the constitutionality of the notice provision of R.C. 2107.13 as applied to him. Accord *In re Estate of Cluck* (1959), 168 Neb. 13, 18, 95 N.W.2d 161, 165.

We therefore hold that the constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision.

Id. at page 175.

The record before the Probate Court showed that Appellant's counsel, John Zinkand, filed his Entry of Appearance in the Probate Court on August 20, 2008, thereby providing clear evidence that the Appellant had actual knowledge that the Artz Will had been admitted to probate. Further, because the file was available for review by Mr. Zinkand at the courthouse down Park Avenue from his office, a reasonable inference may be made that the Appellant knew both the date that the required certificate was filed, thereby beginning the three month limitations period, and the content of the Artz Will. Yet, the Appellant did not file its will contest action until May 3, 2010, 21 months after its counsel filed the Entry of Appearance. Due to this unexplained delay, Appellant does not have standing to challenge the constitutionality of the Ohio probate statutes.

3. *Appellant Does Not Have a Constitutionally Protected Property Interest.*

In order to prevail in this "textbook" constitutional challenge, Appellant must show that it had a constitutionally protected property right at the time of the ante mortem

validation proceeding in 1992. As will be demonstrated below, Appellant did not possess such an interest.

Appellant cites the cases of *Schroeder v. City of New York* (1962), 371 U.S. 208, 212, and *Boddie v. Connecticut* (1971), 401 U.S. 371, 379 for the proposition that “the ability to contest a will is a legally protected interest entitled to constitutional protection.” The language just quoted and the citation to the *Schroeder* and *Boddie* cases were copied directly by Appellant from page 172 of the *Palazzi* decision discussed above. The language and authorities from the *Palazzi* opinion used by Appellant are important when considered together with this Court’s opinion in *Corron v. Corron* (1988), 40 Ohio St.3d 75, which was decided one year after this Court rendered its opinion in the *Palazzi* case.

As this Court is aware, *Palazzi* concerns the application of due process protections to an interested party’s ability to challenge a will that has been admitted to probate in the probate court. It does not, however, support Appellant’s argument in the present case, where Appellant challenges the application of the probate statutes in an ante mortem proceeding for validation of the Artz Will brought by Raymond Artz 16 years before his death. In such cases the rule enunciated by this Court in the *Corron* case is controlling, to wit:

A will is ambulatory in nature, and until the death of the testator, and until the law admits such instrument to probate, it gives no accrued rights to the potential takers of benefit. *Id.* at Paragraph 2 of Syllabus.

Further, this Court specifically held that only the testator may have a judgment as to the validity of his or her will prior to the time that it has been admitted to probate due to the fact that, “persons who are potential beneficiaries or heirs at law have no actionable interest in the document.” *Id.* at Page 78. Another point made by this Court in its *Corron*

decision is that when a will contains an express revocation clause, as does the Artz's Will, prior wills are thereby rendered ineffective as a legal instrument. Under this rule, even if the unsigned draft of the 1982 will and codicil naming the Memorial Church as a legatee that Appellant has wrongfully cited and discussed, were actually signed by Raymond Artz, they would offer no vested rights to either the named beneficiaries or heirs at law. *Id.* at Page 79.

It is important to note that the language and authorities copied from the *Palazzi* opinion, and used to support Appellant's argument, are not referred to in this Court's *Corron* opinion.

Appellant cites *Mulane v. Central Hanover Bank & Trust Co.* (1985), 339 U.S. 306, which concerned the form of notice to be given to present vested beneficiaries of pooled trusts which the court found to be deficient under the due process clause of the Fourteenth Amendment because it was not of such a nature as would reasonably convey required information regarding the court proceeding and afford a reasonable time for the trust beneficiaries to protect their interest. Once again, this case involved constitutionally protected interests unlike the present action where, at the time of the ante mortem validation proceeding, the Appellant had no such interest.

Similarly, in *Tulsa Professional Collection Services, Inc. v. Pope* (1988), 485 U.S. 478, cited by Appellant, the court considered the application of the Oklahoma Non-Claim Statute against reasonably ascertainable creditors of the estate. The Court found that the creditor's unsecured claim against the estate for an unpaid bill was clearly a property interest protected by the Fourteenth Amendment. Appellant cannot show that it has a similarly protectable interest.

4. *Ohio Revised Code §2107.084(A) Controls the Binding Effect of the 1992 Judgment Not the Doctrines of Res Judicata and Collateral Estoppel.*

As will be discussed below, the Appellant attempts mightily to bring itself within the definition of the necessary parties to a will validation action described in R.C. §2107.081(A). This foray into equity is initiated by Appellant ignoring the applicable and explicit statutory law controlling the legal effect of a judgment of the Probate Court in the ante mortem validation action brought by Raymond Artz under §2107.081(A) and then launching into a discussion of the doctrines of res judicata and collateral estoppel based largely on the imaginary factual assertions contained in Appellant's Statement of the Facts.

Pursuant to R. C. §2107.084(A), the 1992 Judgment bars a collateral attack on the Artz Will of the type initiated by Appellant. The binding effect of the 1992 Judgment in the present action is described in §2107.084(A), which states, in part:

Any [judgment declaring the validity of a will under Section 2107.084] is binding in this state as to the validity of the will on all facts found, unless provided otherwise in this section, section 2107.33 or division (B) of section 2107.71 of the Revised Code, and if the will remains valid, shall give the will full legal effect as the instrument of disposition of the testator's estate, unless the will has been modified or revoked according to law.

Appellant never discusses the application of this section or how, on its face, it operates to preclude Appellant from challenging the Artz Will. Instead, Appellant embarks on a diatribe concerning the application of the common law doctrines of res judicata and collateral estoppel based on its fanciful unsupported factual allegations that the Artz Appellees forcibly removed Raymond Artz from his home in 1991 and held him in isolation against his will until his death in 2008. Apparently Appellant believes that this Court will adopt Appellant's statement of facts without any citations to the record

and, thereby, recognize the righteousness of its claim to Raymond Artz's property over the family members who cared for him as being so compelling that it will disregard the controlling law as Appellant has.

B. The Probate Court's Determination of the Parties' Interests in Raymond Artz's Savings Bonds Does Not Raise a Constitutional Issue.

Appellant appears to contend that it was entitled to a full blown trial on the merits of the issues raised by the Trustee's complaint and then an opportunity to present its argument in the form of a brief. Appellant cites no authority for this contention, but instead presents an irrelevant argument concerning the procedural requirements for a judgment on the pleadings. Be that as it may, due to the type of issues before the Probate Court for decision in rendering its declaratory judgment and the lack of disputed factual issues, the Court was able to decide these issues as a matter of law without the need of a trial.

The United States Supreme Court has long held that the application of a party's right to an opportunity to protect its interest in court requires a case by case analysis, "with due regard for the practicalities and peculiarities of the case." *Mullane v. Central Hanover Bank & Trust Co., Supra.*, 339 U.S. 306, 314-315. Where the constitutional requirements are reasonably met the parties' due process rights are satisfied. *Id.*

In the present action, there was no dispute concerning the existence of the Raymond Artz Trust or the terms of the Declaration of Trust. As to the 1992 Will, due to the previous adjudication of the validity of the will the Probate Court was bound by the 1992 Judgment. *Baily v. McElroy* (1963) 120 Ohio App. 85, 95.

In a declaratory relief action involving the construction of a will the sole function of the court is to ascertain and give effect to the intention of the testator. *Findley v. City*

of *Conneaut* (1945) 145 Ohio St. 480, 486. Such intention must be ascertained from the words employed in the will by giving to such words their usual and ordinary meaning. *Id.* Similarly, a fundamental rule in the construction of a trust is to ascertain the intent of the settlor. *National City Bank, N.E. v. Beyer* (2000) 89 Ohio St.3d 152, 156. In doing so, Ohio courts apply the same principles of construction to trusts as they do to other written instruments. *Domo v. McCarthy*, (1993) 66 Ohio St.3d 312, 314. Thus, as stated by the Ohio Supreme Court in *Alexander v. Buckeye Pipe Line Co.*, (1978) 53 Ohio St.2d 241, it is black-letter Ohio law that “[t]he construction of contracts and instruments of conveyance is a matter of law.” *Id.*, at Syllabus ¶ 1. In construing the trust document, the intention of the settler is to be ascertained from the language of the instrument. *Blosser v. Enderlin*, (1925) 113 Ohio St. 121, 129. Where the intention of the settler is expressed by clear and unambiguous language of the instrument, evidence cannot be introduced to show an intent materially different from that. *Id.*

Clearly a trial was not necessary nor required for the Probate Court to render its decision in the declaratory relief action.

IV. CONCLUSION

As is aptly demonstrated above, under its own theories, the only way that Appellant can assert any claim to the Raymond Artz estate is by asserting an interest in a prior will and codicil, the existence of which is not supported by any evidence in the record. Even so, had the Appellant been named in a prior will and codicil, it still would not have a constitutionally protected interest because of the transitory interest held by legatees named in wills of persons who are still living.

Apart from the lack of legal support for the Appellant's position, there is no law or policy that requires every person or entity that has ever been named in a will executed by a testator be provided notice and an opportunity to challenge the validity of the will. To impose such a requirement would wreak havoc on Ohio's probate system.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served, by ordinary

United States mail, this 30th day of August, 2011, on the following:

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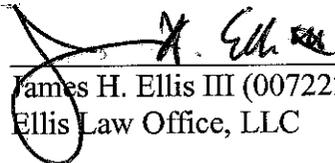
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