

12-0537

IN THE SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT KATHY A. MAYS  
(DISCRETIONARY)

KATHY A. MAYS	:	
	:	On Appeal from the Huron County
Appellant	:	Court of Appeals, Sixth Appellate
	:	District
vs.	:	
	:	Court of Appeals
CARL L. MAYS TRUST, STEVEN L. MAYS,	:	
TRUSTEE, et al	:	Case No. H 2011-0004
	:	
Appellees	:	

NOTICE OF DISCRETIONARY APPEAL OF APPELLANT KATHY A. MAYS

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NOTICE OF DISCRETIONARY APPEAL OF APPELLANT KATHY A. MAYS

Appellant Kathy A. Mays hereby gives notice of discretionary appeal to the Supreme Court from the Judgment of the Huron County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. H 2011-0004 on February 17, 2012.

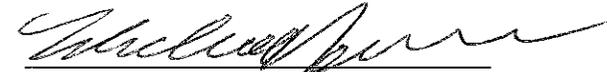
This case is one of public or great general interest.

Respectfully submitted,

By:   
Michael B. Jackson  
Counsel of Record  
COUNSEL FOR APPELLANT,  
KATHY A. MAYS

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Denial of Motion to Certify Conflict was sent by ordinary U. S. Mail to counsel for appellees, Justin D. Harris, Reminger Co., L.P.A., 237 W. Washington Row, 2<sup>nd</sup> Fl., Sandusky, OH 44870; and, Linda Tucker-Moir, TONE, GRUBBE, MCGORY & VERMEEREN, LTD., 1401 Cleveland Rd., Sandusky, OH 44870, this 27 day of March, 2012.

  
Michael B. Jackson  
COUNSEL FOR APPELLANT,  
KATHY A. MAYS

COPY

HURON COUNTY  
COURT OF APPEALS  
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IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
HURON COUNTY

Kathy A. Mays

Court of Appeals No. H-11-004

Appellant

Trial Court No. DJ 2010 00002

v.

The Carl L. Mays Trust, et al.

**DECISION AND JUDGMENT**

Appellees

Decided:

**FEB 17 2012**

\*\*\*\*\*

Michael B. Jackson, for appellant.

Linda Tucker Moir and Justin D. Harris, for appellees.

\*\*\*\*\*

**OSOWIK, J.**

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas, Probate Division, granting appellee's motion to dismiss. For the reasons that follow, this court affirms the judgment of the trial court.

{¶ 2} On appeal the appellant sets forth the following assignments of error:

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1. The trial court erred when it exclusively applied the time frames set forth in R.C. 2106.01 and R.C. 2106.22 and not the ten year statute of limitations set forth in R.C. 2305.14 to set aside a spousal election and antenuptial agreement in granting defendant's motion to dismiss.

2. The trial court erred in granting appellee's 12(B)(6) motion to dismiss and by not conducting a hearing on whether the factors for equitable relief to set aside a spousal election and antenuptial agreement could have been met.

3. The trial court erred in determining that allegations of fraud, duress, or undue influence did not overcome the conclusive presumptions of R.C. 2106.01, R.C. 2106.25 and R.C. 2106.22 for the purpose of a motion to dismiss.

{¶ 3} The following undisputed facts are relevant to the issues raised on appeal.

On January 12, 1985, appellant, Kathy A. Mays, married Carl L. Mays. Prior to the marriage, the parties executed an antenuptial agreement. On January 1, 2009, Carl L. Mays died. On November 10, 2009, appellant was appointed executrix of the estate of Carl L. Mays. On that same day, the court sent a citation notifying appellant to elect whether or not to exercise surviving spousal rights. Appellant received this information on November 13, 2009.

{¶ 4} On September 3, 2010, appellant filed a complaint for declaratory judgment to void disclaimer, void antenuptial agreement, and for leave to file election of spousal rights. On October 12, 2010, appellee filed a motion to dismiss appellant's complaint. On January 10, 2011, appellant filed an amended complaint. Appellee responded by filing a motion to dismiss on February 4, 2011. On March 1, 2011, it was granted. The trial court dismissed the action because appellant filed her complaint after the statutory deadlines.

{¶ 5} R.C. 2106.01(E) provides:

The election of a surviving spouse to take under a will or under section 2105.06 of the Revised Code may be made at any time after the death of the decedent, but the surviving spouse shall not make the election later than five months from the date of the initial appointment of an administrator or executor of the estate. On a motion filed before the expiration of the five-month period, and for good cause shown, the court may allow further time for the making of the election. If no action is taken by the surviving spouse before the expiration of the five-month period, it is conclusively presumed that the surviving spouse elects to take under the will. The election shall be entered on the journal of the court.

{¶ 6} Given this applicable statute of limitations, appellant had until April 10, 2010, to elect against the will, to request an extension of time, or to contest the will. Instead, appellant filed the complaint approximately five months after the expiration of

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the relevant statute of limitations. Thus, not only are appellant's claims time barred, but it is also conclusively presumed that she elected to take under the will pursuant to the statutory mandate.

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{¶ 7} Similarly, R.C. 2106.22 provides:

Any antenuptial or separation agreement to which a decedent was a party is valid unless an action to set it aside is commenced within four months after the appointment of the executor or administrator of the estate of the decedent, or unless, within the four-month period, the validity of the agreement otherwise is attacked.

{¶ 8} Pursuant to this applicable statute of limitations, appellant had until March 10, 2010, to commence an action to set aside the antenuptial agreement or to challenge its validity. However, appellant filed her complaint on September 3, 2010, nearly six months after the expiration of the relevant statute of limitations.

{¶ 9} Due to appellant's failure to comply with the applicable statutory deadlines, the underlying claims were properly dismissed on the basis of untimely filing. While appellant asserts that the ten-year statute of limitations set forth in R.C. 2305.14 should apply in this case, R.C.2305.03(B) clearly establishes that the ten-year limit does not apply when a different limit is prescribed by statute. Appellant also tries to argue that an exception should be granted due to her post hoc claims of malfeasance of her attorney. However these claims are not determinative to the issues in question in this case. Appellant's first and third assignments of error are found not well-taken.

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{¶ 10} Appellant asserts in her second assignment of error that the court erred in granting appellee's Civ.R. 12(B)(6) motion to dismiss. Given the trial court's decision that the claims are time barred, the court did not err in granting appellee's dismissal. Likewise, the court did not err in failing to conduct a hearing on a time-barred case. Appellant's second assignment of error is found not well-taken.

{¶ 11} Wherefore, we hereby affirm the judgment of the Huron County Court of Common Pleas, Probate Division. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

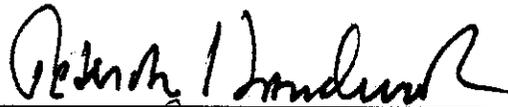
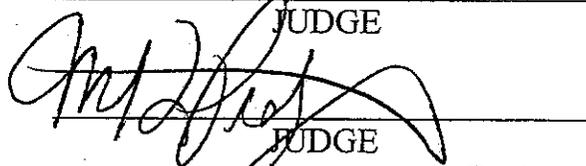
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.

CONCUR.

  
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JUDGE  
  
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JUDGE  
  
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JUDGE

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>.

Copies - Michael Jackson  
Linda Tucker Morr  
Kathy Magee  
cc Huron Co - probate