

ORIGINAL

IN THE SUPREME COURT OF OHIO

VICKI RADZISEWSKI, )  
EXECUTRIX, ET AL )  
 )  
Appellees )  
 )  
v. )  
 )  
MIROSLAW SZYMANCZAK )  
 )  
 )  
Appellant )  
 )  
 )  
 )

On Appeal from the Cuyahoga County  
Court of Appeals, Eighth Appellate District

Court of Appeals No. 12-097795

Supreme Court No.:

12-1241

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ZUZANNA SZYMANCZAK

Teddy Sliwinski, Esq.  
(S. Ct. No. 0024901)  
Counsel of Record  
5800 Fleet Ave.,  
Cleveland, Ohio 44105  
(216) 641-9191

**Attorney for Appellee**  
**Vicki Radzisewski, Executrix**

**Radoslaw Kowalski**  
96-300 Zyrardow  
ul. Kosciuszki 15/17 m. 37 Poland  
**Pro Se.; Appellee**

**Katarzyna Olszewska-Sulek**  
96-300 Zyrardow  
ul. Mireciego 36 m 18 Poland

Ross S. Cirincione, Esq.  
(S. Ct. No. 0024774)  
Counsel of Record  
5306 Transportation Blvd.  
Garfield Heights, Ohio, 44125  
(216) 587-2120; 587-2131 "fax"  
[rsc@rgm-law.com](mailto:rsc@rgm-law.com)

**Attorney for Appellant**  
**Zuzanna Szymanczak**

FILED  
JUL 25 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

RECEIVED  
JUL 25 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

**Pro Se; Appellee**

**Malgorzata Polkowska-Sulek**

9600 Zyrardow

ul. Rodzinna 2 Poland

**Pro Se; Appellee**

**Wieslawa Sas**

**96-100 Skierniewice**

ul. Kapitana Hali 6 m. 9 Poland

**Pro Se. Appellee**

**Irena Stankiewicz**

99-320 Zychlin

ul. Warynskiego

5 m. 14 Poland

**Pro Se.; Appellee**

**Agata Maciszewska**

96-300 Zyrardow

ul. Srodkowa 25 m. 27 Poland

**Pro Se, Appellee**

TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....	6
Proposition of Law No. 1. : In construing the language of a will a court can only consider the four corners of the will to construe the testator’s intent and may not insert missing language in the will based upon construction of extrinsic facts.....	6
Proposition of Law No. 2: When a party fails to timely object to a magistrates decision under Civil Rule 53, the party waives the right to assert those objections as assignments of error in an appeal.....	15
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	iii
APPENDIX.....	A
Opinion of the Cuyahoga County Court of Appeals (June 14, 2012).....	A-1
Judgment of the Cuyahoga County Court of Common Pleas, Probate Division (December 1, 2011).....	A-11
Decision of the Cuyahoga County Court of Common Pleas Probate Division (Magistrate; October 6, 2011).....	A-14

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page</b>
<i>Barr v. Jackson</i> ; 2009 - 5135, 08 CAF 09 0056.....	2
<i>Cleveland Trust Co., Trustee v. Frost, et al.</i> ; 166 Ohio St. 329 (1957).....	9
<i>Estate of Hersh v. Schwartz</i> ; 195 Ohio App. 3d 295 (2011).....	14
<i>Hoppes v. American National Red Cross, et al.</i> ; 129 N.E. 2d 851 (1955).....	10,11,13
<i>Moore v. Deckeback</i> ; 46 Ohio App. 381, 383.....	8
<i>Niedler v. Donaldson</i> ; 9 Ohio Misc. , 224 N.E. 2d 404.....	2,11
<i>Shay v. Herman</i> ; 85 Ohio App. 2d 441, 83 N.E. 2d 237 (1948).....	2
<i>Sommers v. Doerson</i> ; 115 Ohio St. 139, 150 (1926).....	7,8, 10
<i>Townsend Exr's v. Townsend</i> ; 25 Ohio 477 (1874).....	1,11,13
 <b>Treaties and Compacts:</b>	
Convention and Protocol Between the United States of America and The Polish Peoples Republic - May 31, 1972; Article 26.....	4
 <b>Statutes and Rules of Procedure:</b>	
Ohio Revised Code Sec. 2105.06.....	2
Rule 53, Ohio Rules of Civil Procedure.....	15

## I. STATEMENT OF EXISTENCE OF SUBSTANTIAL WHY THE INSTANT CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case presents a question of public or great general interest. The general public certainly has an interest in the reasonable and consistent application of the state's laws governing the distribution of assets by a decedent. Appellant respectfully submits that the Eighth District Court of Appeals decision reversing the Cuyahoga County Probate Court in this case obliterates the standards for will construction established by the Ohio Supreme Court over the course of the past one hundred-thirty-eight (138) years. It is axiomatic that in construing the language used in a decedent's last will and testament, a court may not insert language into a will which is not present.

In the instant case, under the guise of "construing" the language of the will, the Court of Appeals instead inserted a provision in the will to convey decedent's interest in two pieces of real estate located in Poland. Initially, in its analysis, the Court accurately stated that:

"The basic law guiding will interpretation is that, "the sole purpose of the court should be to ascertain and carry out the intention of the testator". The Court further noted that: **"This intent is to be gleaned from the words used"**. *Townsend's Exrs. v. Townsend*, 25 Ohio 477 (1874).

The Court of Appeals then proceeded to ignore the requirements of this venerable Supreme Court case by analyzing not the intent of the decedent as expressed by the words in the will, but rather engaged in a broad review of extrinsic "evidence" to justify insertion of a provision in the will which was simply not present. Despite the lack of a residuary clause and a

specific devise of the real property in Poland, the Court of Appeals ignored the provisions of R.C. Sec. 2105.06 under which Appellant Zuzanna Szymanczak is the rightful heir to the Polish real estate. In effect, the Court amended the will to avoid the statutory disposition. In order to do so, the Court's justification for ignoring the "four corners of the will" was to find a latent ambiguity in the will, supposedly "not for the purpose of showing the testator's intention, but to assist the court to better *interpret* that intention from the language used in the will". [Citing *Barr v. Jackson*, 5<sup>th</sup> Dist. No. 08 CAF 09 0056; 2009-Ohio-5135 citing *Shay v. Herman*; 85 Ohio App. 441, 83 N.E.2d 237 (1948).]

However, although the Court cited the correct standard of construction, it failed to apply it to this case. On the contrary, the "latent ambiguity in the will" found by the Court was a rationalization of the Court's action in exceeding the proper construction of the will by improperly inserting a provision in the will that is not present and simply did not exist. In *Neidler v. Donaldson*; 9 Ohio Misc. 208, 224 NE2d 404 (Probate, Seneca Co., 1967) the Court stated:

"It is a fundamental rule of construction not requiring citation of authority that the four corners of the instrument must be searched to determine the intention of the testator, and that the court will sustain the will if at all possible. However, the court cannot make for the testator a will which, for whatever cause, he himself did not make."

The relevant portions of decedent's will states:

"I Zofia Sulek,...do hereby make, publish and declare this instrument to be my Last Will and Testament, hereby revoking and making null and void all other Wills heretofore made by me.

#### **ITEM I**

I DIRECT that all of my debts, funeral and administrative expenses be paid out of my estate...and any and all ...taxes, levied or assessed by reason of my death, shall be paid by my

Executor out of my residuary estate... .

#### **ITEM II**

I give, devise and bequeath all of my household, clothing, jewelry, books, works of art, and similar articles of tangible personal belongings I give and bequeath [sic] to my family residing in Poland: **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA**, absolutely and in fee simple share and share alike.

#### **ITEM III**

In the event **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA**, predecease me or fail to survive me..., leaving child or children surviving said child or children shall take the share of the deceased parent as if the deceased parent survived me.

#### **ITEM IV**

I direct that the Real Property located at 144 East Dawnwood, Seven Hills, Ohio be sold and the proceeds divided among my family and friends: **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ AND AGATA MACISZEWSKA**, share and share alike. ”

The Will contained no reference to the parcels of real estate in Poland owned by the testator. The Will contained no residuary clause which would have provided for the transfer of property either real or personal which was not specifically devised or bequeathed elsewhere in the Will. The only mention in the will to a residuary clause is located in Item I of the Will which states that all “taxes levied or assessed by reason of my death, shall be paid by my executor, out of my residuary estate”.

In regard to this omission, the Court of Appeals in a puzzling analysis stated as follows:

“In this case, Sulek provided in her will that her funeral expenses should be paid out of her ‘residuary estate’, however she specifically bequeathed only her Ohio property at the same time when she specifically named in her will no other persons but appellees. Moreover, she

bequeathed her property in Ohio "in fee simple", which are words that commonly refer to real property rather than only to personal property. Polen, 92 Ohio St. 3d 563, 565-566, 752 N.E. 2<sup>nd</sup> 258 (2001), citing Hamilton v. Pettifor; 165 Ohio St. 361, 135 N.E. 2d 264 (1956).

The Court then used the above language to justify the use of an unenforceable, ineffective and revoked handwritten will written by the testator in Polish as justification for finding that:

"The magistrate nevertheless decided this evidence, even in light of the affidavit of the attorney who had drafted Sulek's Ohio will was somehow 'inconsistent' with the language Sulek used in her will. In this the magistrate erred...[citations omitted]...Because the magistrate failed to correctly apply the law to the facts adduced at the hearing, the probate court improperly adopted the magistrate's decision. Appellants' issues for review", accordingly are resolved in their favor."

The will executed in Ohio, which is the subject of this action, is the only valid

will **both** in Ohio and Poland since the decedent had revoked all previous wills. (See *The Convention and Protocol between the United States of America and the Polish Peoples Republic, May 31, 1972, Article 26*).

## **II. COMBINED STATEMENT OF THE CASE AND FACTS**

On December 16, 2009, Appellee Vicki Radzisewski was appointed as Executrix of the Estate of Zofia Sulek, deceased. Decedent's Will was admitted to the Probate Court of Cuyahoga County on December 16, 2009. The Estate was assigned Probate Court Case No. 2009 EST 0153693. Item II of the subject Will provided for a specific bequest of "household" and other personal property and belongings. Item IV of the Will provided specific instructions for the sale of decedent's real property located at 144 East Dawnwood, Seven Hills, Ohio with a specific bequest of the proceeds to Appellee beneficiaries Malgorzata Polkowska, Katarzyna Olszewska Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska. The will contained no residuary clause directing the transfer of any other real

or personal property of the decedent.

Accordingly, Appellee Executrix, Vicki Radzisewski, filed an action in the Probate Court to construe the Will. This action was assigned Cuyahoga County Probate Court Case No. 2009 ADV 016606 on February 23, 2011. All beneficiaries under the Will were joined as parties as was the Decedent's sole heir, her brother, Miroslaw Szymanczak. All parties were served or filed waivers of service. All Defendants filed answers asserting their respective positions and the matter was set for hearing. Prior to the disposition of the case, the sole heir Defendant-Appellant Miroslaw Szymanczak died. His estate was substituted as a party defendant represented by his spouse Zuzanna Szymanczak.

The hearing on the construction of the Will occurred on July 5, 2011 before Cuyahoga County Probate Court Magistrate Perdexter H. Williams. At said hearing, only Executrix Vicki Radzisewski appeared and testified. Exhibits introduced included a certified copy of the Will, judicial notices of the appointment of the executrix and an affidavit of Attorney Markiewicz, who had prepared the decedent Zofia Sulek's will.

The Magistrate issued her decision on October 6, 2011. She concluded that once the specific bequests to the named beneficiaries were satisfied, absent a residuary clause in the Will, the residuary property (two parcels of real estate owned by the decedent in the Country of Poland) passed intestate to the estate of the decedent's brother, i.e. the Estate of Miroslaw Zymanczak and its representative, his surviving spouse, Zuzanna Szymanczak.

Appellants below, Appellee beneficiaries herein, filed an untimely objection to the Magistrates decision on October 25, 2011. Nonetheless, Probate Court Judge Russo, after

reviewing the Magistrate's decision, overruled the objections of the Appellee beneficiaries and entered his judgment entry on December 1, 2011. From that decision, the Appellee beneficiaries filed an appeal to the Eighth District Court of Appeals on December 30, 2011. Although the Appellee beneficiaries failed to file "Assignments of Error" with their Appellant's Brief on the Merits, the Court of Appeals treated the two "issues" delineated by Appellees as a substitute for assignments of error. On June 14, 2012, after all parties briefed the case, the Court of Appeals issued its judgment entry reversing and remanding the case to the Probate Court of Cuyahoga County. From that judgment, Appellant Zuzanna Szymanczak has filed her Notice of Appeal along with the instant Memorandum in Support of Jurisdiction.

### **III. Law and Argument.**

#### **A. IN CONSTRUING THE LANGUAGE OF A WILL A COURT CAN ONLY CONSIDER THE FOUR CORNERS OF THE WILL TO CONSTRUE THE TESTATOR'S INTENT.**

The Appellee beneficiaries "issues for review" which were resolved in their favor by the Court of Appeals, apparently includes the assertion that:

"II. In particular whether the trial Court erred in omitting during the Last Will the intended meaning of Zofia Sulek's latently ambiguous words: 'I give, devise and bequest [sic] all of my household, covered in Item II of the aforementioned Will, in situation, where according to appellant's [sic] and in light of all extrinsic evidence this phrase covers all estate (or at least real properties) of Zofia Sulek?'"

Item II of the will, as previously noted, disposed of the household goods and personal property of the testatrix. Thus, as a result, the Court of Appeals, as a tenuous and invalid foundation for its decision, reversed the Probate Court, and resolved Issue No. II presented by Appellee beneficiaries in their favor. Thus, the Court implicitly found that the term

“household” in Item II of the will [immediately followed by a listing of various items of personal property] included all real property owned by testatrix including her real property in Poland. The word “household” is thus given a meaning contrary to not only the common but technical meaning of the term. According to this logic, the specific devise of the Seven Hills property to the Appellees as contained in Will Item No. IV was unnecessary to transfer even the Seven Hills Ohio real property owned by testatrix to the Appellee beneficiaries since this property was transferred to the Appellees (Appellants below) as part of the “household” (Item II of the Will) of the decedent. Thus, in resolving Issue No. II in favor of the Appellees, it was not necessary to specifically leave the Seven Hills property to Appellees in Item IV since under the Court of Appeals analysis Item II of the will effectively transferred the testatrix’s “household” i.e., the Ohio real property as well as the real property located in Poland to the named beneficiaries. According to Appellees (Appellants below), and as implicitly found by the Court of Appeals in specifically resolving this issue in favor of the named beneficiaries, the term “household” has been improperly expanded beyond any reasonable and rational definition under Ohio law to include not only all real estate owned by the testatrix in Ohio, but also all real estate owned by testatrix wherever situated including a foreign country. In *Sommers v. Doersam*; 115 Ohio St. 139, 150 (1926), the Court stated:

“A testator is presumed to use the words in which he expresses himself in his will in their primary or ordinary sense, and in construing the will the words employed are to taken in that sense, unless it is manifest from the context of the whole will, or from the subject matter, that the testator intended to use them in a different sense, or unless a reading of the words in their primary or ordinary sense will lead to some absurdity, repugnancy, or inconsistency with the declared intention of the testator as ascertained from the whole will, in which case the natural and ordinary meaning of the words may be modified, extended or abridged. Where the words when given their natural, ordinary or popular meaning are plain and unambiguous, and

show a clear intention on the part of the testator, they must be given that meaning notwithstanding the effect, and such meaning cannot be departed from for the purpose of giving effect to what it may be supposed was the intention of the testator, or merely because they lead to consequences which are capricious or even harsh or unreasonable.”

The Court of Appeals in this case ignored the admonitions of the Ohio Supreme Court as outlined in the *Sommers* case, *id.*. The Court of Appeals concluded that Testatrix Sulek disposed of the “rest and remainder of her Ohio property” when she specifically named in her will no other persons but appellees. Thus, coupled with the bequest of the “household” goods to the beneficiaries named in the will this “evidenced” her intent to also convey the real estate located in Poland to the named beneficiaries. To enable it to reach this dubious conclusion, the Court of Appeals noted the existence of the revoked, hand-written will written in Polish. The Court of Appeals erroneously stated that said handwritten will was not effective to pass her property in Poland since it had not been submitted to a Polish Court. [In fact, the hand-written Polish will was invalid and ineffective because it had been revoked and superceded by the Will in this case. Had the Polish will not been revoked by the testator by the subsequent Ohio will, it would have been enforceable under the International Protocol cited above both in Poland and Ohio]. As noted earlier, the handwritten Will (Exhibit “C” presented at the hearing before the Probate Court Magistrate) referenced by the Court of Appeals was expressly revoked by the Will which is the subject of this action. As stated by Magistrate Williams at page five of her “Magistrates Decision”:

“It is the duty of the Court to construct a will. However, the Court may only construe the language in the will. The Court cannot amend, insert, or interpolate a provision which was not written in the will”. (Citing *Moore v. Deckeback*; 46 O.A. 381, 1933).

A close reading of the Court of Appeals decision does not reveal what language it

construed **in the Ohio Will** justifying its conclusion that the decedent disposed of her real property in Poland. There is simply no latent ambiguity in the language used in the will to justify the extensive extrinsic evidence used by the Court of Appeals to construe the term "household" and the specific devise of real property in Seven Hills, Ohio to include separate parcels of real estate located in Poland.

To follow the Court's logic, the bequeathing of personal property and household goods to a beneficiary coupled with a specific devise of real estate by a testator in a will not containing a transfer of property under a residuary clause opens the door for an extensive review by a Court of Appeals of disputed extrinsic "facts" to supply the missing language in regard to disposition of other unmentioned real property owned by the decedent. In effect, the Court of Appeals amended the subject will. This is not the law in Ohio. The Ohio Supreme Court in *Cleveland Trust Co., Trustee v. Frost, et al.*; 166 Ohio St. 329 (1957) recognized and cited the limitations in will construction cases. As stated by this Court In *Cleveland Trust*, id:

"Various rules have been evolved which have general application in will construction cases. A court has no power to make a new and different will for a testator in contravention of the language employed in the will..."

The Court of Appeals review in the instant case turns a deaf ear to legal precedent in the State of Ohio for construing the language of a will. Further the Court of Appeals virtually renders the R.C. Sec. 2105.06 statutory scheme for the transfer of property not otherwise disposed of by a will superfluous and unnecessary. The laws of descent set the rules for the transmission of property in Ohio. Ohio statutes provide the rule of law which governs the

disposition of property in the absence of a valid residuary clause in a will. In this case the Probate Court validly found that due to the lack of a residuary clause and a specific devise of the real property located in Poland, the property passed to the Appellant Zuzanna Szymanczak as the appropriate heir under R.C. 2105.06. The Court of Appeals attempt to ignore the dictates of the case law in order to avoid the resulting impact of R.C. 2105.06 is invalid. As indicated by the Supreme Court in *Sommers, id.*, the attempt by the Court of Appeals to avoid the requirements of R.C. 2105.06 in order to reach a perceived "equitable result" is error. The Court stated:

"However confidently we might follow counsel in conjecture that the testator would have used such terms if he had foreseen all that has now occurred, we should still be admonished that in ascertaining the meaning of the testator it is of first importance to assume that he meant what he said... Whatever method may resorted to for the interpretation of a will, it must be applied solely with a view to arrive at the intention of the testator, as his intention may be gathered from the language found in the instrument itself. However clearly an intention not expressed in the will may be proved by extrinsic evidence, the rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution."

In the instant case, the Court of Appeals went far afield in order to justify its consideration of extrinsic evidence to enable it to supply the missing devises of real property located in Poland to the Appellee beneficiaries (Appellants below). The question before a Court construing a Will is not what should the language employed have been but what was the language employed. As stated in *Hoppes v. American National Red Cross, et al.* 128 N.E. 2d 851 (Fayette County, 1955):

"While, as shown in the preceding section, the purpose of construction as applied to [a] will is unquestionably to arrive at the intention of the testator, **that intention is not that which existed in the mind of the testator but that which is expressed by the language of the will. The question always before the mind of the court must be not what should the testator**

have done, but what did he do, and what did he mean by the words he actually employed. If language of the will is plain, and the meaning obvious, **the court cannot qualify or control the language by conjecture or doubt arising from extraneous facts.** The testator must be presumed to have meant what he said.” (emphasis added).

The Court in *Hoppes* was merely reiterating that which has been Ohio law since 1874 when the Ohio Supreme Court in *Townsend's Exr's.*, succinctly stated that a testator's intent “*must be gleaned by the words used*”. *supra.* (emphasis added). (See also *Neidler v. Donaldson, supra.*)

In the case, *sub judice*, the Court of Appeals did not limit its review of the will to the words actually employed by the testator. Instead, the Court supplied the language by conjecture and doubts arising from extraneous facts not from the language of the will, but on the basis of what the Court felt the testator should have said. Quite simply, the Court of Appeals amended the Will. This becomes clear when the language of the will is compared to the extraneous evidence upon which the Court of Appeals based its decision reversing the Probate Court. First, the Court considered a revoked hand-written will written in Polish which had been specifically revoked by the will which is the subject of this action. The Court of Appeals relied on the revoked, hand-written will to bolster its finding of intent that the decedent intended to dispose of all of her property in Poland as well as the real property in Seven Hills, Ohio. The Court of Appeals states:

“According to the evidence supplied at the hearing, an additional will handwritten by Sulek in Polish existed, but Sulek died before she submitted it to a Polish Court. The hand-written will, like her Ohio will, disposed of all of her property in Poland to the same persons named in her Ohio will.”

There are two problems with the statement of the Court of Appeals as cited above. The first problem is that Exhibit "C" which was offered at the Magistrate's hearing as the will hand-written in Polish by the testatrix, in which:

"...the undersigned Zofia Sulek, residing at number 144 E. Dawnwood Dr., Seven Hills...bequeath my estates wherever they are to the family residing in Poland at the same time I annul previous testaments" **was executed on August 25, 2009.**

That date was two weeks **prior** to the execution of the Will which is the subject of this case **on September 8, 2009.** The preamble to the Ohio Will executed on September 8, 2009 signed by testatrix Sulek specifically states in relevant part:

"I, Zofia Sulek...do hereby make, publish, and declare this instrument to be my Last Will and Testament, **hereby revoking and making null and void all other Wills heretofore made by me**".  
(emphasis added).

Thus, the Court of Appeals relied on extrinsic language contained in a previous will (August 25, 2009) which had been specifically revoked and rendered void by the decedent at the time she executed the Ohio Will. Once it was revoked, the August 25, 2009 Will had no more probative value than the 1994 Polish will in which the decedent left all her property located in Poland to her nephew Miroslaw Szymanczak. (Appellant Zuzanna Szymanczak's late husband) [See Par. 6 of Court of Appeals opinion]. The above scenario vividly demonstrates the problems inherent when a Court attempts to discern intent from extrinsic language not contained in the Will which it is construing in a misguided attempt to avoid statutory requirements.

The second problem with the above-cited quote from the Court of Appeals opinion is its

statement that “the hand-written will, like her Ohio will disposed of all of her property in Poland to the same persons named in her Ohio Will”. Actually, as pointed out by Magistrate Williams in her decision, Exhibit “C” (the August 25, 2009 hand-written Polish will) does not, contrary to the Court’s finding, name the same six people as those named in the Ohio Will. Agata Maciszewska is not named as a beneficiary in Exhibit “C”, the Polish Will. These factual errors further undermine the Court of Appeals decision in this case.

The Court of Appeals also relied on the affidavit of the attorney who prepared the Ohio will which is the subject of this dispute to support its erroneous conclusions. In that affidavit, Attorney Markiewicz states that it is her belief that Testatrix Zofia Sulek’s intent was to bequeath all of her real properties and personal properties tangible and intangible to her family and friends in Poland. The Markiewicz affidavit makes no mention of any language in the Ohio will which indicates the testator’s intent to leave the property in Poland to the same individuals specifically listed in Item IV of the will as beneficiaries of the sale of the Seven Hills property. In addition, the Markeiwicz affidavit fails to state any reason that language transferring the real property located in Poland is not mentioned in the Will. The affidavit of Ms. Markiewicz addresses, and the Court of Appeals accepted evidence as to what language **should have been in the will** in order to devise the Polish real estate to the Appellees, **not what the language in the will actually said**. As indicated previously herein in *Hoppes*, supra and in the seminal Ohio Supreme Court case of *Townsend’s Exr’s.*, supra, the Court of Appeals went beyond the proper scope of its construction of the will in order to reach its conclusion.

As noted earlier in this Memorandum the “issues” raised by the Appellee-Beneficiaries to the Court of Appeals in lieu of Assignments of Errors inadvertently demonstrate the lack of ambiguity employed by the language of the subject will. In “Issue for Review No. II” before the Court of Appeals, Appellee beneficiaries claim that the Probate Court erred since Item II of the will states that:

“I give devise and bequest [sic] all of my household, clothing, jewelry, books, works of art, and similar articles of tangible personal belongings I give and bequeath to... [the named beneficiaries].”

Appellee-Beneficiaries argued that the Court is free to entertain extrinsic evidence since the term “household” in that item is ambiguous. Appellant respectfully submits that this term is not ambiguous. Definitions of the term “household goods” was reviewed by the Court in *Estate of Hersh v. Schwartz*; 195 Ohio App. 3d 295; 2011-Ohio-3994 (Hamilton Co., , 2011).

The Court stated:

“...the Northern District of Ohio has defined household goods under R.C. 2329.66 as ‘items of personal property reasonably necessary for the day to day existence of people in the context of the homes...The United States Bankruptcy Court for the Southern District of Ohio, however, disagreed with this approach when interpreting the nearly identically worded federal exemptions statute...the court held that ‘household goods’ are those items of personal property that are typically found in or around the home and used by the debtor or his dependents to support and facilitate day-to-day living within the home including maintenance and upkeep of the home itself.”

None of these definitions encompass separate parcels of real property located in another country, i.e., Poland. The Court of Appeals did not specifically comment on this “issue” since it clearly illustrates the tenuous and invalid basis upon which the ambiguity necessary to trigger the review of extrinsic evidence is founded in this case. Instead, the Court of Appeals merely said that: “Appellants’ Issues for Review are resolved in their favor”. The

Court of Appeals erred in reaching that conclusion.

**B. THE FAILURE OF THE APPELLANTS TO FILE TIMELY OBJECTIONS TO THE MAGISTRATE'S ORDER SHOULD HAVE PRECLUDED THE COURT OF APPEALS FROM CONSIDERING THE "ISSUES" BELOW**

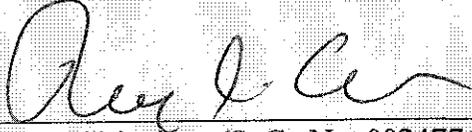
The Magistrate issued her opinion and order on October 16, 2011. Appellee beneficiaries filed untimely objections to the Magistrate's decision on October 25, 2011. Rule 53(D)(3) of the Ohio Rules of Civil Procedure requires that objections to a magistrate's decision must be filed within fourteen (14) days of the filing of the decision. The Appellee beneficiaries failed to file their objections within that time period. Appellee beneficiaries also failed to request an extension of time to file said objections. This failure should have been fatal to the Appellees' (Appellants' below) appeal to the Court of Appeals. As provided in 53(D)(3)(b)(iv) of the Civil Rules a party shall not assign as error on appeal a court's adoption of any factual finding or legal conclusion of a magistrate...unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b). Appellees failure to timely file objections to the magistrate's decision, in and of itself, should have precluded the action taken by the Court of Appeals.

**IV. CONCLUSION**

For the reasons outlined above, the instant case involves and presents matters of public and great general interest. Appellant respectfully requests that this Court accept jurisdiction of the instant case so that it may have the opportunity to review the important probate issues raised herein on the merits.

Respectfully Submitted:

Ross S. Cirincione, Co. L.P.A.



Ross S. Cirincione (S. Ct. No. 0024774)  
Counsel of Record

Castleton Building  
5306 Transportation Blvd.,  
Garfield Heights, Ohio 44125  
(216) 587-2120  
(216) 587-2131 "fax"  
rsc@rgm-law.com

**Attorney for Appellant Szymanczak**

SERVICE

A copy of the foregoing "Memorandum In Support Of Jurisdiction of Appellant Zuzanna Szymanczak" was served upon Counsel for Appellee Executrix, Teddy Sliwinski, Esq. at 5800 Fleet Ave., Cleveland, Ohio 44105 and the following Pro Se Appellees on this 25<sup>th</sup> day of July, 2012: Radoslaw Kowalski, 96-300 Zyrdow, ul Kosciuszki 15/17 m. Poland; Katarzyna Olszewska-Sulek 96-300 Zyrdow ul Mireciego 36 m 18 Poland; Malgorzata Polkowska-Sulek 9600 Zyrardow, ul Rodzinna 2 Poland; Wieslawa Sas, 96-100 Skierniewice, ul. Kapitana Hali 6m. 9 Poland; Irena Stankiewicz, 99-320 Zychlin ul Warynskiego, 5m 14 Poland, and Agata Maciiszewska, 96-300 Zyrdow,. Ul. Strodkowa l25 m. 27 Poland.



Ross S. Cirincione

## APPENDIX

A

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 97795

---

**VICKI RADZISEWSKI, EXECUTOR**

PLAINTIFFS-APPELLEES

vs.

**MIROSLAW SZYMANCZAK, ET AL.**

DEFENDANTS-APPELLANTS

---

**JUDGMENT:  
REVERSED AND REMANDED**

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Probate Division  
Case No. 11ADV0166006

BEFORE: Rocco, J., Stewart, P.J., and Keough, J.

RELEASED AND JOURNALIZED: June 14, 2012

KENNETH A. ROCCO, J.:

{¶1} This is an appeal from a judgment of the the Cuyahoga County Court of Common Pleas, Probate Division ("the probate court"), in an action to construe the will of decedent Zofia Sulek. Defendants-appellants Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz, and Agata Maciszewska, who are family members and friends of Sulek who still live in Sulek's native country of Poland, appeal from the order that adopted the magistrate's decision that, because the will contained no "rest and remainder" clause, Sulek's residuary estate went to her next-of-kin, defendant-appellee Zuzanna Szymanczak ("Zuzanna").<sup>1</sup>

{¶2} Appellants present two "issues for review."<sup>2</sup> They assert the probate court improperly interpreted Sulek's intent, as expressed in her will, to distribute all of her property to them rather than to her next-of-kin.

{¶3} Upon a review of the record, this court agrees with appellants. Consequently, their "issues for review" are resolved in their favor, and the probate court's judgment is reversed.

---

<sup>1</sup>Zuzanna Szymanczak is the wife of Zofia's deceased nephew, Miroslaw, who was originally named as a defendant in this action; during the course of the underlying proceeding, Zuzanna was substituted for her husband.

<sup>2</sup>One of the appellants, Radoslaw Kowalski, acting on behalf of all, filed a pro se appellate brief that does not strictly comply with the Ohio Appellate Rules; therefore, appellants presented no actual assignments of error as required by App.R. 16(A)(3).

{¶4} The record reflects that Vicki Radzisewski, executor of Sulek's estate, filed this action seeking construction of Sulek's will, because Sulek, at the time of her death, owned property in Poland that the will failed to mention. Radzisewski attached a copy of Sulek's will, which Sulek executed on September 8, 2009.

{¶5} The relevant portions of Sulek's will, which was prepared by an attorney, state:

I, Zofia Sulek,\* \* \* do hereby make, publish and declare this instrument to be my Last Will and Testament, hereby revoking and making null and void all other Wills heretofore made by me.

#### ITEM I

I DIRECT that all of my debts, funeral and administrative expenses be paid out of my estate \* \* \* and any and all \* \* \* taxes, levied or assessed by reason of my death, shall be paid by my Executor out of my residuary estate \* \* \* .

#### ITEM II

I give, devise and bequeath all of my household, clothing, jewelry, books, works of art, and similar articles of tangible personal belongings I give and bequeath [sic] to my family residing in Poland: **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA,** absolutely and in fee simple, share and share alike.

#### ITEM III

In the event **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA,** predecease me or fail to survive me \* \* \* , leaving

child or children surviving said child or children shall take the share of the deceased parent as if the deceased parent survived me.

#### ITEM IV

I direct that the Real Property located at 144 East Dawnwood, Seven Hills, Ohio be sold and the proceeds divided among my family and friends: **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ and AGATA MACISZEWSKA, share and share alike.**

{16} Appellee Zuzanna, Mirosław Szymanczak's widow, filed a written response to the complaint, asserting that Sulek's intent was to leave all property in Poland to Zuzanna's husband, Sulek's nephew Mirosław, "in accordance with the Polish law." In support of her response, Zuzanna attached a copy of separate, Polish wills, that had been made by Sulek and her husband in 1994 and that referred only to the property in Poland.

{17} Appellants filed a "waiver of service of the complaint," followed by an answer. Therein, appellants asserted that, while the "validity" of the Sulek's will submitted to the probate court on December 16, 2009 was "not contested," Sulek's intent was to leave her property in Poland to her nephew "only in case of [the] simultaneous death[s]" of her and her husband. Appellants also asserted that Sulek prepared in Polish a handwritten will dated August 25, 2009 in which she left "her estates, wherever situated \* \* \* to the family in Poland."

it was "inconsistent" with the other evidence submitted at the hearing. Based upon this and upon the lack of a phrase in Sulek's will that bequeathed the residuary estate to appellants, appellants were not entitled to an equal share of Sulek's residual estate.

{¶12} Appellants filed objections to the magistrate's decision. Appellants argued that the magistrate had ignored the fact that the "Testament" contained Agata Maciszewska's maiden name, i.e., "Agata Sulek"; therefore, the decision lacked a basis in fact.

{¶13} The probate court eventually issued an order in which it overruled appellants' objections and adopted the magistrate's decision. Appellants filed a timely appeal from the probate court order. They present the following "Issues" for review.

"I. Whether the trial Court erred in failing to expressly say, that in her Last Will, Zofia Sulek, died on November 23, 2009 disposed all of her properties; real (including real properties in Poland) and personal properties only to Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz, [and] Agata Maciszewska?

"II. In particular whether the trial Court erred in omitting during construing the Last Will the intended meaning of Zofia Sulek's latently ambiguous words: *I give, devise and bequest [sic] all of my household,*

covered in Item II of the aforementioned Will, in situation, where-  
according to appellant's [sic] and in the light of all extrinsic evidence,  
this phrase covers all estate (or at least real properties) of Zofia Sulek?"

{¶14} Appellants argue that the magistrate misapplied the law to this  
case because the magistrate did not properly consider the facts presented at the  
hearing; therefore, the probate court erred in adopting the magistrate's decision.  
Based upon the record, this court agrees.

{¶15} With respect to a judgment involving the construction of a will, an  
appellate court reviews the decision of the probate court de novo. *Church v.*  
*Morgan*, 115 Ohio App.3d 477, 481, 685 N.E.2d 809 (4th Dist. 1996). Thus, this  
court reviews the judgment independently and without deference to the probate  
court's determination. *Belardo v. Belardo*, 187 Ohio App.3d 9, 2010-Ohio-1758,  
930 N.E.2d 862, ¶ 7 (8th Dist.).

{¶16} The basic law guiding will interpretation is that, "the sole purpose  
of the court should be to ascertain and carry out the intention of the testator."  
*Polen v. Baker*, 92 Ohio St.3d 563, 752 N.E.2d 258 (2001), citing *Oliver v. Bank*  
*One, Dayton, N.A.*, 60 Ohio St.3d 32, 34, 573 N.E.2d 55 (1991), and *Townsend's*  
*Exrs. v. Townsend*, 25 Ohio St. 477 (1874), paragraph one of the syllabus. This  
intent is to be gleaned from the words used. *Id.*, citing *Townsend's Exrs.*,  
paragraph two of the syllabus.

The court may consider extrinsic evidence to determine the testator's intention only when the language used in the will creates doubt as to the meaning of the will. *Sandy v. Mouhot* (1982), 1 Ohio St.3d 143, 145, 1 OBR 178, 180, 438 N.E.2d 117, 118; *Wills v. Union Savings & Trust Co.* (1982), 69 Ohio St.2d 382, 23 O.O.3d 350, 433 N.E.2d 152, paragraph two of the syllabus. *Oliver*.

{¶17} In this case, the magistrate's decision indicates that extrinsic evidence was considered. *Michelsen-Caldwell v. Croy*, 6th Dist. No. WD-08-001, 2008-Ohio-4281. The magistrate, therefore, clearly believed the language Sulek used in the will "created doubt as to the meaning" of her will, i.e., that a latent ambiguity existed.

{¶18} A latent ambiguity is one that is not apparent from the language used or from the face of the instrument. *Conkle v. Conkle*, 31 Ohio App.2d 44, 285 N.E.2d 883 (5th Dist. 1972). A latent ambiguity can arise even if the language of the instrument is unambiguous and suggests only a single meaning, but some extrinsic fact or evidence creates the necessity for *interpretation* or a choice between two or more possible meanings, or if the words apply *equally well to two or more different subjects or things*. *Id.* (Emphasis added.)

{¶19} Extrinsic evidence may be used to resolve a latent ambiguity in a will, "and aid in the interpretation or application of the will." *Id.* Where there is a latent ambiguity appearing in a will, extrinsic evidence is admissible, not for the purpose of showing the testator's intention, but to assist the court to better *interpret* that intention from the language used in the will. *Barr v. Jackson*, 5th

Dist. No. 08 CAF 09 0056, 2009-Ohio-5135, ¶ 36, citing *Shay v. Herman*, 85 Ohio App. 441, 83 N.E.2d 237 (1948).

{¶20} In this case, Sulek provided in her will that her funeral expenses should be paid out of her “residuary estate,” however, she specifically bequeathed only her Ohio property. Thus, Sulek disposed of the “rest and remainder” of her Ohio property at the same time when she specifically named in her will no other persons but appellees. Moreover, she bequeathed her property in Ohio “in fee simple,” which are words that commonly refer to real property rather than only to personal property. *Polen*, 92 Ohio St.3d 563, 565-566, 752 N.E.2d 258 (2001), citing *Hamilton v. Pettifor*, 165 Ohio St. 361, 135 N.E.2d 264 (1956).

{¶21} According to the evidence supplied at the hearing, an additional will handwritten by Sulek in Polish existed, but Sulek died before she submitted it to a Polish court. The handwritten will, like her Ohio will, disposed of all of her property in Poland to the same persons named in her Ohio will.

{¶22} The magistrate nevertheless decided this evidence, even in light of the affidavit of the attorney who had drafted Sulek’s Ohio will, was somehow “inconsistent” with the language Sulek used in her Ohio will. In this, the magistrate erred. *Shay*, 85 Ohio App. 441, 83 N.E.2d 237 (1948); *Hamilton*; compare *Henson v. Casey*, 4th Dist. No. 04CA9, 2004-Ohio-5848, ¶ 22.

{¶23} Because the magistrate failed to correctly apply the law to the facts adduced at the hearing, the probate court improperly adopted the magistrate's decision. Appellants' "issues for review," accordingly, are resolved in their favor.

{¶24} The probate court's order is reversed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

MELODY J. STEWART, P.J., and  
KATHLEEN ANN KEOUGH, J., CONCUR

**ATTORNEY FOR APPELLANTS**

Christina M. Joliat  
P.O. Box 391531  
Solon, Ohio 44139

**ATTORNEY FOR APPELLEE**

Teddy Sliwinski  
5800 Fleet Avenue  
Cleveland, Ohio 44105

FILED AND JOURNALIZED  
PER APP.R. 22(C)

JUN 14 2012

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS

Sulek I

PROBATE COURT  
FILED  
DEC - 1 2011  
CUYAHOGA COUNTY, O.

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

VICKI RADZISEWSKI, )  
Executrix of the Estate of )  
Zofia Sulek, Deceased, )  
  
Plaintiff, )  
  
vs. )  
  
MIROSLAW SZYMANCZAK, )  
et al, )  
  
Defendants. )

CASE NO. 2011 ADV 0166006

JUDGE ANTHONY J. RUSSO

JUDGMENT ENTRY

This cause came on to be heard before Magistrate Williams on October 6, 2011 on a **Complaint for Construction of Will** filed February 23, 2011 by Teddy Sliwinski, attorney for Plaintiff. Present at the hearing were Executrix, Vicki Radzisewski, and her attorney, Teddy Sliwinski. All interested parties were notified of the hearing. No transcript of the hearing was taken.

Zofia Sulek died testate on November 23, 2009. Plaintiff Vicki Razisewski was appointed Executrix of her estate on December 16, 2009. Plaintiff's Complaint requests the Court to provide instructions concerning the Last Will and Testament of Zofia Sulek, stating that the Will does not contain a rest and remainder clause and seeking the covenant construction of the Will so that she can perform her duties and distribute the property.

A Magistrate's Decision was filed on October 6, 2011 that recommended, based on the facts and applicable law, that based on Items II, II and IV of the Will, that the decedent intended to distribute all of her household, clothing, jewelry, books, works of art, similar articles of

1 A-11

DOCKETED

personal belongings as well as the proceeds from the sale of the East Dawnwood property to Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska. The Magistrate further found that the Will did not contain a residuary clause, and that therefore the residuary estate of Zofia Sulek should be distributed to her next of kin, Miroslaw Szymanczak, in accordance with Ohio law. *See Neidler v. Donaldson*, (1967 O. Misc. 208); O.R.C. Ann. 2105.06. Mr. Sliwinski filed a Suggestion of Death on May 25, 2011 stating that Mr. Szymanczak died on December 22, 2010 and a Motion to Substitute Party, which the Court granted on June 3, 2011, allowing Mr. Szymanczak's spouse, Zuzanna Szymanczak, to be substituted as the party defendant in the case. Magistrate Williams therefore further recommended that the residuary estate of Zofia Sulek be distributed to the Estate of Miroslaw Szymanczak.

On October 25, 2011, Objections to the Magistrate's Decision were filed by Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska, arguing that they should be the residuary beneficiaries of the Estate of Zofia Sulek.

Upon careful review of the file, including the Magistrate's Decision, and all of the pleadings filed all parties, the Court finds that the Objections are not well taken and should be overruled for the reason that the Magistrate properly applied Ohio law to the facts of this case.

The Court further finds that the Magistrate's Decision should be adopted as the decision of this Court.

The Court further finds that based on Items II, II and IV of the Will, that the decedent intended to distribute all of her household, clothing, jewelry, books, works of art, similar articles

of personal belongings as well as the proceeds from the sale of the East Dawnwood property to Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska.

The Court further finds that the Will did not contain a residuary clause, and that therefore the residuary estate of Zofia Sulek should be distributed to her next of kin, Miroslaw Szymanczak, in accordance with Ohio law.

The Court further finds that as Mr. Szymanczak died on December 22, 2010, and his spouse, Zuzanna Szymanczak, has been substituted as the party defendant in the case, the residuary estate of Zofia Sulek should be distributed to the Estate of Miroslaw Szymanczak.

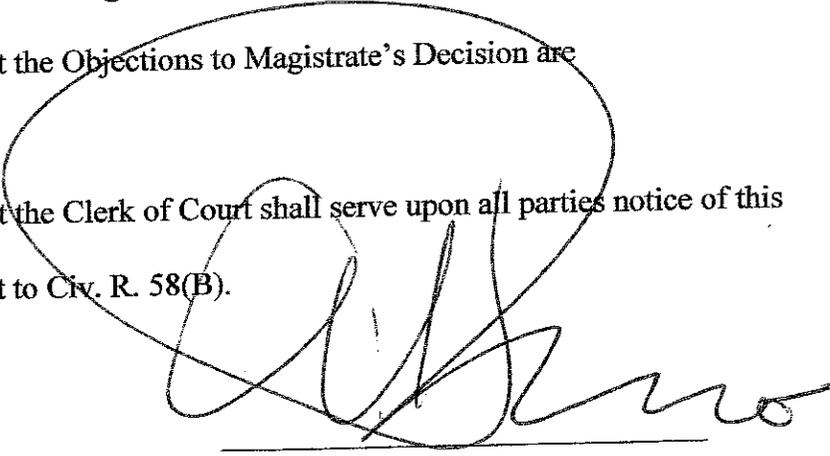
The Court further finds that the Objections to the Magistrate's Decision are not well taken and should be overruled.

Therefore, it is **ORDERED, ADJUDGED AND DECREED** that the residuary Estate of Zofia Sulek shall be distributed to the Estate of Miroslaw Szymanczak.

It is further **ORDERED** that the Magistrate's Decision is **ADOPTED**.

It is further **ORDERED** that the Objections to Magistrate's Decision are **OVERRULED**.

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



PROBATE JUDGE

PROBATE COURT  
**FILED**  
OCT 06 2011  
CUYAHOGA COUNTY, O.

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

OCT 06 2011  
*Magistrate's*  
*Decision*  
*Entered*  
*PHW*

VICKI RADZISEWSKI, )  
Executrix of the Estate of )  
Zofia Sulek, Deceased, )

CASE NO. 2011 ADV 0166006

Plaintiff, )

vs. )

MIROSLAW SZYMANCZAK, )  
et al., )

Defendants. )

**MAGISTRATE'S DECISION**

DEC - 1 2011  
*Mag. dec.*  
*adopted*  
*OSG. ASR/m*

This matter came to be heard on July 5, 2011 on a **Complaint for Construction of Will** filed February 23, 2011 by Teddy Sliwinski, attorney for the plaintiff. Present at the hearing were Executrix, Vicki Radzisewski, and Teddy Sliwinski, representing Ms. Radzisewski. All interested parties were duly notified of the hearing. No transcript of the hearing was taken.

**FACTS**

Zofia Sulek died testate on November 23, 2009. Vicki Radzisewski was appointed Executrix of the Estate of Zofia Sulek on December 16, 2009. The plaintiff has requested that the Court provide instructions concerning the Last Will and

A+14

**DOCKETED**

Testament of Zofia Sulek, stating that the will does not contain a rest and remainder clause and she seeks the covenant construction of the will so that she can perform her duties and distribute the property.

**Items II, III, and IV** of the Last Will and Testament of Zofia Sulek provides:

**ITEM II**

“I give, devise and bequest all of my household, clothing, jewelry, books, works of art, and similar articles of tangible personal belongings I give and bequeath to my family residing in Poland: **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ** and **AGATA MACISZEWSKA**, absolutely and in fee simple, share and share alike.”

**ITEM III**

“In the event that **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ** and **AGATA MACISZEWSKA**, predecease me or fail to survive me or we should meet a common disaster or they die within thirty (30) days of my death, leaving child or children surviving said child or children shall take the share of the deceased parent as if the deceased parent survived me.”

**ITEM IV**

“I direct that the Real Property located at 144 East Dawnwood, Seven Hills, Ohio be sold and the proceeds divided among my family and friends: **MALGORZATA POLKOWSKA-SULEK, KATARZYNA OLSZEWSKA-SULEK, RADOSLAW KOWALSKI, WIESLAWA SAS, IRENA STANKIEWICZ** and **AGATA MACISZEWSKA**, share and share alike.”

**LAW**

**Ohio Revised Code Section 2105.06**

**Ohio Revised Code Section 2107.46**

**Townsend v. Townsend, (1874) 25 O. S. 477**

**Moore v. Deckeback, (1933) 46 O. A. 381**

**Neidler v. Donaldson, (1967) 9 O. Misc. 208**

**CONCLUSTION AND RECOMMENDATION**

The will is a very important legal document. It expresses the Testatrix's intent as to the final disposition of her personal and real property after her death. **Ohio Revised Code Section 2107.46** provides that a fiduciary may file an action in Probate Court against other parties and ask for direction of the Court concerning the property to be administered and the rights of the parties in interest. One of the functions of the Court is to ensure that each item of the will be enforced. In addressing the plaintiff's questions concerning the distribution of the rest and remainder of the decedent's estate, the Court will consider the following rules:

- “1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.
2. Such intention must be ascertained from the words contained in the will.
3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear from the context that they were used by the testator in some secondary sense.
4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it.
5. If a dispute arises as to the identity of any person or thing named in the will, extrinsic facts may be resorted to, insofar as they can be made ancillary to the right interpretation of the

testator's words, but for no other purpose."

**Townsend v. Townsend, supra.**

It was apparent from a review of the **Items II, III and IV** of the Last Will and Testament of Zofia Sulek, that she intended to distribute all of her household, clothing, jewelry, books, works of art, similar articles of personal belongings as well as the proceeds from the sale of the East Dawnwood property to Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska.

It was the plaintiff's contention that Ms. Sulek wanted all of her estate to be divided equally among the persons named under **Items II, III and IV** of her will. Ms. Radzisewski further stated that the decedent was close to these beneficiaries. She further stated that Ms. Sulek was not close to Mirosław Szymanczak.

Plaintiff's Exhibits A, B, and C were admitted into evidence. Exhibit A was an affidavit signed by Grazyna K. Markiewicz. Ms. Markiewicz stated that she was a licensed attorney in the State of Ohio. She further stated that she drafted the decedent's will. The affiant further stated that during the execution of said will it was the intent of Ms. Sulek to bequeath and devise all of her real properties and personal properties, tangible and intangible, to her family and friends in Poland.

Ms. Markiewicz further stated that Ms. Sulek's specific intent was to bequeath and devise all of her properties to the following: Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska to share and share alike. The affiant further stated that Ms. Sulek was of sound mind and memory and was not acting under the undue influence of any person.

Exhibit B was a copy of the Last Will and Testament of Zofia Sulek, Exhibit C was a handwritten copy of a document titled "Testament" that was written in the Polish language. The interested parties attached a copy of a translation of Exhibit C. The Executrix stated that Exhibit C was a draft of a new will that Ms. Sulek had intended to execute before her death. Exhibit C provided in part:

"This is the last will of the undersigned Zofia Sulek,  
residing at number 144 E Dawnwood dr Seven Hills;  
I bequeath my estates wherever they are to the family  
residing in Poland at the same time I annul previous  
testatments.\*

I, Zofia Sulek, affix the signature in  
person.

25<sup>th</sup> August 2009...

Below there are the surnames, names and addresses  
of the family residing in Poland...

1. Malgorzata Polkowska...
2. Katarzyna Olszewska Sulek...
3. Radoslaw Kowalski...
4. Wieslawa Sas...
5. Irena Stankiewicz...."

The extrinsic evidence offered by the Executrix and Ms. Markiewicz indicated that it was the intent of Ms. Sulek to leave her entire estate to the six parties identified within her will. However, their statements were inconsistent with Exhibit C. Exhibit C did not include the name of Agata Maciszewska.

It is the duty of the Court to construct a will. However, the Court may only construe the language in the will. The Court cannot amend, insert, or interpolate a provision which was not written in the will. Moore v. Deckeback, supra. In the present

case, there was no operative sentence or phrase within the Last Will and Testament of Zofia Sulek bequeathing or devising the decedent's residuary estate to the six parties named in the will. This Court has no jurisdiction to modify a will in such a manner as to include a residuary clause which does not appear within the four corners of the Last Will and Testament of Zofia Sulek. Thus, Malgorzata Polkowska-Sulek, Katarzyna Olszewska-Sulek, Radoslaw Kowalski, Wieslawa Sas, Irena Stankiewicz and Agata Maciszewska are not entitled to an equal share of the decedent's residuary estate.

At the time of the decedent's death, she was the owner of real estate in Poland. There is no dispute that the Testatrix did not dispose of the real estate in Poland in her will. It is also undisputed that Ms. Sulek did not include a residuary clause addressing the disposition of her assets which were not included within **Items II, III and IV** of her will.

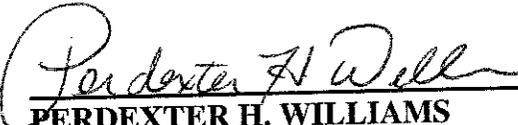
The Probate Court of Seneca County held that in the absence of a residuary clause in a will, the decedent died intestate as to the remainder interest in all of his property, both real and personal. Neidler v. Donaldson, supra. **Ohio Revised Code Section 2105.06** provides that when a person dies intestate and there are no surviving spouse, children, or parents, the decedent's estate shall pass, to her brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes. The Court records indicated that the decedent was survived by her nephew, Miroslaw Szymanczak.

**THEREFORE**, based on the evidence presented and applicable law, it is the recommendation of this Magistrate that the residuary estate of Zofia Sulek be

distributed to her next of kin, Miroslaw Szymanczak. It should be noted that Mr. Sliwinski filed a Suggestion of Death on May 25, 2011, stating that Mr. Szymanczak died on December 22, 2010. Mr. Sliwinski also filed a Motion to Substitute Party. The Court granted this motion on June 3, 2011, allowing Mr. Szymanczak's spouse, Zuzanna Szymanczak, to be substituted as the party defendant in this case. Since Mr. Szymanczak died several months ago, it is further recommended that the residuary estate of Zofia Sulek be distributed to the Estate of Miroslaw Szymanczak.

Pursuant to Civ. R. 53(D)(3)(b)(iv), a party shall not assign as error on appeal a Court's adoption of any factual finding or legal conclusion of a magistrate, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless that party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b).

Respectfully submitted,

  
PERDEXTER H. WILLIAMS  
Magistrate

**COPIES MAILED TO:**

**Teddy Sliwinski, Esquire**  
5800 Fleet Avenue  
Cleveland, Ohio 44105

**Zuzanna Szymanczak**  
Ul. Bohaterow  
Warszawy 136/7  
96-300  
Zyrardow, Poland

**Malgorzata Polkowska-Sulek**

9600 Zyrardow

ul. Rodzinna 2 Poland

**Katarzyna Olszewska-Sulek**

96-300 Zyrardow

ul. Mireckiego 36 m. 18 Poland

**Radoslaw Kowalski**

96-300 Zyrardow

ul. Kosciuszki 15/17 m. 37 Poland

**Wieslawa Sas**

96-100 Skierniewice

ul. Kapitana Hali 6 m. 9 Poland

**Irena Stankiewicz**

99-320 Zychlin

ul. Warynskiego

5 m. 14 Poland

**Agata Maciszewska**

96-300 Zyrardow

ul. Srodkowa 25 m. 27 Poland

**PROBATE COURT OF CUYAHOGA COUNTY**

DIVISION OF THE COURT OF COMMON PLEAS  
1 LAKESIDE AVE. W.  
CLEVELAND, OHIO 44113

ANTHONY J. RUSSO  
PRESIDING JUDGE

LAURA J. GALLAGHER  
JUDGE

JOHN R. HOMOLAK  
COURT ADMINISTRATOR

CHARLES T. BROWN  
CHIEF MAGISTRATE

DAVID M. MILLS  
DIRECTOR OF  
GUARDIANSHIP SERVICES

October 6, 2011

Teddy Sliwinski, Esquire  
5800 Fleet Avenue  
Cleveland, Ohio 44105

**In re: Vicki Radzisewski, Executrix of the  
Estate of Zofia Sulek, Deceased vs.  
Miroslaw Szymanczak, et al.  
Case No. 2011 ADV 0166006**

Dear Mr. Sliwinski:

Enclosed please find a copy of the Magistrate's Decision filed today in the above-captioned matter.

For your information and guidance, please refer to the Ohio Rules of Civil Procedure.

Very truly yours,



Orlanda DeFiore  
Deputy Clerk

/od

Enclosure

cc: Zuzanna Szymanczak  
cc: Malgorzata Polkowska-Sulek  
cc: Katarzyna Olszewska-Sulek  
cc: Radoslaw Kowalski  
cc: Wieslawa Sas  
cc: Irena Stankiewicz  
cc: Agata Maciszewska