

IN THE COURT OF COMMON PLEAS FOR LUCAS COUNTY, OHIO  
PROBATE DIVISION

HERBERT E. ADAMS, Executor	:	Case No. 2007 ADV 149
	:	
Plaintiff	:	Judge Jack R. Puffenberger
	:	
v.	:	
	:	
BARBOURA KRUPP, et al.,	:	MOTION FOR SUMMARY
	:	JUDGMENT; MEMORANDUM
Defendants	:	IN SUPPORT OF MOTION

MOTION

NOW COMES Laura L. Kronz, Donna M. Gardner, Ruth Anne Franklin, Carole L. Mason, Grace M. Bauman, Floyd R. Franklin, John W. Franklin, Verlin A. Rice, Carma E. Rice, Donald L. Underwood, David E. Underwood, Kathy Woods Allen, Dennis J. Woods and Gaylene C. Finch, some of the Next of Kin of Decedent John A. Waldvogel (hereinafter "Next of Kin"), by and through counsel, and moves for partial Summary Judgment dismissing the State of Ohio as a Defendant in the captioned matter.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT OF MOTION

### BACKGROUND

On January 22, 2007, the within case was filed by Plaintiff/Executor, Herbert E. Adams, Executor in the Estate of John A. Waldvogel, 2006 EST 2826, Probate Court of Lucas County, OH. The within case was styled as a Complaint for Construction of Will by Fiduciary, R.C. §2107.46, and named the then known eight (8) heirs and the State of Ohio as Party Defendants. Since the original filing of the within case, Answers and a Motion for a Declaratory Judgment were filed and the Court determined in its July 7, 2007 Judgment Entry that

"The subject Will manifests the decedent's intention that escheat to the State should be the last resort and that the proceeds of his estate should pass to his lawful heirs."

Thereafter, Julia R. Bates, Prosecuting Attorney for Lucas County, OH filed a Motion to Intervene and a Order granting Intervention was granted by the Court on August 16, 2007, a genealogist was hired and she gave her report on her findings concerning the living relatives of John A. Waldvogel at a Status Conference held on February 21, 2008, Herbert E. Adams, Executor and drafter of Decedent's Last Will and Testament was taken by representatives of Lucas County Prosecuting Attorney on March 17, 2008 and the undersigned Counsel, on behalf of the Next of Kin set forth above, filed an Answer and a Motion to Intervene at the time of the filing of this Motion and Memorandum.

Plaintiff, in his Complaint asks the Court to construe the language in Decedent's Will that states:

"Item 4. (f) I hereby make no provision for my half-sister, LORENE BERNO, due to the lack of any close relationship between us during my

lifetime, except that in the event that all the above named beneficiaries shall predecease me, then I direct that my estate shall be distributed to the said LORENE BERNO, as the last possibility remaining before distribution is made to the State of Ohio.”

As previously stated, this Court, on July 5, 2008 ruled on Plaintiff's Complaint and stated:

“Absent a prior judicial determination of Escheat, the State of Ohio is not a necessary or proper party to this Action for Construction of Will. Plaintiff therefore voluntarily dismisses the State of Ohio **with prejudice**.”

“The subject Will manifests the decedent's intention that escheat to the State should be a last resort and that the proceeds of his estate should pass to his lawful heirs.” Emphasis added.

The July 5, 2007 Judgment Entry also approved the division of the Estate to the second cousin Defendants without consideration of the issue of the right of other heirs to be Estate beneficiaries.

Thereafter, on September 14, 2008, Prosecuting Attorney Bates filed a Motion for Relief from Judgment asking the Court to Vacate its July 5, 2008 Order and the Court Responded on October 16, 2008. In the Judgment Entry, the Court stated:

“The Court hereby stays consideration of said Motion pending further Order of the Court, pending receipt by the Court and the parties of the Genealogy report to be forthwith obtained by Plaintiff herein.”

Finally, the Court, on February 25, 2008, issued a Pretrial Order setting for a trial date of April 1, 2008 and further setting forth early dates for Pretrial Motions/Motions for Summary Judgment and Responsive Pleadings to be submitted. The matter, upon receipt of Responsive Pleadings, is now ripe for the Court's determination.

## ISSUE

Does the Will manifest Decedent's intent that his Estate would escheat to the State as a last resort?

## ARGUMENT

One of the most frequently stated rules of construction of a will is that the intention of a testator must be gleaned or ascertained from the language used in the will, as applied to the subject matter and read in the light of circumstances surrounding its execution. *Point v. Baker*, 92 Ohio St. 3d 563 (2001) and *Sandy v. Mouhot*, 1 Ohio St. 3d 143 (1982). In *Townsend's Ex'rs v. Townsend*, 25 Ohio St. 477 (1874), the Supreme Court set out five (5) general rules of construction:

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 should, if possible, be ascertained from the words contained in the will;
3. The words in the will, if technical, should be taken in their technical sense, unless it appears from the context that they were used by the testator in some secondary sense;
4. All parts of the will should be construed together and effect, if possible, given to every word contained in it; and,
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.

When considering a question of will construction, the Court should attempt to ascertain the intent of the testator and give effect to his intentions wherever possible. *In re Estate of Hernton*, 164 Ohio App. 3d 306 (9<sup>th</sup> Dist. Lorain County 2005). Also, recognition of the fundamental axiom that the ascertainment and effectuation of the intention of the testator should control in the construction of wills, *Kidd v. U.S.*, 334 F. Supp. 631, S.D. Ohio 1971, *aff'd*. 451 F.2s 1026 (6<sup>th</sup> Cir. 1971) and a fiduciary of the estate is obligated to ascertain and accomplish

the intention of the testator. *Merkstroth v. Robinson*, 83 Ohio Misc. 2d 57 (C.P. 1996). Further, it has also been stated that the testator's intention must be determined as of the time of the making or execution of the will, *Bielat v. Bielat*, 87 Ohio St. 3d 350 (2000) because that is the law that frames the intent of the testator. *Supra*. It is the circumstances that exist at the time of the execution of the will, and not those occurring before or after, that govern the ascertainment of the testator's intent. *In re Scott's Estate*, 50 Ohio L. Abs. 193 (2<sup>nd</sup> Dist. Franklin County 1947).

Contrary to the assertions made by the Prosecuting Attorney, it is submitted that when the entire Will is read, word for word, it is apparent that the Testator intended the State of Ohio to be the last possible beneficiary of the Estate. For example, in Item 4. (e) of the Will, Decedent directed "...that his (Paul Bletcher) share of my estate be distributed as if he predeceased me". Rhetorically questioning, is it clear from this statement that the Testator wanted his Estate to escheat? If there is ambiguity, the Court must inquire as to the intentions of the Decedent at the time of the Will's execution.

Also, is there not ambiguity in the statement "...as **the last possible distribution remaining** before distribution is made to the State of Ohio? Bolding added. See Item 4. (e). See also TR. 16, Lines 4-7 where Mr. Dunn explains his objection to Mr. Ranazzi's question by pointing out that Mr. Ranazzi's question ignored the fact that Item 4. (e) differed from the preceding paragraphs in that there was no presumption that Lorene Berno needed to survive.

In Mr. Adams' deposition, he goes to great lengths to point out Decedent's negative feelings about the State of Ohio, TR. 12, Lines 20-23, TR 13., Lines 2-9, TR. 15, Lines 15-24, TR. 16, Lines 6-11 and elsewhere and he further points out the Testator's mistaken opinion that no other family existed. Starting at TR. 17, Lines 6-24 through TR. 18, Lines 1-24 and TR. 19. Line 1, Deponent Adams testifies that the Will drafting, while maybe inarticulate (inartistic), TR. 12, Lines 20-23, was written with the assumption that the Testator was one of the last members of his family. With regard to his mistaken assumption, it is illustrated in Testator's use of the phrase to Attorney Adams, "...he was at the end of a dying family".

A. An when we got down here to this point, he kept insisting that this is the only heirs that he had; that he was at the end of a dying family, and these were the only people involved, okay. TR. 13, Lines 11-14.

With regard to Testator's negative opinion about the State of Ohio, it was expressed starting at TR. 13:

Q. What was he upset at the State of Ohio about?

A. He had been fighting with them over a Workers' Compensation claim...TR. 13, Lines 2-5.

\* \* \*

A. And I was trying to keep him from looking totally incompetent in that, okay, in the same paragraph we're practically disinheriting somebody and then leaving them the entire residue of the estate and, you know, he was so

desperate to keep the State of Ohio from getting it that he was willing to give it to her (Lorene Berno). TR. 14, Lines 2-8.

What is clear in all of this is that ambiguity exists and in will construction this Court is to ascertain and carry out the intentions of the Decedent. In doing so, in so far as possible, we look to all of the words contained in the Will.

The Court now has before it, the only person who was a participant in the drafting of the Will beside John A. Waldvogel and Herbert R. Adams, Decedent's attorney and the individual who wrote the words set forth in the Will, sets forth uncontroverted albeit challenged testimony. Counsel for the Prosecutor sets up possible scenarios that **could have taken place** in the "word smithing" of the instrument but despite the possible opinion differences in the way the drafting "might have" or "could have" been done, no testimony exists to create questions of fact to deny the within Motion for Summary Judgment.

### CONCLUSION

For the reasons set forth, it is respectfully urged that the Court grant this Motion for Summary Judgment and dismiss the State of Ohio as a party Defendant.

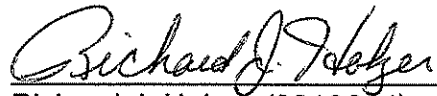
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true copy of this Motion and Memorandum in Support of Motion was sent by regular US mail, postage prepaid to those persons whose names are set for below, on this 18<sup>th</sup> day of March, 2008.



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