

PROBATE COURT OF HAMILTON COUNTY, OHIO

ESTATE OF GERTRUDE A. EVERHART, DECEASED

CASE NO. 99-994446

**OPINION AND ENTRY OVERRULING
EXCEPTIONS TO INVENTORY**

This matter came before Judge Wayne F. Wilke on September 20, 2000 regarding numerous exceptions to the fiduciary's inventory filed on December 29, 1999. Present were Richard K. Mittendorf on behalf of the Exceptor, Linda Ladrigan, and Robert H. Steltenpohl on behalf of the Executor, Judith A. Phariss. The parties were given ample time to file written closing arguments so this matter is ripe for decision.

The decedent, Gertrude A. Everhart, died testate on April 4, 1999 and was survived by five adult children. Pursuant to the decedent's will, daughter Judith A. Phariss was appointed Executor of this estate and is serving in that capacity. Item III of the decedent's will gives the residue of the Estate to four of the decedent's children. Item IV of the will specifies that no distribution be made for daughter Linda L. Everhart.

The decedent created two bank accounts with rights of survivorship with Linda L. Everhart as the joint tenant, being PNC Bank account nos. 41-1034-2755 and 41-1003-1826. It is undisputed that on or about June 23, 1998, Linda L. Everhart withdrew the funds deposited by her mother in the total amount of \$40,952.28. Ms. Everhart contends she holds those funds as trustee of an unrevoked oral trust.

On December 29, 1999, the Executor filed her inventory. It indicates the Estate consists of intangible property with a value of \$42,952.28, including "Funds of Decedent in possession of Linda L. Everhart" in the amount of \$40,952.28. On January 19, 2000,

Linda L. Everhart filed exceptions to the inventory, alleging that the Executor omitted many items from the inventory and mistakenly included the funds described above. Ms. Everhart also moved for an order upon the Executor to show cause why she should not be held in contempt for allegedly violating this court's order that all assets remain in Hamilton County, Ohio. Finally, Ms. Everhart moved that the Executor be removed. After several continuances at the request of the parties, the issue of the exceptions to the inventory was heard on September 20, 2000.

Ohio Revised Code §2115.16 provides for the filing of exceptions to an inventory. A hearing on exceptions to an inventory under R.C. §2115.16 is a summary proceeding to determine whether those charged with the responsibility of filing an inventory have included in a decedent's estate more or less than such decedent owned at the time of death. *In re Estate of Gottwald v. Hershey* (1956), 164 Ohio St. 405, paragraph one of the syllabus. A fiduciary has the burden to prove the value of assets listed on an inventory. On the other hand, when a party files exceptions to an inventory based on the non-inclusion of assets, the exceptor has the burden of proving the existence of those assets. *Steward v. Barry, Admr.* (1921), 102 Ohio St. 129, paragraph 3 of the syllabus. In this case, the Executor must prove the contents of the inventory and Linda Everhart would normally have to demonstrate that the property not listed on the inventory should, in fact, be listed on the inventory.

However, Linda Everhart did not and has not contested the validity of the decedent's will. Since she takes no distribution under the decedent's will, she has no standing to challenge the exclusion of assets and the Court denies that portion of her exceptions as it relates to the non-inclusion of assets. The sole issue then, is whether the funds from the joint bank account and held by Linda Everhart belong to the Estate.

The Ohio Supreme Court has clarified the previously-cloudy law concerning property titled jointly with rights of survivorship. In *In re Estate of Thompson*, the court held that a joint and survivorship account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. (1981), 66 Ohio St.2d 433, paragraph one of the syllabus. In 1994, the Supreme Court further discussed these types of accounts but with respect to the property during the life of a tenant, left the holding in *Thompson* as stated above, intact. See, e.g. *Wright v. Bloom* (1994), 69 Ohio St.3d 596.

The evidence demonstrates that Linda L. Everhart possesses \$40,952.28 from the joint and survivorship account established by her mother. It is clear that the decedent contributed all of the money that was on deposit. Accordingly, it belonged to Gertrude A. Everhart during her lifetime to do with as she wished. For the following reasons, the Court finds that those funds are property of the Estate and that Linda L. Everhart must return them to the Estate and must provide an accounting to the Executor.

Ms. Everhart contends she holds that property as trustee of an unrevoked oral trust or as constructive trustee. The evidence, however, does not support Ms. Everhart's contention. Where there is a formal trust instrument, the settlor's intention to create a trust is clearly shown. Without a formal trust instrument, as in this case, the intention and the terms of the trust must be implied. *Adm. v. Fleck* (1961), 171 Ohio St 451, 458. An implied trust requires clear and convincing evidence demonstrating the settlor's intention to create a trust. *Id.* Ms. Everhart failed to meet that evidentiary burden. All she presented was her own testimony.

On the other hand, the Executor presented competent and credible evidence that the decedent wanted her funds returned to her estate and that even if she did create an

oral trust, that she revoked that trust. A constructive trust, such as that urged by Ms. Everhart, is a remedial technique utilized by courts of equity to do justice. *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 172. Under the evidence presented in this case, equity calls for the abolition of a constructive trust, not its creation.

Two pieces of evidence demonstrate that the decedent intended that the funds in question be administered as part of her estate and that to the extent Ms. Everhart held funds as trustee, that the decedent wanted to “revoke” the trust and wanted to regain control over those funds. Defendant’s Exhibit 3, which was identified as a letter written by the decedent to her attorney and to her funeral director and was admitted into evidence, serves as a clear expression of the decedent’s intention that her funds be returned to her. Consistent with that intention indicated by Defendant’s Exhibit 3, the decedent’s will, which was executed during this period, also demonstrates the decedent’s desire that she have a probate estate so that her other children would receive distributions from her probate property. Given that evidence, it is clear that even if an oral trust was created, the decedent revoked it. Accordingly, Linda L. Everhart must return the funds she holds from her mother’s joint account to the Executor and must make an accounting of those funds within 30 days from the date of this entry. If Linda L. Everhart still seeks the removal of the Executor and an order to show cause, she must renew those applications and set them for further hearing.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Richard K. Mittendorf
Robert H. Steltenpohl