

**COURT OF COMMON PLEAS  
PROBATE DIVISION  
HAMILTON COUNTY, OHIO**

ESTATE OF	:	CASE NO. 956010
WILLIAM J. FLICK	:	
	:	OPINION AND ENTRY
	:	ORDERING THE DECEDENT'S
	:	INCOMPETENT SPOUSE TO
	:	TAKE AGAINST THE WILL
	:	
	:	
	:	
	:	

This matter came for hearing before Judge Wayne F. Wilke on June 4, 1996, concerning the Executor's application for the Court to determine whether the decedent's incompetent surviving spouse should take under the decedent's will. Present were Francis J. Niehaus, representing the Executor of this Estate, and Michael L. Weber, the Guardian Ad Litem for the decedent's incompetent spouse.

Facts

The decedent herein, William J. Flick, died testate on December 4, 1995. He was survived by a spouse, Vera E. Flick, and three adult children, to wit: Robert W. Flick, Mary Ann Haas, and Jeanne M. Herms. On December 29, 1995, both Decedent's will was admitted to probate and Robert W. Flick was appointed Executor. The inventory, filed on April 30, 1996, lists assets of the Estate to total \$76,184.58, of which \$75,000 consists of the decedent's residence.

The decedent's will devises and bequeaths the estate residue to the children named above and makes no provision for the decedent's spouse. Mrs. Vera E. Flick

suffered a stroke in April of 1994 and has resided at the Western Hills Retirement Center since that time. She is currently receiving Medicaid assistance.

Believing her unable to make an election under R.C. §2106.01 due to legal disability, the Court appointed Michael L. Weber as Mrs. Flick's Guardian Ad Litem. Mr. Weber's Report was filed on April 12, 1996. That report described Mrs. Flick as requiring assistance for all of her living requirements. Because of her age, poor health and pessimistic prognosis for meaningful recovery, the Guardian Ad Litem recommended that Mrs. Flick continue to reside in a supervised setting and that no election be made for her to take against the will. The Guardian Ad Litem believed an election against the will would be against Mrs. Flick's best interest as any assets she received would be liquidated and used for her care. For reasons stated below, this court shall not adopt the Guardian Ad Litem's report and hereby orders an election be made for the surviving spouse to take against the will.

#### Conclusions of Law

Eligibility for Medicaid benefits is dependent upon a recipient's income or available resources. Ohio Administrative Code §5101:1-39-08(A) states that the "role of income is a primary element in the medicaid eligibility determination." As for the "resource" part of eligibility requirements, O.A.C. §5101:1-39-05(A)(1) defines "resources" for purposes of medicaid as any real property that an individual has the right

to convert to cash. “Resources” for purposes of medicaid also includes property in which a recipient has a legal interest and the legal ability to use or dispose of. *In re Estate of Cross* (1996), 75 Ohio St.3d 530, 532. Ohio Administrative Code §5101:1-39-08(A) states that

“[a] basic tenet of public assistance is that all income must be considered in determining the need of an individual for public assistance.... An individual who does not avail himself of a potential income is presumed to fail to do so in order to make himself eligible for public assistance. Such nonutilization of income available upon request constitutes ineligibility.”

In a recently-decided case factually similar to the one before this court, the Ohio Supreme Court unanimously upheld the probate court’s decision that elected for the surviving spouse to take against the will. 75 Ohio St.3d at 533. The Supreme Court found that in order to maintain Medicaid eligibility and to continue to have the surviving spouse’s nursing home expenses provided for by public assistance, the probate court was required to elect for the surviving spouse to take against the will and to receive her intestate share. The Court in *Cross* then explained, “if the election was to take under the will, [the surviving spouse] would receive no income and would be deemed ineligible for benefits for failing to avail herself of a potential income. Thus, the election to take against the will was necessary for [the surviving spouse’s] future support and met the requirements of R.C. 2106.08.” *Id.*

The facts of this case are too similar to those of *Cross* for this court to ignore. It

is in Mrs. Flick's best interest to maintain her Medicaid eligibility. As a result,  
IT IS HEREBY ORDERED that Mrs. Vera E. Flick take against the will of her deceased  
husband, William J. Flick.

SO ORDERED.

---

WAYNE F. WILKE, JUDGE

cc: Francis J. Niehaus  
Michael L. Weber