

PROBATE COURT OF HAMILTON COUNTY, OHIO

ESTATE OF PASQUALE LEPROTTI, DECEASED

CASE NO. 975789

**OPINION AND ENTRY OVERRULING OBJECTIONS TO DECISION OF
MAGISTRATE REGARDING ELECTION OF INCOMPETENT SPOUSE**

This matter came before Judge Wayne F. Wilke on February 9, 1999, regarding objections to the Decision of Magistrate from December 11, 1998. Present were James J. Condit on behalf of the Estate and John J. Nolan, Sr. on behalf of the decedent's surviving spouse. For the reasons that follow, the objections to the decision are hereby overruled.

The decedent, Pasquale Leprotti, died testate on November 18, 1997. The decedent's will was admitted to probate on December 18, 1997. The decedent was survived by his wife, Goldie Leprotti, for whom the decedent made no provision in his will. Because Mrs. Leprotti is alleged to be of unsound mind and therefore under legal disability, the Court appointed a commissioner, pursuant to R.C. §2106.08, to aid the Court in determining whether to make the election for the spouse to take under the statute of descent and distribution.

The estate inventory indicates there are liquid assets that total \$239,785.23. Since the time the commissioner made his findings, the executor filed a report of newly discovered assets that indicated the estate owns an additional \$10,000 in cash. After payment of the \$25,000 support allowance provided for by R.C. §2106.13, Mrs. Leprotti could receive one-half of the net estate or up to \$112,392.62. Because there are debts

owed by the estate and administrative costs, however, the net amount that Mrs. Leprotti could realistically receive would be much less. For example, the statutory fiduciary's commission amounts to \$8,493.55. There are attorney fees, a funeral bill and other debts that will necessarily be paid from the assets of the estate. Accordingly, the amount available to Mrs. Leprotti is more likely to range between \$100,000 and \$105,000.

In contrast to the amount available to her from the estate, Mrs. Leprotti herself has assets available for her maintenance and support that amount to \$248,339.68. She also receives income from Social Security and a pension that total \$11,669.76 annually. Finally, Mrs. Leprotti should receive various amounts of income from stocks, savings and real estate.¹

Pursuant to R.C. §2106.08, if a surviving spouse is under legal disability and therefore unable to make an election, a commissioner is to "ascertain the value of the provision made for the surviving spouse by the testator, the value of the rights of the surviving spouse [under the laws of intestacy], and the adequate support needs of the surviving spouse after taking into consideration the other available resources and the age, probably life expectancy, physical and mental condition, and present and reasonably anticipated future needs of the surviving spouse". After receiving such information, a court may elect for the surviving spouse to take under the laws of descent and distribution only if it finds, after taking into consideration the other available resources and the age, probable life expectancy, physical and mental condition, and present and reasonably anticipated future needs of the surviving spouse, that the election to take under §2105.06 is necessary to provide adequate support for the surviving spouse during his or her

¹ The Court agrees with the Estate that such income was not considered by the magistrate. The Estate suggests Mrs. Leprotti could receive as much as \$9,000 in additional income from these sources.

lifetime. Under R.C. §2106.01(C), if a surviving spouse elects to take under the laws of descent and distribution, the surviving spouse shall take not to exceed one-half of the net estate.

Mrs. Leprotti is 77 years old and has suffered a stroke. Her life expectancy is 5.48 years based upon the American Experience Table. Last year she expended \$52,150.00 for her nursing home expenses and it was not disputed that those expenses are expected to increase to \$62,000.00 annually.

Over a 5.48 period, it is reasonable to expect Mrs. Leprotti to have to expend \$339,760.00. Based upon Mrs. Leprotti's assets and current income, even assuming the Estate's contention that she could generate an additional \$9,000 of income per year, she would have \$361,609.97 available to her during those 5.48 years.² According to the actuarial tables and the above calculations, Mrs. Leprotti would have an estate of \$21,849.97 at the time of her death. These simple calculations fail to take into consideration capital gains or income taxes or the expenses of maintaining rental property. Most importantly, there is no evidence that Mrs. Leprotti's demise is imminent. While she has suffered a stroke, she may very conceivably live a much longer period than the predicted 5.48 years. Her condition may be poor, but there is no evidence to indicate her condition is anything but stable.

Mrs. Leprotti may very well need the \$100,000 or so available to her from the estate of her husband of many years. Moreover, to suggest that government assistance is available to Mrs. Leprotti when her personal funds are expended is to mutate the intent of

² Current assets of \$248,339.68, plus income from Social Security and Kroger pension at \$11,670, plus other income of \$9,000.

such social programs. Consequently, it is incumbent upon the Court to make the election for Goldie Leprotti against the will of her husband, Pasquale Leprotti.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: James J. Condit
John J. Nolan, Sr.