

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

PNC BANK, N.A.	:	CASE NO. 985008
Executor of the Estate	:	
of Frank Showalter, Deceased	:	
	:	
Plaintiff	:	<u>OPINION AND ENTRY</u>
	:	<u>GRANTING DECLARATORY</u>
	:	<u>JUDGMENT AND CONSTRUING</u>
-vs-	:	<u>WILL</u>
	:	
BEVERLY VARNAU, et al.	:	
	:	
Defendants	:	
	:	

This matter came before Judge Wayne F. Wilke on August 16, 1999 regarding a complaint for declaratory judgment construing decedent Frank L. Showalter's last will and testament. Present were James W. Thompson on behalf of Plaintiff PNC Bank, N.A.; Julie Schimpf Kehres, who represents Defendant the Estate of Mary Josephine Powell; G. Robert Hines on behalf of Defendant Beverly Varnau; and Kevin L. Swick, who represents Defendant Carlton J. King.

FINDINGS OF FACT

The decedent, Frank L. Showalter, died testate on September 27, 1997. The decedent's will was admitted to probate on October 21, 1997 and pursuant to Item Five of that will, Plaintiff PNC Bank, N.A. was appointed executor of the decedent's estate on October 21, 1997.

The decedent executed the last will and testament admitted to probate on December 1, 1976. At that time, the decedent was married to Betty A. Showalter. The decedent and Betty A. Showalter later divorced on August 27, 1981. Betty A. Showalter subsequently married Defendant Carlton J. King on December 6, 1988. Betty A. Showalter died on January 23, 1998 without living issue.

Plaintiff has asked the Court to construe Item Three of the decedent's will. Under the terms and conditions of the will, all of the decedent's estate is bequeathed and devised to Betty A. Showalter and if she failed to survive the testator, then all property was to pass under the testator's residuary estate pursuant to Item Three (B) as follows:

"ITEM THREE (A) All the rest, residue and remainder of the property which I may own at the time of my death of whatsoever nature and wheresoever situated, I give, devise and bequeath, in fee simple, to my spouse.

(B) In the event that my said spouse should fail to survive me, I give, devise, and bequeath the said rest, residue, and remainder of the property which I may own at the time of my death of whatsoever nature and wheresoever situated, as follows:

(1) One-half of said residuary estate to the persons who would be entitled to inherit from me as set forth and determined by the laws of descent and distribution of the State of Ohio then in effect.

(2) One-half of said residuary estate to the persons who would be entitled to inherit from my spouse as set forth and determined by the laws of descent and distribution of the State of Ohio then in effect.

(3) If there be no persons entitled to inherit either of the shares herein before provided in subparagraph (1) or (2) then such shares shall be added to the remaining share."

Betty Showalter King's mother, through her estate, and her surviving spouse, Carlton J. King, both believe they are entitled to one half of the residuary estate. Plaintiff has asked the Court to construe the will so that it may make proper distribution.

CONCLUSIONS OF LAW

When construing a will, a probate court must ascertain and effectuate the intent of the testator within the bounds of the law. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314. The express language of the will generally provides the court with an indication of the testator's intent as related to the provisions therein. *Stevens v. National City Bank* (1989), 45 Ohio St.3d 276, 278. In the event the language employed in the will is unclear or ambiguous, then the court may look to extrinsic evidence to help ascertain the testator's intent. *In re Estate of Evans* (1956), 165 Ohio St. 27, 30. In this case, the words used by the testator are sufficiently clear so that extrinsic evidence is neither admissible nor needed to determine the testator's intent. Instead, the question presented by Plaintiff concerns the effect of divorce upon those not related by consanguinity to a testator.

The methods of revoking a will are described in R.C. §2107.33. Revised Code §2107.33(C) provides that "[i]f after executing a will, a testator is divorced *** any disposition or appointment of property made by the will to the former spouse *** shall be revoked unless the will expressly provides otherwise." Furthermore, R.C. §2107.33(D) provides that "[p]roperty prevented from passing to a former spouse or to a trust *** because of revocation by this section shall pass as if the former spouse failed to survive the decedent." In this case, Betty Showalter King's divorce from the decedent severed her rights of inheritance to his estate. It also severed her second husband's and her mother's right of inheritance as well.

Item Three (A) has no application since the decedent was divorced from Betty Showalter King at the time of his death and did not remarry. Since the provisions of Item

Three (A) lapse, distribution must then be made under Item Three (B). Item Three (B)(1) provides for distribution to those entitled to inherit under the statute of descent and distribution. In this case, the decedent was survived by one sister, Beverly Varnau. She is entitled to one-half of the net estate under Item Three (B)(1).

Item Three (B)(2) provides for one-half of the net estate to be distributed to those persons who would be entitled to inherit from the decedent's spouse as determined by the laws of descent and distribution. Significantly, the decedent did not use the terms "former spouse", nor did he identify Betty Showalter by name. The decedent instead simply chose the word "spouse" to qualify the members of the class to receive the remaining one-half residue of the estate. Since R.C. §2107.33(C) operates to revoke the testamentary disposition of property to a former spouse, it follows that such testamentary disposition must also lapse as to that former spouse's heirs at law.

Moreover, R.C. §2107.33(D) requires property prevented from being distributed to a former spouse to be treated as though the former spouse failed to survive the decedent. Unless one of two conditions are met, the bequest of property to "persons who would be entitled to inherit from my spouse" must lapse.

There are two ways to avoid the lapse of a bequest when a beneficiary predeceases the testator. One is through the application of Ohio's anti-lapse statute and the other is through an expression of the testator's intention that the bequest not lapse. *Oliver v. Bank One, Dayton* (1991) 60 Ohio St.3d 32, 34. It is well-settled that the anti-lapse statute applies only to "relatives" who are related by consanguinity and not, in this case, by affinity. See, e.g. *Oliver v. Bank One, Dayton* supra; *Schaefer v. Bernhardt*

(1907), 76 Ohio St. 443. Neither the anti-lapse statute applies nor has the testator made clear his intention that the bequest not lapse.

Since there is no one entitled to inherit under Item Three (B)(2), Item Three (B)(3) requires the lapsed bequest in Item Three (B)(2) to be added to the share distributed under Item Three (B)(1). Accordingly, it is HEREBY ADJUDGED, ORDERED AND DECREED that Beverly Varnau, as the sole surviving heir at law, shall receive all of Frank L. Showalter's net residuary estate.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: G. Robert Hines / 24670
James W. Thompson / 3882
Julie Schimpf Kehres / 59320
Kevin L. Swick / 23149