

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

V. RUTH KLETTE, Executrix	:	CASE NO. C-97068
of the Estate of	:	
CHARLES WICHMAN, deceased	:	
	:	<u>OPINION AND ENTRY</u>
Plaintiff	:	<u>CONSTRUING WILL</u>
-vs-	:	
	:	
KENNETH MONTAG, et. al,	:	
	:	
Defendants	:	
	:	
	:	
	:	
	:	
	:	

This matter came before Judge Wayne F. Wilke for judgment on the pleadings pursuant to Civ.R. 12(C) and concerns a complaint to construe the Last Will and Testament of Charles Wichman. All parties have been served notice of the Plaintiff's complaint and are properly before the Court.

The decedent, Charles Wichman, died on August 30, 1995 and his will was admitted to probate on August 29, 1997 after the Court received testimony regarding the execution of said will. V. Ruth Klette was appointed Executrix and she filed a complaint to construe the decedent's will. The Court finds that under Item III of the decedent's will, the decedent purported to dispose of the residue of his estate. The Court also finds that the residual portion under Item III only accounts for 96% of the decedent's estate.

A court's overriding concern when interpreting a testamentary document must be to ascertain and give effect to the testator's intent if it be legally possible. *Townsend's Exrs. v. Townsend* (1874), 25 Ohio St. 477, paragraph one of the syllabus. Additionally,

every reasonable effort should be made to avoid intestate succession where possible. *Carr v. Stradley* (1977), 52 Ohio St.2d 220. When the decedent's will is examined *in toto*, it is abundantly clear that he intended the residuary provisions in Item III to dispose of 100% of his estate. Accordingly, the 4% of the estate's residue for which no provision has been made shall be distributed to the residual beneficiaries named in Item III in proportions established thereunder.

The second issue before the Court concerns the 30% bequest under Item III (A) of the will to the decedent's sister-in-law, Emma May. The parties concede that Emma May predeceased the testator. Since Ohio's anti-lapse statute, R.C. §2107.52 only applies to individuals who are related to a testator by consanguinity and to designated heirs at law, the bequest to Emma May must lapse as a matter of law. The question is whether this portion of the estate should be distributed according to the laws of descent and distribution or pursuant to the percentages established in the will. The Ohio Supreme Court has stated

“where a will contains general residuary provisions for the disposition of the testator's property not disposed of by other provisions of the will, any lapsed bequest will ordinarily pass under the residuary provisions of the will to any other parties entitled thereunder to portions of the residue, instead of passing as intestate property.”

*Wendell v. AmeriTrust Co.* (1994), 69 Ohio St.3d 74, quoting *Commerce Natl. Bank of Toledo v. Browning* (1952), 158 Ohio St. 54. Since Charles Wichman executed a will, he manifested his intent to die testate. Ordering distribution under the statutes of descent and distribution would thwart that intent. Accordingly, the bequest to Emma May lapses and should be distributed to the remaining residual beneficiaries in proportions established in their respective bequests.

SO ORDERED.

---

WAYNE F. WILKE, JUDGE

cc: Thomas A. Wietholter  
J. Jay Hampson  
Jerry Scott  
Edwin R. Wichman  
Jerry Scott  
Ryan Pinsenschaum  
Julie Pinsenschaum  
Jenny May  
Alan M. May  
Doris Pinsenschaum  
Marguerite Ann Beedle  
Edwin Wichman  
Veronica L. Wineka