

Probate Code Amendments

BY FRANCIS J. EBERLY*

This review of new legislation affecting probate law and procedure will be confined mainly to legislation sponsored by the Probate and Trust Law Committee of the Ohio State Bar Association. It will be discussed section by section. Without going into detail concerning other new legislation, brief comment only will be made on some of the amendments which are of interest to the practicing lawyer.

SECTION 2105.21 (10503-18)

PRESUMPTION OF ORDER OF DEATH. — This first amendment, from the standpoint of the practicing lawyer, is one of the most drastic amendments to our probate law since the adoption of the 1932 Probate Code. It not only involves the statute of descent and distribution but the construction of wills, and most importantly it involves the proper drafting of wills.

There is no change in the wording of the first sentence of the section, so the law remains the same when there is no evidence of the order in which the death of two or more persons occurred. The amendment, however, does away altogether with any mention of death from a common accident. It simply provides that when a surviving spouse, heir, or legatee dies within thirty days after the death of the decedent, such persons do not participate at all in the estate of such decedent. This postpones the definite vesting of all estates for thirty days after the death of the decedent and consequently it is a very important exception to the statute of descent and distribution. OHIO REV. CODE § 2105.06.

It is important to note, however, that this section does not apply to a beneficiary of a testamentary trust, except in the case where there is no evidence of the order in which the death of the testator and such beneficiary occurred.

It became the general opinion of lawyers that it was not possible to so draft a will that the testator's estate could be taken out of the operation of the old statute. This is what prompted the Probate and Trust Law Committee to sponsor the amendment to this section. By being able to provide by will for a distribution different from the provisions of this section it is possible to take advantage of the marital deduction allowed under the federal estate tax law, where the surviving spouse dies within thirty days of the death of the testator. Accordingly, this sentence was inserted in the section, *viz*: "This section shall not apply in the case of wills wherein pro-

* Franklin County Probate Court, Columbus, Ohio.

vision has been made for distribution of property different from the provisions of this section.”

It will be apparent at once to the practicing lawyer that this change could materially affect the interpretation of wills which he has heretofore drawn. It would, therefore, be well for lawyers to review the wills they have drawn and if there is any question at all in their minds as to the intention of their clients in the light of this new amendment, such wills should be re-drafted. Likewise, in the drafting of new wills under this amendment, a lawyer cannot be too careful in his phraseology to make sure that the will clearly expresses the intention of the testator and places the will beyond the necessity of a court construction.

SECTION 2107.39 (10504-55) (10504-48)

ELECTION BY SURVIVING SPOUSE.—This amendment was adopted for the purpose of avoiding uncertainty and litigation concerning the question of the intention of the testator when the surviving spouse elects to take under the statute of descent and distribution rather than under the will. In such cases if the surviving spouse is given a life estate, the question invariably occurs: Do the remainder or other interests accelerate as though the surviving spouse had died? To avoid litigation over this question the amendment specifically provides that the estate shall be disposed of as though the spouse had predeceased the testator, unless the will shall *expressly* provide that there shall be no acceleration of remainder or other interests. Therefore, under this amendment the testator is forced to make clear his intention in the event the surviving spouse should elect to take under the statute of descent and distribution, otherwise there shall be an acceleration of remainder and other interests.

The second paragraph is a replacement of Section 10504-58 of the General Code. The reference at the beginning of the Section to Section 10504-48 is in error.

SECTION 2107.41 (10504-60)

FAILURE TO MAKE ELECTION; PRESUMPTION.—This section was amended to offset the effect of the decision of the Supreme Court in the case of *Raleigh v. Raleigh*, 153 Ohio St. 160 (1946). In that case the surviving spouse had died before the probate of the will, and the court ruled that after the probate of the will the probate court was authorized to make such an election for the estate of the deceased surviving spouse as would be most advantageous to his estate. Under this amendment, even if the surviving spouse dies before the probate of the will, such spouse shall be conclusively presumed to have elected to take under the will.

SECTION 2107.43 (10504-56, 10504-59)

ELECTION MADE IN PERSON.—This amendment was suggested by The Ohio Association of Probate Court Judges. In 1951 the Association sponsored an amendment to General Code Section 11483, now Revised Code Section 2315.37, which authorized the probate courts to appoint as referees, deputy clerks who are attorneys at law admitted to the practice in the state of Ohio. This amendment permits the election of a surviving spouse under a will to be made in person before such a referee as well as before the probate judge. Since the year 1947 the surviving spouse has been required under the law to appear in person before the probate judge to make an election. The inconvenience created by this requirement soon became apparent, especially in the larger counties. It was often found that the probate judge, busy with the trial of cases and other duties, was not readily available to take the election of a surviving spouse. Under this amendment the probate judge can appoint a qualified deputy to take these elections when he is otherwise engaged.

SECTION 2109.13 (10506-23, 10506-24, 10506-25)

DEPOSIT OF SECURITIES IN LIEU OF BOND.—This amendment provides for the deposit of any suitable personal property in lieu of bond. The old section limited what could be deposited to certificates of stocks, bonds, notes, or other securities. It was felt that this enumeration in the old section did not cover such items of personal property as certificates of deposit, bank accounts and money. Therefore, the broad term, "suitable personal property" was used. This term could also include diamonds, jewelry, and even small works of art which under the old law could only be deposited in a museum under Revised Code Section 2109.14 (10506-25a).

Under the old law if any security was withdrawn from the custody of the bank, the original bond of the fiduciary would have had to be increased if the bond did not equal twice the value of the security withdrawn and the personal property in the hands of the fiduciary. Under this amendment the court may find that the original bond of the fiduciary is sufficient, having regard for the disposition to be made of the property, its value as related to the total value of the estate and the period of time it will remain in the possession of the fiduciary; otherwise, the court may determine the amount of additional bond the fiduciary shall be required to furnish.

The last sentence of the section is a new and important provision. It provides that neither the fiduciary nor his sureties shall be liable for any loss to the estate resulting from a deposit author-

ized by the court under this section if the fiduciary has acted in good faith.

SECTION 2111.23 (10507-26)

GUARDIAN AD LITEM.—The amendment to this section was induced by an article this reviewer wrote for the Practicing Law Institute of the Ohio State Bar Association for the 1950 Spring meetings, which article was entitled, "Settlement of Accounts in the Probate Court." The article called attention to the fact that by virtue of Section 10507-26 of the General Code the probate court was empowered to appoint only a guardian of the estate, or of the person and estate, of a minor or person under disability, where no guardian had theretofore been appointed, for the purpose of representing them in any proceeding in the probate court in which they were interested. In such a situation the section did not authorize the appointment of a guardian ad litem, but it was quite generally felt that it did. So that there would be no question about the meaning of the section, it was amended to authorize the probate court to appoint either a guardian or a guardian ad litem.

The clause "suit or proceeding in which the guardian is personally interested" has been changed to "suit or proceeding in which the guardian has an adverse interest." This wording is more definite and also conforms to the wording in Revised Code Section 2307.13 (11249) found in the Code of Civil Procedure.

SECTION 2113.23 (10509-24)

SALES OF FORMER EXECUTOR OR ADMINISTRATOR VALID.—The old law provides that when letters of administration are revoked, or an executor or administrator is removed or resigns, or a will is declared invalid, all previous sales made by him shall be valid as to such executor or administrator. In the amended section the contingency of the death of the executor or administrator and also the contingency of a surviving spouse electing to take under the law rather than under the will have been added. The statute is broadened to include leases and encumbrances, and extends the protection afforded the executor or administrator to purchasers, lessees, encumbrancers, and all other parties, dealing with the fiduciary for value in good faith, and all parties claiming under any of them.

This amendment was suggested by title companies as they were not sure that a purchaser was protected in his title the same as the executor or administrator was under the old law.

SECTION 2113.50 (10509-226)

COMPLETION OF DECEDENT'S CONTRACT TO BUY LAND.—The old section dealt with the alteration and cancellation of a contract to purchase land and with the compelling of a con-

veyance of land purchased under a contract. The old section was poorly drawn and was badly in need of revision.

The amended section deals only with proceedings to complete, and for the alteration and cancellation of a contract to purchase land. The section is patterned after Revised Code Sections 2113.48 and 2113.49 (10509-224 and 10509-225), which sections were revised by the legislature in 1949 at the instance of the Probate and Trust Law Committee. The first paragraph provides for the procedure for the completion of the contract and the second paragraph for its alteration and cancellation.

For the completion of a contract an application is filed by the executor or administrator, or by the surviving spouse, or any heir, or any devisee having an interest in the contract. Notice of the hearing on the application must be given to all interested persons. If the court is satisfied that it would be for the best interests of the estate it may, with the consent of the vendor, authorize the executor or administrator to complete the contract; or the court may authorize the persons entitled to the interest of the decedent in the contract to complete it.

For the alteration or cancellation of a contract a petition is filed by the executor or administrator, or by the surviving spouse, or any heir, or any devisee having an interest in the contract. All interested persons must be made parties defendant. If the court is satisfied that it would be for the best interests of the estate it may, with the consent of the vendor, authorize the executor or administrator to agree to the alteration or cancellation of the contract.

The amendment does not include any procedure for compelling the conveyance of land under a contract of purchase. The heirs or devisees are generally the ones interested in the contract as it represents real estate. No statute is necessary to compel the completion in equity for specific performance.

SECTION 2117.23 (10509-78)

YEAR'S ALLOWANCE WHEN DECEDENT IS NON-RESIDENT.—This section was entirely rewritten. Under the old law the probate court had the discretion to allow a year's allowance out of Ohio property owned by a non-resident decedent only where the laws of the state of his residence made no provision for year's allowance for widows and children of resident decedents. This limitation does not appear in the amended section. The section recites that the probate court may set off a year's allowance, having due regard for the laws of the state of decedent's residence as to its provisions for widows and children, the assets of the estate and the amount the widow and children may be expected to receive in the state of decedent's residence, and any other facts and circumstances which may have a bearing on the case.

The amendment requires that ancillary administration proceedings be had, and prior to the approval of the inventory and appraisal that the fiduciary notify the widow and children under the age of eighteen that they have sixty days after the approval of the inventory to apply for a year's allowance out of the Ohio property. Notice of the hearing on such application may be given to such persons as the court may require.

SECTION 2129.10 (10511-12)

PROCEDURE.—This section is in the chapter on ancillary administration and provides that the procedure in ancillary administration shall be the same as in estates of resident decedents. The second paragraph of the section is new and provides that all rights, powers, and duties authorized by Revised Code Section 2117.23 (preceding section) relating to a year's allowance shall be available to the widow and children of a non-resident decedent but that the duty to notify them of their right to apply for a year's allowance shall be exercised by the ancillary administrator.

It is important to note that an ancillary administrator has an additional duty to perform which was not required under the old law. Failure to perform this duty might make the ancillary administrator liable for any loss that the widow or children might suffer as the result of not being notified in time of their rights in the Ohio property.

This amendment was made to this section in the chapter on ancillary administration so that the procedure required under Revised Code Section 2117.23 would be called to the attention of lawyers representing ancillary administrators. This is an important duty of the ancillary administrator which is new and should not be overlooked.

SECTION 2107.181

DENIAL OF ADMISSION TO PROBATE.—This is an entirely new section and has been inserted after the section headed: "Admission to probate." Under this new section if the court denies the probate of a will, an interlocutory order denying probate is entered and the matter is continued for further hearing. The court shall then order that not less than ten days notice of such further hearing be given to all persons named in the will, including the executor. At such hearing anyone interested in having the will admitted to probate may call or subpoena witnesses and examine or cross-examine them. Thereupon the court shall either enter a final order refusing to probate such instrument or revoke its interlocutory order and admit the will to probate.

This new procedure eliminates the uncertainty under the old law of an order denying probate of an instrument. All persons

named in a will are required by law to be notified of the admission of the will to probate (OHIO REV. CODE § 2107.19, OHIO GEN. CODE § 10504-23) but, under the old law, when an instrument was denied probate no such notice was required. Consequently, the Supreme Court has held, under the old law, that where admission of a will to probate has been refused, persons having no notice of the proceedings and refusal until too late to perfect an appeal from the order of refusal, are not concluded thereby, but may repropound the will notwithstanding the former order of refusal has not been vacated. *Feuchter v. Keyl, et al.* 48 Ohio St. 357 (1891) *State, ex rel. Young v. Morrow*, 131 Ohio St. 266 (1936). Under these decisions it was possible for an estate to be completely administered as an intestate estate only to have such administration set aside years later and the estate re-administered under the will. In order to prevent this uncertain and embarrassing situation this new section was adopted.

SECTION 2109.37

ADDITIONAL INVESTMENTS BY FIDUCIARIES. — This is an entirely new section which augments the existing statute defining legal investments (OHIO REV. CODE § 2109.37 OHIO GEN. CODE 10506-41). Since the year 1932 the investments of fiduciaries have been limited to what has been termed the "legal list". This section now permits fiduciaries to invest up to thirty-five percent of the market value of the fund held by them in securities which are not included in the statutory list. The conditions upon which such investments may be made are that the securities may be lawfully sold in Ohio and are such securities as would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital. This is what is called the "prudent man rule" which exists in varying degrees among the majority of states. It is to be observed that it is not necessary to make application to the probate court for authority to make such investments.

MENTAL CASES

House Bill 142 amends several sections of Chapter 5123 which deals with mental cases. The more important changes are as follows: The law now definitely provides that one of the places in which the probate court may order a mentally ill person detained is a receiving hospital wherein such person may be observed and treated prior to his hearing before the probate court. It is no longer required that the probate court set a mental illness case for hearing on the next business day after a person is detained but may exercise his discretion as to when the case shall be set for hearing. Under this new procedure a patient can immediately be placed

under observation and treatment in a receiving hospital prior to the hearing.

This is an important step forward in the treatment of persons alleged to be mentally ill; in some cases it is possible, by the time the person is brought before the court for hearing, that the mental disturbance shall have been removed and consequently the court could, upon the hearing, dismiss the affidavit of mental illness and order the person discharged. This will forestall a finding of mental illness in such cases. However, if an immediate hearing before the court is demanded the court is required to hear the case within forty-eight hours.

Another important provision is that a patient in a hospital under the control of the division of mental hygiene may be discharged as recovered when such patient is no longer mentally ill, feeble-minded, or epileptic. Such a discharge as recovered or a discharge as competent by the Veterans Administration shall operate as a restoration to competency. Such discharges under the new amendments obviate the necessity of proceeding under Revised Code Section 5123.51 (1890-63a) to determine whether a person so discharged is competent.

INHERITANCE TAXES

SECTION 5331.171

LIABILITY FOR PAYMENT OF TAXES VOID, WHEN. —

This is an entirely new section. Under this section the liability for the payment of inheritance taxes, including collateral inheritance taxes, together with any lien created thereby, shall become void ten years after the date of death of the decedent, or two years after the effective date of the section, whichever shall be later. The effective date of this section is October 13, 1953. Not only does the lien created by the tax on the property of the decedent become void, but also the liability of the fiduciary of the estate for the payment of the tax become void. However, if there is any litigation pending for the determination or collection of the tax, the liability or lien does not become void until one year after the determination of the litigation.

QUALIFICATIONS AND SALARIES OF PROBATE JUDGES

Senate Bill 42 raised the qualifications of judges of the probate court to equal those of judges of the court of common pleas. To be qualified to serve as probate judge one must now have been admitted to practice as an attorney at law in this state for a period of at least six years immediately preceding his election, or have served as probate judge immediately prior to his election. This was effected by amendment to Revised Code Section 2101.02 (10501-1).

This bill also increased the salaries of judges of the probate court to equal those of judges of the court of common pleas. This

was accomplished by including probate judges in the sections of the code providing for the salaries of judges of the common pleas court (OHIO REV. CODE § § 141.04 and 141.05 OHIO GEN. CODE 2251 and 2252.) In this way the cumbersome method of computing the salaries of probate judges has been abolished and they will be paid from the same sources as the common pleas judges.

This legislation will go a long way toward maintaining the level of the probate courts throughout the state. For economic reasons many of the judges have resigned to go back in the practice of law. With this increase in salary the office of probate judge will at least be as attractive to lawyers as a place on the common pleas bench. This equality both in the salary and the qualifications for office of the two judgeships will also have a tendency to dispel the erroneous conception that some people still have that the probate court is considered in law to be an inferior court to that of the common pleas. (Ohio Rev. Code § 2101.42, OHIO GEN. CODE 10501-50).