

## WILL CONTEST: NECESSARY PARTIES DEFENDANT

*Fletcher v. First Nat'l Bank,*

*167 Ohio St. 211, 142 N.E.2d 599 (1958)*

An action to contest a will was instituted within the statutory period of six months after the admission of the will to probate as provided in Revised Code section 2741.09.<sup>1</sup> The action was dismissed by the trial court on the ground of lack of jurisdiction since an heir at law had not been made a party as required by Revised Code section 2741.02.<sup>2</sup> On appeal, the dismissal by the trial court was affirmed by both the court of appeals and the Ohio Supreme Court.<sup>3</sup>

Though an action to contest a will is one of the most difficult to win even on the merits, many such cases have been lost on procedural grounds without ever having been tried on the merits. This may occur when a plaintiff commences such an action within the six months period but fails to join all necessary parties as required by Revised Code section 2741.02; then, six months after the will had been admitted to probate, a defendant successfully moves to dismiss the action because it was not properly commenced within the prescribed statutory period as set forth in Revised Code section 2741.09. The Ohio courts have repeatedly held that the right to contest a will in Ohio is statutory<sup>4</sup> and if plaintiff does not comply with the statutes the cause of action is lost and the court is without jurisdiction.<sup>5</sup>

Five categories of necessary parties are prescribed by Revised Code section 2741.02:

1. *Devisees*: those persons or classes of persons named or designated

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<sup>1</sup> "An action to contest a will or codicil shall be brought within six months after it has been admitted to probate. . . ." The deleted portion of the statute concerns the rights saved to persons under a legal disability; this saving clause will not be dealt with in this note. OHIO REV. CODE § 2741.09 (1953).

<sup>2</sup> "All the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to an action under section 2741.01 of the Revised Code." OHIO REV. CODE § 2741.02 (1953).

<sup>3</sup> *Fletcher v. First Nat'l Bank*, 167 Ohio St. 211, 147 N.E.2d 599 (1958).

<sup>4</sup> "The validity of a will can be contested only by a civil action brought pursuant to Section 12079 *et seq.*, General Code [OHIO REV. CODE § 2741.01 (1953)], after the admission of such will to probate." *Sager v. Hull*, 146 Ohio St. 448, 66 N.E.2d 629 (1946). For the history of proceedings to contest wills in Ohio see *Slemmons v. Toland*, 5 Ohio App. 201, 25 Ohio C.C.R. (n.s.) 485 (1916).

<sup>5</sup> "The provision of Section 12087, General Code [OHIO REV. CODE § 2741.09 (1953)], that 'an action to contest a will or codicil shall be brought within six months after it has been admitted to probate,' is not a mere time limitation on the commencement of such an action but imposes a condition to the existence of the right." Syllabus 2, *Woodruff v. Norvill*, 91 Ohio App. 251, 107 N.E.2d 911 (1951). See also *Donovan v. Decker*, 98 Ohio App. 183, 122 N.E.2d 501 (1953).

in the contested will as receiving real estate or an interest therein.<sup>6</sup>

2. *Legatees*: those persons or classes of persons named or designated in the contested will as receiving personalty.

Since a suit to contest a will cannot be commenced until the will has been admitted to probate,<sup>7</sup> there should ordinarily be no difficulty in ascertaining the devisees and legatees. However, some problems of identification may arise where a devise or bequest is made to persons designated but not named in the will, e.g., "to my grandchildren." Though plaintiff may be unable to ascertain the names and residences of some or all of these designated persons, they are nevertheless necessary parties under Revised Code section 2741.02 and must be joined as parties defendant and must be properly served. In such instances, where the names and residences of necessary parties are unknown, plaintiff may make them parties and have service by publication under the "unknown heirs statute."<sup>8</sup>

3. *Heirs*: those who will take under the statute of descent and distribution<sup>9</sup> if the contested will is found not to be the last will and testament of the decedent. If plaintiff should determine that heirs may exist, the names and residences of whom plaintiff is unable to ascertain, he must join such heirs as parties defendant and may have service by publication.<sup>10</sup>

4. *Other interested persons*: those persons "who, at the time of the commencement of an action to contest a will, have a direct, pecuniary interest in the estate of the putative testator, that would be impaired or defeated if the instrument admitted to probate were held invalid."<sup>11</sup>

<sup>6</sup> A devisee of a remainder is a necessary party defendant. *Seedy v. Cockley*, 14 Ohio C.C.R. (n.s.) 72 (1911).

<sup>7</sup> OHIO REV. CODE § 2741.01 (1953), "A person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest its validity by a civil action in the court of common pleas of the county in which such probate was had." See also *In re Estate of Frey*, 139 Ohio St. 354, 40 N.E.2d 145 (1942).

<sup>8</sup> In the principal case the court recognized the practice of using OHIO REV. CODE § 2703.24 (1953) when it said, "For some reason the contestants had not employed the usual procedure of obtaining service by publication on the decedent's 'unknown heirs,' as authorized by the provisions of Section 2703.24, Revised Code." OHIO REV. CODE § 2703.24 states, "When an heir or a devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him, and the court shall make an order respecting the publication of notice, but the order shall require not less than six weeks' publication."

<sup>9</sup> OHIO REV. CODE § 2105.06 (1953).

<sup>10</sup> The previous discussion of OHIO REV. CODE § 2703.24 (1953) in connection with devisees and legatees is also applicable to heirs.

<sup>11</sup> *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364 (1918). Though the court used this statement to describe the words "persons interested" as used in section 12079, General Code [OHIO REV. CODE § 2741.01 (1953)], it said, at 109, "the language of Section 12079 and 12080, General Code [OHIO REV. CODE §§ 2741.01 and 2741.02 (1953)], is substantially the same. In the former section

A beneficiary under a prior will is not a necessary party.<sup>12</sup> However, the following have been held to be necessary parties: children in being of the first donees in tail;<sup>13</sup> a grantee of a devisee who transfers his interest after the probate of the will;<sup>14</sup> trustees, even though they have failed to qualify as required by statute.<sup>15</sup>

5. *Executor or administrator*: the executor or administrator is a necessary party and should be described as such in the caption of the petition contesting the will.<sup>16</sup> This description should be repeated in the praecipe, summons and sheriff's return so that it is clear that defendant is being sued and served as executor or administrator and not as an individual. Also, an appropriate allegation of his appointment should be made in the body of the petition.<sup>17</sup>

If the executor or administrator is also a necessary party in his individual capacity under one of the other four categories, he must be named and designated in the caption of the petition in each capacity so that it is clear that he is being sued as if he were two separate persons. Each time his name is mentioned in the petition it should be followed by an appropriate designation *e.g.*, as executor or as a devisee. As an extra precaution, plaintiff should instruct the sheriff to serve the party twice, once for each capacity, and to indicate such service in his return.

If the foregoing procedure is followed and service of summons is properly had within the six months period, the action will have been properly commenced as to all necessary parties and the suit will not be subject to a motion to dismiss because of failure to comply with Revised Code sections 2741.02 and 2741.09. In certain situations, plaintiff may join a necessary party defendant but fail to have service of summons or plaintiff may fail to join one who is a necessary party. This does not necessarily mean that plaintiff has failed to comply with Revised Code sections 2741.02 and 2741.09 as interpreted by the Ohio courts for an action to contest a will is deemed to be commenced "as to each

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the words 'a person interested' are used. In the latter section, the words, 'other interested persons.' These words are identical in meaning." See also *Sears v. Stinehelfer*, 89 Ohio St. 163, 105 N.E. 1047 (1913); *Bloor v. Platt*, 78 Ohio St. 46, 84 N.E. 604 (1908).

<sup>12</sup> *Ryman v. Wood*, 15 Ohio Dec. N.P. 754, 2 Ohio L. Rep. 448 (1905).

<sup>13</sup> *Harris v. Maholm*, 20 Ohio N.P. (n.s.), 28 Ohio Dec. N.P. 228 (1918).

<sup>14</sup> *Sears v. Steinhelfer*, 89 Ohio St. 163, 105 N.E. 1047 (1913).

<sup>15</sup> *Martin v. Falcomer*, 10 Ohio Dec. Reprint 771, 23 Bull. 333 (1890).

<sup>16</sup> Syllabus 5, *Peters v. Moore*, 154 Ohio St. 177, 93 N.E.2d 683 (1950), "In such an action (will contest) the court is without jurisdiction unless the executor is made a party and a summons, duly followed by service, is issued within six months after the will has been admitted to probate. (*Draher v. Walters*, 130 Ohio St., 92, overruled as to that part of the syllabus relating to an executor; and paragraphs two and three of the syllabus in the cases of *McCord v. McCord*, 104 Ohio St., 274, approved and followed.)" See also *Bynner v. Jones*, 154 Ohio St. 184, 93 N.E.2d 687 (1950).

<sup>17</sup> *Mangan v. Hopkins*, 166 Ohio St. 41, 138 N.E.2d 872 (1956). This case cites *Peters v. Moore*, *supra* note 16, *Bynner v. Jones*, *supra* note 16.

defendant, at the date of summons which is served on him or a co-defendant who is a joint contractor, or otherwise united in interest . . . .” That Revised Code section 2305.17 is applicable to will contest cases, though once questioned, is now clearly settled.<sup>18</sup> The problem then arises as to which parties are “united in interest.” Generally speaking, “co-defendants are ‘united in interest’ within 11230, General Code,<sup>19</sup> only when they are similarly interested in and will be similarly affected by the determination of the issues involved in the action.”<sup>20</sup> Thus, where five grandchildren had been made parties defendant in a will contest action and were served within the time limited for the commencement of the action it was held that the five remaining grandchildren, though not made parties to the action or served with summonses, were united in interest with those who had been made parties defendant.<sup>21</sup> Similarly, it has been held that all legatee-devisee defendants are united in interest.<sup>22</sup> However, the following have been held not to be united in interest: sole beneficiary (who is not an heir at law) and testator’s heirs at law;<sup>23</sup> executors and heirs at law;<sup>24</sup> executors and devisees;<sup>25</sup> parties defendant who are interested in having the will set aside and codefendants who are interested in sustaining the will;<sup>26</sup> testamentary trustee and the administrator *de bonis non*.<sup>27</sup>

In conclusion, plaintiffs in will contest actions should make every effort to join all necessary parties and have service on each party within the prescribed six months period. It is a far more advisable practice to join and serve as parties defendant *all* interested persons than to rely upon the court’s finding that a necessary party is united in interest with one against whom the action was commenced. And even if plaintiff is certain that several parties would be found by the court to be united in interest, each should be joined and served so that plaintiff will not

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<sup>18</sup> “This court has repeatedly applied 11230 General Code [OHIO REV CODE § 2305.17 (1953)], to will contest cases.” *Gravier v. Gluth*, 163 Ohio St. 232, 126 N.E.2d 332 (1955). See also *Cover v. Hildebran*, 103 Ohio App. 413, 145 N.E.2d 850 (1957) citing *Gravier v. Gluth*, *supra*, where the court said, “The compelling fact remains that Section 2305.17 R.C. has been long and consistently applied and is still applied to will contests by the Supreme Court (of Ohio). . . .”

<sup>19</sup> Now OHIO REV. CODE § 2305.17 (1953).

<sup>20</sup> *Syllabus 2, McCord v. McCord*, 104 Ohio St. 274, 135 N.E. 548 (1922).

<sup>21</sup> *Carnicom v. Murphy*, 101 Ohio App. 416, 140 N.E.2d 3 (1956).

<sup>22</sup> *Wallenstein v. Wallenstein*, 30 Ohio Op. 96, 14 Ohio Supp. 61 (1943).

<sup>23</sup> *Case v. Smith*, 142 Ohio St. 95, 50 N.E.2d 142 (1943). See also *Staley v. Scheck*, 99 Ohio App. 242, 133 N.E.2d 189 (1955).

<sup>24</sup> *McCord v. McCord*, *supra* note 20. See also *Woodruff v. Norvill*, *supra* note 5.

<sup>25</sup> *McCord v. McCord*, *supra* note 20. See also *McKelvey v. McKelvey*, 90 Ohio App. 563, 107 N.E.2d 555 (1951).

<sup>26</sup> *Sours v. Shuler*, 42 Ohio App. 393, 181 N.E. 908 (1932).

<sup>27</sup> *Campbell v. Duncan*, 51 Ohio L. Abs. 257, 81 N.E.2d 238 (1948).

find it necessary at some later date to demonstrate to the court that these parties are united in interest.<sup>28</sup>

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<sup>28</sup> *Carnicom v. Murphy*, *supra* note 21, is a case in which plaintiff could have avoided the problem had all ten grandchildren been joined as parties defendant.