

# CONTESTING A WILL

## *Truly a contest of human will*

By Robert G. Palmer

Seneca, the Roman philosopher (4 B.C. – A.D. 65), knew all about what Willie Nelson tells us today – “I’m spending my children’s inheritance.” But Seneca explains why.

What madness it is for a man to starve himself to enrich his heir, and so turn a friend into an enemy! For his joy at your death will be proportioned to what you leave him.

For those whose level of joy is less than rapture, Ohio law provides an exclusive statutory remedy to contest a will admitted to probate.<sup>1</sup> A will admitted to probate is presumed to be valid. O.R.C. §2107.74; *Stischok v Stischok*, 01-LW-2519 (10th), decided June 28, 2001. A “person interested” under the will may sue.<sup>2</sup> The person must have a direct pecuniary interest.<sup>3</sup>

The civil action is brought in the probate court in which the will was admitted. It must be filed within three months of the notice that the will was admitted. If the plaintiff is under legal disability, it must be brought within four months after the disability is removed.<sup>4</sup> The estate must defend the will, for which the attorneys for the estate are paid from the estate’s assets – even if the will is declared a nullity.<sup>5</sup> Thus, one may not want to contest a will where the assets will be substantially depleted by paying the estate’s lawyers for all of their hard work defending the action.

The Ohio Rules of Civil Procedure apply.<sup>6</sup> Each party is entitled to a jury trial. The demand for a jury trial must be made pursuant to Rule 38, but waiver is modified by §2107.72(B)(1). For example, at trial if every one who appears agrees, the case can proceed without the previously demanded jury. Although summary judgment under Civil Rule 56 is possible, if a question of fact exists as to the validity of a will, it is inappropriate. *Stischok, supra*.

So, what’s it take to throw out a will? Strong evidence that the will was not properly executed, or that the testator lacked “testamentary capacity,” or that someone successfully exerted “undue influence” over the testator to give his property to someone the testator did not intend to receive the property. None of these tasks are for the faint at heart. As Seneca observed, passions run deep for the disinherited heir or scorned caregiver.

For proper execution, both subscription and attestation by the testator before two or more competent witnesses are essential.<sup>7</sup> Subscription is the physical act of affixing his signature. Attestation occurs when the witnesses hear the testator acknowledge his signature.<sup>8</sup> In *Stischok*, the testator’s lawyer claimed that only he signed as a witness in the presence of the testator, and then took it to his home for his wife to sign as the second witness outside of the testator’s presence. The lawyer claimed that the testator agreed with this procedure knowing from the lawyer that a will contest action might ensue. The testator, who was in his late 80’s, gave his residual estate to his end of life companion, also in her 80’s. The lawyer, who was in his late 80’s, claimed that this signing “procedure” was the same for not just one, but eight wills or codicils over several years that gave the residual estate to the companion. The lawyer also testified that he didn’t think the testator was being generous enough to his family and that his companion was a “golddigger.” Armed with this information, disgruntled heirs filed a will contest action. The residual beneficiary not only fought that case, but also sued the testator’s lawyer for legal malpractice.<sup>9</sup>

A testator needs to have testamentary capacity only at the time the will is executed. Thus, just because a person “goes in and out” of apparent lucidity, he is capable of making a valid will at that moment in time if he has sufficient mind and memory (1) to understand the nature of his business, (2) to comprehend generally the nature and extent of his property, (3)

to hold in his mind the names and identities of those who had natural claims upon his bounty, and (4) to be able to appreciate his relation to members of his family.

Thus, in a case where the testator develops Alzheimers disease, medical testimony becomes critical. With the differing opinions about the nature, extent and impact of this disease, a classic battle of expert testimony can easily result.

It is easy for a would-be heir to claim that someone seeking to gain personally, wrongly and unduly influenced the testator to write them into the will. Proving it, however, takes substantial evidence. You must show that (1) the testator was “susceptible” to being influenced, (2) another had the opportunity to exert undue influence, (3) improper influence was exerted or attempted, and (4) a result showing the effect of that influence. *Redman v Watch Tower Bible & Tract Soc. of Pennsylvania* (1994), 69 Ohio St.3d 98 ; *Kirschbaum v Dillon* (1991), 58 Ohio St.3d 58. With families scattered across America, non-family caregivers often are in positions of control and power not only of the assets during the testator’s life, but in directing the remaining assets to them after death. However, as in *Stischok*, the testator (who had no children or surviving spouse) expressly and repeatedly designated his end-of-life companion as the residual beneficiary of his estate.

The underlying legal premise for testamentary documents is that one should be able to give his property to whomever he wants. Those intentions should be honored and enforced. However, people being people, they sometimes are blindsided by the true feelings of their family member revealed by a will, sometimes get squeezed out by others who think they are more deserving, or sometimes get bad legal representation. If so, a will contest often results. So, if an Ohio “Anna Nicole Smith” calls, you best become very familiar with O.R.C. §2107.71-77 and the considerable case law. Your success will be driven by the facts that surface from the lengthy discovery you will need to undertake. But, of course, it all starts with Seneca.

<sup>1</sup> O.R.C. §2107-71 -77; *Corron v. Corron* (1988), 40 Ohio St.3d 75.

<sup>2</sup> O.R.C. §2107.71.

<sup>3</sup> O.R.C. §2107.73; *Bloor v Piatt* (1908), 78 Ohio St. 46.

<sup>4</sup> O.R.C. §2107.76.

<sup>5</sup> O.R.C. §2107.75; *Logeman v. Wagner* (1966), 7 Ohio App.2d 48.

<sup>6</sup> O.R.C. §2107.72.

<sup>7</sup> O.R.C. §2107.03.

<sup>8</sup> *Stischok, supra*.

<sup>9</sup> See, *Simon v Zipperstein* (1987), 32 Ohio St.3d 74. But see, *Sayyah v. Catrell* (2001), 143 Ohio St.3d 102; *Elam v. Hyatt Legal Serv. Inc.* (1985), 44 Ohio St.3d 175; *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453; *Brickman v. Doughty* (2000), 140 Ohio App.3d 494; *DePugh v. Sladoje* (1996), 111 Ohio App.3d 675; *Dukes v. Guyton*, 139 Ohio App.3d 395.



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