Cleveland State Law Review

Volume 6 | Issue 2 Article 19

1957

Wills Can Be Made Unbreakable

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Wills Can Be Made "Unbreakable"

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So Many Will Contest Cases have been filed in the courts in recent years that it almost seems that whenever a will provides for distribution other than in the manner in which the property would descend in the event of intestacy,[1] the probability of a will contest is present. Even though the testator is a layman, he is so conscious of this possibility that the attorney drawing the will is usually asked, "Will this will hold up?" and "Are you sure that the property will go in the manner I desire?" Whatever the form of the question, the answer must be that an action to contest a will can always be initiated by proper parties, if it is commenced within the time provided by statute.[2]

In Ohio, the right to contest is not even limited to those who are next of kin. For example, the right inures to beneficiaries under a prior will who are omitted in a subsequent will.[3] In proper circumstances, one who falls within the designation of beneficiaries in the commonly known "half and half" statute[4] also can bring a will contest action. In fact, Ohio courts have gone so far as to suggest that a creditor of an heir, who has obtained a lien by a levy on the property, which, in the absence of a will would go to the heir, may bring an action to contest a will.[5]

This article will suggest methods by which a client can be given added assurance that his desires will be fulfilled. There are two aspects to consider: first, those methods which we can employ prior to the death of the testator; and second, the precautions we should use in preparing the will.

A client during life, if competent, may give a part or a major portion of his estate to the object of his bounty by outright gift. Generally, this suggestion is quickly rejected by the client. Al-

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1 See Ohio G. C., Sec. 2105.06 as to intestate distribution.

2 Ohio R. C., Sec. 2107.23.

3 Caswell v. Lermann, 85 Ohio App. 200, 40 Ohio Op. 148, 88 N. E. 2d 405 (1948).

4 Ohio R. C., Sec. 2105.10.

5 Bloor v. Platt, 78 Ohio St. 46, 84 N. E. 604 (1908).

though he may wish to have certain persons receive his property after death, he does not want to give away any portion of his estate during life. The exception is the client who is wise enough to see the benefits of *estate planning*, and the tax savings that follow a proper gift program. But unless a client has a considerable estate and is wise enough to see the tax savings, advice as to a gift program usually falls on deaf ears.

Even the amendable revocable inter vivos trust does not offer the guaranteed protection desired by the testator when a surviving spouse remains.[6]

Joint accounts with right of survivorship, 'or' and 'P. O. D.' savings bonds in some cases afford adequate, but definitely limited protection.

If the client refuses to employ any form of gifts, we are faced with the problem of seeking other methods that will insure that his property passes in accordance with his wishes.

One way to accomplish this is to place the desired beneficiaries, during the lifetime of the testator, in such a position that in the event of an action to contest their interests under the will can be wholly or partially protected. In other words, such a plan places a person who would not otherwise inherit, in the category of a next-of-kin.

One way in which this can be accomplished, where the desired beneficiary is a minor, is by adoption with proper compliance with the statute.[7] This assures the intestate inheritance by the minor, even though he was previously a stranger by blood.[8]

But in the vast majority of cases adoption is not a practical solution. Generally this is because the natural parent or parents of a minor will not consent to giving him up for any dollar consideration; or else the desired beneficiary is not a minor and thus is not subject to adoption.

If these suggestions, with their limited scope of application, were the only possibilities for the protection of the desired beneficiary, certainly the horizon would be dark and dismal. However, in Ohio we have a statute, surprisingly rarely invoked, which affords a practical method for accomplishing the desired results. Its application is unlimited. Its protection is boundless. Its procedure is simple. And its liabilities are most limited.

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[6] Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N. E. 2d 381 (1944).

[7] Ohio R. C., Sec. 3107.03.

[8] Ibid., Sec. 3107.13.

If properly complied with, this statute affords such protection as no will can insure.

This statute is Revised Code Section 2105.15. Among other things, it provides for the *designation of an heir* as follows:

> "A person of sound mind and memory may appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person's acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law in the event of his death. Such declaration must be attested by the two disinterested persons and subscribed by the declarant. If satisfied that such declarant is of sound mind and memory and free from restraint, the judge thereupon shall enter that fact upon his journal and make a complete record of such proceedings. Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born. A certified copy of such record will be prima-facie evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud or undue influence. After a lapse of one year from the date of such designation, such declarant may have such designation vacated or changed by filing in said probate court an application to vacate or change such designation of heir; provided, that there is compliance with the procedure, conditions, and prerequisites required in the making of the original declaration."

Under the statute all that is required is that a person of sound mind and memory appear before the probate judge with two disinterested persons of the designator's acquaintance, and that he file an application in which he states that it is his own free and voluntary act, and that he specifically designate a person to stand in relation to him as an heir-at-law in the event of his death. The two disinterested persons attest. The court proceeds to find if the declarant is of sound mind and memory. After such finding, the court places this fact upon its journal.

Note that the statute provides, in part:

> "Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born."

It further provides, in part:

"A certified copy of such record will be prima-facie evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud or undue influence."

The designated heir thus need not be apprised of the action taken by the designator. The designator need give no notice to those who would normally become his heirs had there been no such designation.[9]

This statute only provides for "a person of sound mind and memory." The statute, in stating "Who may make a will," [10] requires "a person of full age, sound mind and memory." A question then arises: Is this an oversight on the part of the legislation, or may a minor designate an heir?

The statute for the designation of an heir, if utilized, thus provides protection against a will contest if the person designated is a beneficiary or one of the beneficiaries. It would be impossible for any contest to set aside such a beneficiary completely. Even if the will were set aside, the designated heir would still inherit as a child of the decedent. One possible exception would be wherein a prior will made after the designation of the heir is admitted to probate and the designated heir is disinherited.

However, it is possible that a designated heir will inherit nothing where the year's allowance[11] and exempted estate[12] of the decedent's surviving spouse consumes the entire estate of the decedent. Other than in such a situation, a designated heir always is protected.

A designated heir may be a minor as well as an adult.

The statute does not provide that the designation of an heir must be made in court. It merely requires that this action take place before the Probate Judge of the county of the designator. Early in the history of the statute, a designation was attacked on the grounds that it was not made in court, as the Probate Judge had gone to the designator's residence to hear the proceedings. The Supreme Court held that the statute, in saying "before the Probate Judge," meant anywhere in the county where he was judge, and not necessarily "before the court." [13]

Recently an article appeared in one of the Cleveland newspapers, stating that Judge Frank J. Merrick of the Probate

9 Davis v. Laws, 27 Ohio Nisi Prius (N. S.) 185 (1928).
10 Ohio R. C., Sec. 2107.02.
11 Ibid., Sec. 2117.20.
12 Ibid., Sec. 2115.13.
13 Bird v. Young, 56 Ohio St. 210, 46 N. E. 819 (1897).

Court of Cuyahoga County had gone to the home of a well-known and respected lawyer, who was physically disabled, for a designation. The lawyer designated as his heirs two strangers who for many years had showed to him loyalty and faithfulness. The judge accepted the designation at the residence, and it was spread upon the journal of the court in due form.

As in the case of adoption, there are certain limitations that apply to designated heirs. Ohio's Supreme Court has held that, even though the statute provides "The rules of inheritance shall be the same between him and the relations by blood of the declarant as if so born" (referring to a child born in lawful wedlock), he is not thereby fully equivalent to a natural child, and that the designee's rights of inheritance are only *from, but not through* the designator.[14]

It has further been held that the designation of an heir under Revised Code Section 2107.06 does not apply to a will which provides for invalidating a gift to a benevolent or religious institution if the testator dies within a year of its making and execution.[15]

The Designation-of-Heirs statute further provides that the designation may be set aside after a period of a year. With this in mind, let us explore the potentialities of the statute. Suppose that a client has no children, adopted children, or their lineal descendants. Her husband has predeceased her. She has one nephew, or a friend who has been most conscious of her welfare. She desires to insure that this particular person shall receive whatever estate she leaves upon her death. During her lifetime, she is not interested in establishing a gift program, being reluctant to do so perhaps because of the size of her estate. By conferring the designation of "heir" upon the party whom she wishes to be the major beneficiary of her bounty, she can leave specific and general bequests to others, and leave the residue of her estate to the declared heir. The effect of this statute thus appears to be a case of "all to gain and nothing to lose" for the testator.

If she should change her mind regarding the designated heir, without having voluntarily vacated the designation, an explana-

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14 Blackwell v. Bowman, 150 Ohio St. 34, 37 Ohio Op. 323, 80 N. E. 2d 493 (1948); Kirsheman v. Paulin, 155 Ohio St. 137, 44 Ohio Op. 134, 98 N. E. 2d 26 (1951).

15 Theobald v. Fugman, 64 Ohio St. 473, 60 N. E. 606 (1901).

tion in a properly drawn will, setting forth the reason for disinheriting the designated heir, will accomplish the same result. Now, if the designated heir files an action to contest, and such a suggested explanation by the designator (for her action in disinheriting the designated heir) is set forth in her will, it is highly improbable that the case will receive the sympathy of the jurors, even if permitted to go to the jury.

Aside from deterring will contests, the statutes providing for adoption and designation of an heir are also beneficial from the standpoint of inheritance taxes levied by the State of Ohio. A designated heir or adopted child has a $3,500 exemption, and the tax on his inheritance begins at 1%. A stranger has no exemption, and his tax rate starts at 7%. This fact is most important, for it may well be the "selling point" to a doubting client. The client has created no irrevocable obligation by making the designation, but on the other hand can partially "disinherit" the State of Ohio as a beneficiary. To illustrate, let us assume that there remains on hand for distribution $23,500. To a stranger, there would be a 7% Ohio Inheritance Tax, in the sum of $1645. A designated heir would pay a tax of but 1%, or $200, a saving of $1445.[16]

The designation of an heir may be set aside on the same grounds that are pleaded in an action to contest a will—i.e., that the designator was not of sound mind and memory, or was under restraint. However, to set aside the "designation of an heir" upon the death of a declarant, the act of the Probate Judge in granting the order is challenged. It is challenged in the same Probate Court and possibly before the same Probate Judge who made the order. It must then be shown that the Probate Judge granted the petition of a party who was either of unsound mind and memory or was under restraint. Needless to say, such cases are rarely brought, and when brought, are even more rarely successful.

In the case of *Horine v. Horine*[17] the decedent had designated one Laura McLear as her heir at law, in conformity with the statute.

An heir who was disinherited by this action (decedent evidently died intestate) filed an application to set aside the designation, on the grounds that because of decedent's advanced age and physical and mental condition she was not able to understand

[16] Ohio R. C., Secs. 5731.09, 5731.12.

[17] 16 Ohio Abs. 155 (1934).

the purpose and effect of her act, and further that it was not her free and voluntary act.

The Probate Court journalized an order setting aside the designation for the reason that the decedent was under undue influence at the time of the execution of the designation. The Court of Appeals affirmed, because no bill of exceptions was filed containing the evidence taken at the hearing in the Probate Court. This is one of the few cases in which the designation of an heir was set aside.

It is interesting and important to note that the action of a next of kin to set the designation aside is tried before the Probate Judge, and not before a jury, as in the case of an action to contest a will, and thus the designated heir is relieved of the oft-times emotional judgment of laymen.

Thus the benefits of Revised Code Section 2105.15 can be summarized as follows: In a case where there are no surviving spouse, children or adopted children, nor their lineal descendants, the designated heir will inherit all under the law of intestate succession. Hence, no next of kin by blood can file an action to contest the will, since he is not "an interested party" within the meaning of the statute.[18] The designator will still have the right to leave property by will to others in all or in part, or to disinherit the designated heir; and if it should be desirable after a year, may set aside the designation. So simple—so adequate—so protective. All this can be accomplished, plus the saving of big tax dollars.

It is thus shown that the possibilities of a will contest can be lessened or eliminated by the use of two statutes, i.e., one providing for adoption, and one providing for the designation of an heir.

There is still another statute to be touched upon only briefly because of its limited application. That is the statute providing for the legitimatizing of illegitimate children.[19] On October 14, 1953, the statute was amended to provide that, in addition to marrying the unwed mother of his child, and his thus acknowledging the child as legitimate, a natural father may file an application in Probate Court acknowledging that the illegitimate child as his. And if it is so found and journalized, the statute

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18 Ohio R. C., Sec. 2741.01.

19 Ibid., Sec. 2105.18.

provides "* * * such child shall be the child of the applicant as born to him in lawful wedlock."

Assume that we have a man who is married and who desires to leave an estate to his illegitimate child. Assume further that adoption or designation of an heir is not a practical procedure. He can, by an ex parte proceedings, file an application in the county in which the child resides, which might not be his residence, nor that of his wife. With little or no publicity and no witnesses, he can make the child both legitimate and an heir-at-law. In this situation, as in the situation of a designated heir or adopted child, his surviving spouse would accomplish nothing by a contest, because by electing to take under the law[20] she would take a half of the estate, plus a year's allowance, and use of the mansion house and her exempted estate. The illegitimate child, now legitimate, would inherit the remainder. However, had not the child been protected by being legitimatized, the surviving spouse could contest the will and, if successful, would inherit the entire estate.

Having considered how a testator can place a particular person in such a position that he will be protected in whole or in part even in the event of a will contest that should prove to be successful, we can proceed to examine possibilities for further insuring that a contest, if initiated, will be unsuccessful.

Attempts can be made to create a situation or situations where, upon the presentation of the contestant's case, the Court directs the jury to sustain the will,[21] or, in the event it goes to the jury, that their verdict will sustain the will.

The order of probate in a contest is prima-facie evidence of the attestation, execution and validity of the will or codicil.[22] Therefore, the evidence introduced by the contestant must be predominate and outweigh evidence produced by the contestee and the presumption of validity arising from the fact of probate.[23] How can we strengthen the proponent's case at the time when the will is being executed?

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20 Ibid., Sec. 2107.39.

21 Wagner v. Ziegler, 44 Ohio St. 59, 4 N. E. 705 (1886); Irwin v. Jacques, 71 Ohio St. 395, 73 N. E. 683 (1905); Clark v. McFarland, 99 Ohio St. 100, 124 N. E. 164 (1918); Andes v. Shippe, 165 Ohio St. 275, 135 N. E. 2d 396 (1956).

22 Ohio R. C., Sec. 2741.05.

23 Steinle v. Kester, 46 Ohio App. 245, 13 Ohio L. Abs. 497, 188 N. E. 395 (1932).

First, the witnesses to the will should be persons of unimpeachable character. They should have more than merely such a passing acquaintance with the testator as does an associate of the draftsman, merely introduced to the testator to witness the will and leave. The witnesses should be younger than the testator, so that in the normal course of events they will be alive to testify at the time of the testator's death.

It is a *must* that the attorney who drafts the will always shall act as one of the witnesses, so that in the event of a contest he can testify fully as to the conversation with the decedent and the incidents leading up to and surrounding the execution. Being a witness to the will, he is not barred by the attorney-client privilege statute,[24] for the courts have held that where an attorney is a witness to a will, the testator has impliedly waived the privilege.[25]

However, if the attorney who drafts the will is named as the executor or trustee, he should fortify himself in all cases by having a third witness, in order to place himself outside of the purview of the statute affecting witnesses who are legatees or devisees. It has been intimated by the Supreme Court of Ohio that the named executor has a beneficial interest in the will which disqualifies him from becoming a subscribing witness.

In all cases, the writer suggests that there be three witnesses to the will. Ofttimes there may be unnecessary delay in probating a will, where one of the two witnesses leaves the jurisdiction of the Court, or is dead. The will can be probated on the testimony of the two remaining witnesses, when three are used, with little loss of time or added expense. It has been suggested that the better practice is to take the testimony of all of the witnesses, or to have the reason why they have not been called entered on the record.[26] However this has not been the general practice in recent years in Ohio in the vast majority of the counties.

What further protection can be provided? Where the strong possibility of a contest existed, the writer has taken a tape recording of the entire circumstances surrounding the execution of a will.

To illustrate, here is a typical case. Our client, a successful doctor, ill but mentally alert, told the following story. While

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24 Ohio R. C., Sec. 2317.02.

25 Knepper v. Knepper, 103 Ohio St. 529, 134 N. E. 476 (1921).

26 Mosier v. Harmon, 29 Ohio St. 220 (1876).

going to medical school he met a young lady, married her and a son was born of that union.

Subsequently they were divorced, and the affections of his child were alienated through no fault of the doctor's, although he had made support payments even in excess of those directed by court order. Three years after his divorce, he married a nurse employed by him. A daughter was born of this marriage. The daughter studied nursing, was graduated, and became a registered nurse. His second wife died and his daughter then came to work for him. She subsequently married a young physician who eventually took over her father's practice after he retired. There were four grandchildren as the result of the daughter's marriage.

The first time that our client heard from his son by the first marriage was when the boy was 18 years of age and had some difficulty with the law. Now the doctor maintains that he hears from his son only when he requires financial assistance. The son has given him no love or respect, but instead has held him up to ridicule and disgrace. His daughter, son-in-law and grandchildren have given him peace and happiness. He has been told by his son that unless he receives a share of his father's estate equal to that received by his half-sister, the son will contest any will through the courts and, as he put it, "Let the lawyers get it all."

The doctor could not be interested in an inter vivos trust or gift program.

However, in making his will, the doctor wanted an absolute guarantee that his son could not successfully contest the will. He was told that this was impossible to guarantee any more than he could guarantee the results of an operation.

This was the procedure that was adopted. On the day that the will was to be executed, the doctor came into the office with two young physicians who were personally acquainted with him, but not with his son-in-law. A tape recorder was placed on the desk, and he was told that a recording of everything that was to happen in the room would be taken. Each of the witnesses and the elderly doctor identified himself, giving the date, the place and the location where they were sitting in the office. The doctor read aloud the will which had been prepared for him, containing an in terrorem clause which provided that if the son attempted to contest the will he was to receive no estate, and the gift made to him in the will would then go into the residuum to which the

daughter was named residuary legatee and devisee. Provisions of this type have been upheld, expressly, by the Ohio Supreme Court.[27]

The bequest to the son was in the sum of $25,000, which was about five per cent of the total holdings of the doctor.

After the doctor had read the will, he signed it, stating audibly that he was so doing, as did also the witnesses and the attorney. Then a discussion was had with the doctor, relative to the reason for the show of partiality between his two children. He stated that the reason for the unequal distribution was because of gifts previously made to his son, and also the fact that his daughter and her mother had been of great assistance in creating the estate and therefore merited the larger share. He also went into details concerning the difficulties that he had had with his son.

The witnesses were asked if they had left the room during the period in which the doctor had been speaking. They then acknowledged that they had not. They were asked if they had seen the doctor's daughter either in the room or in the office. They acknowledged that they had not. The latter question was to negate any claim of "undue influence" that might be made subsequently.

What was accomplished by this procedure? Assuming that the doctor lives many years, it is very possible that the witnesses, as well as the attorney, who also acted as a witness, might forget what had happened on the date of the execution of the will. On the application to probate the will, if they are called in to give their testimony in long form as provided by statute,[28] or at a hearing of the contest, if one is filed, their memories can be refreshed by playing the recording back to them. It is confidently felt that the sound of their own voices will bring to their minds a clear picture of what happened on that day. They will be able to testify with assurance as to the competency of the testator. Use of the recording to refresh their memories is possible and proper, under decisions which have permitted a stenographer to refresh her memory from her own notes.[29] In fact, the introduction of the recording itself into evidence is possible, according

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27 Bradford v. Bradford, 19 Ohio St. 546 (1869).

28 Ohio R. C., Sec. 2107.14.

29 John v. State, 31 Ohio Circ. Dec. 512, 16 Ohio Circ. Ct. (N. S.) 316 (1908).

to decisions of other states.[30] This will might well be the "test case" in Ohio.

The writer has often thought that sound movies might be made of the execution of a will, where the size of the estate and circumstances warranted such a precaution. Ohio has never ruled on whether such a movie would be admissible in evidence, but again, under decisions of other states, it could be.[31]

Generally, an attorney will not file an action to contest a will unless he is satisfied that the case has some merit.

In the instant case, I feel confident that if an attorney were seriously contemplating contesting the doctor's will, the playing of this recording might greatly diminish his intention to do so. At least it would not prejudice my case.

In the situation given above, the deterrent to the son's filing of a will contest was the terrorem clause. The bequest to the son was made large enough so that the son would think many times before he filed an action to contest; large enough so that no lawyer who was conscientiously representing the son would advise him that he should file a contest action unless reasonably assured of success.

An in terrorem clause properly used in a will can go far to discourage contests. However, in some cases it is not practical, because of the size of the estate or because of the antipathy or animosity of either the testator or the next of kin. On one hand, you may have a testator who unequivocably states that an heir is to get nothing, and on the other hand you may have a next of kin who will give up an inheritance "just to make trouble." These, however, are rare situations.

Situations alter facts. Many years ago an elderly woman with a large estate was under guardianship. She was an incompetent under the statute,[32] which provides in part:

> "*incompetent means any person who by reason of advanced age* * * * is incapable of taking care of himself or his property * * *."

She had six nieces and nephews. All, except one, showed her no consideration or affection. In fact, they had openly stated that under guardianship she could not make out a will, and that

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30 Anno., 168 A. L. R. 927.

31 People v. Hayes, 21 Calif. App. 2d 320, 71 P. 2d 321 (1937); Commonwealth v. Roller, 100 Penna. Super. 125.

32 Ohio R. C., Sec. 2111.01.

therefore they did not have to curry favor with her. One niece cared for her as if she were a child.

In Ohio, the mere fact that one is under guardianship does not deprive him of the power to make a will. The courts follow the general rule that, until the contrary is shown, every person making a will is presumed to be sane. However, when a person has been declared insane by a court of competent jurisdiction, and is under guardianship, the presumption of sanity is not only removed, but a presumption of insanity arises.[33]

A conference with the elderly woman's attorney made it apparent that the court which had appointed the guardian could not be asked to declare this favored niece a designated heir, and that thus a will was the only possible solution.

A will was prepared, containing an in terrorem clause providing for amounts for her other five nieces and nephews, large enough to make them hesitate to contest. The attorney who drafted the will witnessed it, along with two eminent psychiatrists who had spent considerable time with the testatrix prior to the execution of the will. Along with their signatures, they attached written findings as to her mental capacity.

The elderly woman died some five years ago. Curiosity made me check this case. The estate had been administered, distribution had been made, and no will contest had ever been filed.

It must be kept in mind that even the best precautions can be overdone, as is illustrated by a story purportedly involving the great Barnum. It is alleged that he was in a luncheon conference with a famous attorney in New York. Barnum told the attorney that he had a will which even the "famous attorney" could not possibly contest successfully. He told the attorney that he had taken a vacation at his summer home, accompanied by two psychiatrists, two friends who had known him for many years, two attorneys, and two gentlemen of good reputation who had never met him prior to this vacation. He stated that for two weeks they ate, fished, hunted, and lived together. On the last day of his vacation he had executed his will and had had the others witness it. Barnum ended by saying that, with this type of evidence, no jury would ever set the will aside. The attorney looked up and simply said, "I only hope that your disinherited next of kin come to me, because any person who would go to

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[33] Kennedy v. Walcott, 118 Ohio St. 442, 161 N. E. 336 (1928).

all that difficulty has established a prima facie case that he is crazy."

Countless wills in the past have been set aside because the courts were powerless to sustain the real wishes of the testator, due to lack of imagination in its execution, faulty wording of the will, or the effects of statutes. Fortunately, however, in recent years the legislature and the courts in Ohio have come a long way in assisting in carrying out testators' wishes. A close study of the statutes and of the procedures outlined herein may aid the attorney to draft testamentary instruments that, on one hand place a "Sword of Damocles" over the head of a disgruntled heir, causing him to hold his tongue, and on the other hand bring peace of mind to his client, resulting in a deep sense of satisfaction to the scrivener.

Having suggested the direction which may be followed, I hope that the ingenuity of the reader will carry him down those roads which lead to skillful and efficient construction of "unbreakable" wills.