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J. Quentin Wesley
University of Kentucky

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PROBATE OF WILLS IN KENTUCKY— JURISDICTION AND PROCEDURE

Jurisdiction to Probate

In Kentucky, as in most of the United States, probate jurisdiction has been vested in the county courts, primarily because they are readily accessible the year round.[1] The statute vesting jurisdiction to probate a will in the county court, KY. REV. STAT. 394.130, provides:

> No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled.

This statute, as interpreted by the Court of Appeals, gives literal meaning to the word "conclusive." In *Rogers* v. *Leahy*,[2] the court said,

> The above statute gives exclusive jurisdiction to the county court to determine whether an instrument purporting to be a will complies with the legal requirements for probate. . . . The court having jurisdiction of the question of the validity of the manner and form of execution of a will does not have exclusive jurisdiction to determine the validity of the provisions of a will. . . .[3]

The court went on to say that the probate court does not have exclusive jurisdiction to determine the question of its jurisdiction because the statute specifically provides that such a question may be inquired into in a collateral proceeding. But since the manner and form of execution of the will and the testamentary capacity of the testator are questions which must be determined by the county court before it probates a will, and since the statute provides that probate before the county court shall be conclusive except as to the jurisdiction of the court, neither the circuit court nor the Court of Appeals has jurisdiction to determine in a *collateral* proceeding the question of whether the will is void. A court has either original or appellate jurisdiction. If its jurisdiction is confined to a determination of questions on appeal, it has no authority to determine the question in an action originally instituted in it.[4] This was pointed out by the Court of Appeals in a decision in which it overruled a prior case[5] which had, in a collateral proceeding, held a will void, although it had been probated by the county court.[6] This position was reiterated in a recent case,[7] wherein it was said that an order of probate by a county court insofar as it determines the manner

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[1] ATKINSON, WILLS 483 (1952).
[2] 296 Ky. 44, 176 S.W. 2d 93 (1943).
[3] *Id.* at 46-47, 176 S.W. 2d at 95.
[4] *Ibid.*
[5] Gregory v. Oates, 92 Ky. 532, 18 S.W. 231 (1892).
[6] *Supra* note 3.
[7] Hensley v. O'Forest, 313 Ky. 789, 233 S.W. 2d 996 (1950).

and form of execution of a will is not subject to collateral attack. In that case an order of a county court erroneously admitting to probate an instrument which was not properly signed by the testator was held valid and not subject to collateral attack even though the court's error was flagrant, patent and shocking, and was known to the court at the time it entered the order.[8] Thus, it appears that an objection to the validity of the probate of a will in the county court, except on jurisdictional grounds, can be made only by direct appeal from the order of probate and the determination of the validity of the instrument by the probate court is conclusive until a final determination of that particular question has been made by appeal to the Court of Appeals.[9]

Residence of the testator: Residence of the testator is very important in the probate of a will and as to that the statute is explicit, stating:

> Wills shall be proved before, and admitted to record by, the county court of the testator's residence; if he had no known place of residence in this state, and land is devised, then in the county where the land or part thereof lies; if no land is devised, then in the county where he died, or where his estate or part thereof is, or where there is a debt or demand owing to him.[10]

If the will is probated in a county where the testator did not reside at the time of his death, the order of the county court probating the will is void for lack of jurisdiction and can be attacked either collaterally or directly.[11] Under this statute, a county court is without jurisdiction to probate the will of one who only temporarily resided in that county while his permanent residence was in another county.[12] "Residence," within the meaning of the statute, means "domicile" or "legal domicile," which is that place to which a man's rights and obligations are referred and by which his legal status, public and private, is determined.[13] It is submitted that this interpretation by the Court of Appeals only emphasizes the nebulous line drawn between residence and domicile. This line of demarcation is not usually drawn, and the court's use of the words interchangeably tends to be very confusing. Regardless of this, the court insists that the probate of a will by any county court other than that of the testator's "residence" is void.[14]

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[8] *Id.* at 795, 233 S.W. 2d at 999.

[9] Hensley v. O'Forest, 313 Ky. 789, 233 S.W. 2d 996 (1950); Midlow v. Ray's Adm'rs, 302 Ky. 471, 194 S.W. 2d 847 (1946); Reed v. Reed, 91 Ky. 267, 15 S.W. 525 (1891).

[10] KY. REV. STAT. 394.140 (1953).

[11] Johnson v. Harvey, 261 Ky. 522, 88 S.W. 2d 42 (1935).

[12] Ewing v. Ewing, 255 Ky. 27, 72 S.W. 2d 712 (1934).

[13] Hite Adm'r v. Hite Ex., 265 Ky. 783, 97 S.W. 2d 811 (1936).

[14] Ewing v. Ewing, 255 Ky. 27, 72 S.W. 2d 712 (1934); Johnson v. Harvey, 261 Ky. 522, 88 S.W. 2d 42 (1935); Green Ex'r v. Moore, 206 Ky. 724, 268 S.W. 337 (1925).

Where a testator died resident of Kentucky and there was an attempted probate of his will in Ohio, this action was held void under the statute.[15] It is also well settled that even though the factors necessary for federal jurisdiction exist, a federal court has no jurisdiction, either original or upon removal of a cause from a state court, over matters strictly or purely "probate."[16] This is not primarily because the court whose aid is invoked is a federal court, but because such matters are statutory and do not belong to the general equity jurisdiction under long established practice.

An additional limitation upon the right to probate a will, whether it be the will of a resident or non-resident of the state, is the statute of limitation providing that probate must be within ten years after the death of the testator.[17]

Appeals from Probate Courts

From the foregoing it can be discerned that jurisdiction as to probate is strictly confined to the county court. After probate other matters may arise that must be determined by a higher court, and in this connection time limitations and other factors must be considered. Surveying the statutory provisions it will be found that KY. REV. STAT. 394.240 specifies that:

> An appeal must be taken from the county court to the circuit court from every judgment admitting a will to record or rejecting it. A circuit court shall try both law and fact, unless a jury be required. The appeal to the circuit court shall be within five years after rendering the judgment of probate or rejection in the county court. The propounder of the will shall have the right to conclude the argument in the circuit court.

The appellate procedure provided for by this statute is exclusive. Thus, the county court, after probating or rejecting the will, has no jurisdiction to hear a motion to set aside the order or grant a new trial. The only remedy is by appeal to the circuit court.[18]

An appeal of a will contest will not be hampered by restrictive statutory provisions relative to methods and procedure followed generally in prosecuting an appeal from a county court to a circuit court.

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[15] Riggs v. Rankin's Ex'r, 268 Ky. 390, 105 S.W. 2d 167 (1937).

[16] Caesar v. Burgess, 103 F. 2d 503 (10th Cir. 1939).

[17] KY. REV. STAT. 394.150, 143.160 (1953); Hoagland v. Fish, 238 S.W. 2d 133 (Ky. 1951); Foster v. Jordan, 130 Ky. 445, 113 S.W. 490 (1908). See also Morrison v. Fletcher, 119 Ky. 488, 84 S.W. 548 (1905). Here the statute was not applicable to a legally probated will of a nonresident in another state. See also Mullins v. Fidelity and Deposit Co. of Baltimore, Md., 30 Ky. L. Rep. 1077, 100 S.W. 256 (1907).

[18] Patton v. Sallee, 159 Ky. 285, 166 S.W. 1004 (1914); Maynard v. Hatcher, 32 Ky. L. Rep. 720, 107 S.W. 241 (1908).

It seems that the courts have designated no particular mode of appeal but permit a practice sanctioned for many years wherein technical strictness is not required.[19] Although the court has been lax in certain instances, if the case comes within the statute it will adhere to the legislative intent.

Parties: The parties to an appeal may generally include anyone interested in the outcome of the will. A person entitled to inherit from the testator can appeal in his own name.[20] Of course, executors have a right to appeal. It has been held that a purchaser of land from an heir of the testator is a "person interested" and may appeal an order of the county court admitting a will to probate.[21] General creditors of an insolvent heir of a decedent, who claim that the debtor's conduct was spurious and fraudulent as to them, may also appeal where the debtor fails to prosecute such an appeal.[22] In such an appeal, the creditor stands in the shoes of the debtor, and therefore is limited to the latter's rights. No one can appeal, however, from a county court order, notwithstanding lack of knowledge of the probate, after five years.[23] On appeals from the circuit court the statute limits the parties to one year,[24] and the Court of Appeals has discretion to prescribe the course of argument.

In the recent case of *Herd* v. *Herd*[25] the procedure was rather unusual. The petition was in equity and all evidence was taken by deposition. Later, by agreement, the case was submitted to the circuit court from the probate court as a common law action to be tried without a jury. Unlike a true contest of a will, which is ordinarily tried *de novo* in circuit court, with the duty resting upon the propounder to prove proper execution,[26] the contestants assumed the entire burden of proving the instrument not to be decedent's will. The Court of Appeals in reversing stated that: "The exclusive mode of reviewing the probate of a will in the county court is by an appeal to the circuit court, and the statute declares the judge shall try questions both of law and fact unless a jury be required; and, further, that 'The same effect shall be given to the verdict of a jury in a will case as is given to the verdict of a jury in other cases.' "[27] The court concluded that it

[19] Combs v. Wooton, 239 S.W. 2d 981 (Ky. 1951) (here "liberality" was expressed by the court); Henry v. Spurlin, 277 Ky. 114, 125 S.W. 2d 922 (1934).
[20] Security Trust Co. v. Swope, 274 Ky. 99, 118 S.W. 2d 200 (1938).
[21] Foster v. Jordan, 130 Ky. 445, 113 S.W. 490 (1908).
[22] Brooks v. Paine's Ex'rs, 123 Ky. 271, 90 S.W. 600 (1906).
[23] Moore v. Stovall, 309 Ky. 562, 218 S.W. 2d 385 (1949); Crain v. Crain, 268 Ky. 262, 104 S.W. 2d 992 (1937).
[24] KY. REV. STAT. 394.290 (1953).
[25] 293 Ky. 258, 168 S.W. 2d 762 (1943).
[26] Speshiots et al v. Coclanes et al., 311 Ky. 547, 224 S.W. 2d 653 (1949).
[27] 293 Ky. 258 at 270, 168 S.W. 2d 762 at 768.

was clear that had the case been tried with a jury, the evidence would have required an instruction against the contestants, and that since the evidence was insufficient to support the verdict, there must be a retrial. The parties in attempting to submit the case to the circuit court without the intervention of a jury elected to treat the proceeding as a will contest and thereby brought the case within the above statute dealing with findings of fact, and for this reason the court gave effect to the exclusive method prescribed by the statute.

Under KY. REV. STAT. 418.045[28] a party may ask for a declaration of his rights under a will, deed or other instrument of writing. Although KY. REV. STAT. 418.040, in authorizing a declaration of rights provides for "plaintiff" only, KY. REV. STAT. 418.045 gives "any person interested" the right to petition for a declaration of rights under a will, deed, or other written instrument. These statutes were construed by the Court of Appeals in a recent case.[29] There, in an action for the settlement of a decedent's estate and for the construction of a will, it was held that the defendants, by counterclaim, could properly ask for a declaration of rights under a writing purporting to settle all disputes as to construction of the will. Although KY. REV. STAT. 419.040 refers to "plaintiffs," KY. REV. STAT. 418.045 refers to "any person interested," and therefore the court held that the defendants could properly ask for a declaration of rights in their counterclaim, but because the appeal was not filed within sixty days the action was dismissed. In another case, where a widow sought a declaration of her rights under a will, the court passed upon her rights in respect to some questions and reserved a decision in respect to others. On appeal this action was held not to be an abuse of discretion, for her rights under the will were not prejudiced.[30]

Conclusion

The function of a court in probating a will is to fill the void created by the death of the testator, and to dispose of the property as he would have disposed of it if living. The functions of the probate court are both ministerial and judicial. By reason of its closeness to the people the probate court is enabled to administer these duties without the aid of commissioners, referees, etc., who would be required by ordinary courts of law and equity. Thus the probate courts were established by legislative enactment apart and distinct from other branches of the law. Consequently there has been a rapid development of probate law,

[28] Formerly sec. 639 a (2) of the KY. CIVIL CODE OF PROCEDURE (1948).
[29] Greenwell v. Terra Nova, 314 Ky. 631, 236 S.W. 2d 883 (1951).
[30] Miller's Ex'rs v. Miller et al., 310 Ky. 721, 221 S.W. 2d 654 (1949).

distinct from the jurisdiction exercised by the courts of general jurisdiction. In probate the procedure is more lax than in other fields of law and the statutes are loosely construed. Strictness and technical meaning are not always followed where method and procedure are concerned. It is submitted by the writer that due to the peculiar nature of probate this is a desirable situation.

J. QUENTIN WESLEY

SUBSTITUTIONAL CONSTRUCTION AS PERTAINING TO DIE WITHOUT ISSUE

In *Howard* v. *Reynolds*[1] testator apparently drafted his own will and in very informal language provided for his farm to go to his son Ellis. He further directed that Ellis should pay a share to another son within three years and then should borrow money against the land in order to pay two additional shares to persons named in the will. Testator also placed a fair value of four thousand dollars on each share and then wrote: ". . . if any heir was to die without *leving* [sic.] an *air* [sic.] his part should go to the other heirs." A declaratory judgment action was filed for a construction of the will and the chancellor held that Ellis took a fee simple interest in the land subject to equitable liens in favor of the other named persons in the amount of four thousand dollars a share. He also held that there should be no defeasance of these interests upon the death of Ellis without issue surviving him. The Court of Appeals of Kentucky affirmed the chancellor's holding and in its opinion held that the phrase "die without heirs" created defeasible interests which would be divested *only* if death without issue occurred before the death of the testator. Thus, since the devisee and the legatees survived the testator, the former took a fee simple absolute interest in the land subject to equitable liens in the legatees.

When used in a will to designate a condition of defeasance, the meaning of the phrase "die without issue" or its equivalent is clearly a matter of construction. The two possible meanings are: (1) the testator intended the condition to be death without issue at any time, or (2) he intended it to be only death without issue prior to his death. If the latter meaning is adopted, the theory of construction is that the testator merely intended for the second devisee or legatee to be substituted for the first devisee or legatee in order to prevent a lapse should the first taker die without issue before the will takes effect.

[1] 261 S.W. 2d 815 (1953).