3-1-1950

The Probate of Wills in Pennsylvania

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Recommended Citation
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A will is the legal declaration of one's intentions to be carried out after his death. It is said to be ambulatory, that is having no fixed condition until after the death of the maker. Meanwhile it is revocable by the maker at any time. It is the death of the maker without having revoked the will that gives it legal significance. From the standpoint of property rights the will at death acts as a transfer or conveyance of such rights from the decedent to designated living persons. These phenomena are called testamentary dispositions, an instance under our law of posthumous existence of the decedent in the person of an individual called the executor, named in the will for the purpose of continuing or projecting into time the persona of the dead. As our law recognizes the right of private property and its transferability during life through the media of assignments, conveyances, transfers and other legal devices, so the law goes a step further and permits testamentary dispositions as socially desirable. To carry out these desirable ends within certain legal limitations, machinery is set up to execute the testamentary wishes. In Pennsylvania this machinery is found in the Register of Wills and the Orphans' Court. Each of these tribunals has a part in seeing to it that the will of the decedent is precisely determined and then carried out. The Register exercises certain judicial functions as well as ministerial ones and is a county officer as provided by Article XIV, Section 1 of the Pennsylvania Constitution of 1874. The Orphans' Court is a court of record likewise established by the Constitution under Article V Section 1, and Section 26 of the same article prohibits the General Assembly from creating other courts to exercise the powers vested by this Constitution in the judges of the Courts of Common Pleas and Orphans' Court.

Register of Wills.

The office of register is found in the very genesis of the Pennsylvania Colony and its history is curious and interesting. In this office the will is first considered and determined in a proceeding of probate and upon this determination the wishes of the decedent, called the testator, are formally adjudicated and entered of record. Letters testamentary are then issued by the register to the executor named in the

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1 Zell's Estate, 329 Pa. 312, 198 A. 76 (1938); *Hutton on Wills*.
2 Eyster's Estate, 5 Watts, 133 (Pa. 1836); Rowland v. Evans, 6 Pa. 435 (1847); *Scott—Intestate Law of Pa.*
will, these letters being the warrant of authority that this individual is the personal representative of the decedent to carry out the will and to administer the estate according to law. Briefly the functions of the register are (a) to probate wills, (b) to issue letters, (c) to receive and advertise accounts of fiduciaries and (d) to collect death transfer taxes.

The register and the Orphans' Court are statutory creations and have no common law jurisdiction. The register is regulated by the Register of Wills Act of 1917 and the Fiduciaries Act of 1949.

**Probate.**

The probate and issuance of letters are successive and practically simultaneous acts by the register and pursuant to a petition in writing addressed to him, generally by the executor as petitioner, and follows a form prescribed by law the blanks of which are obtainable at the register's office. The first page of the prescribed form embodies the statutory requirements as to allegations of death, residence at time of death of testator and kindred matters, closing with a prayer for probate and issuance of letters. The second page contains the affidavit of witnesses concerning the genuineness of the will and finally the decree of probate by the register.

It is to be noted the statutes do not provide specifically for the filing of a written petition where the probate of the will alone is desired, viz., without the issuance of letters.

Most probate proceedings are ex parte and informal for the reason, usually, that there is general acquiescence by the parties interested. The other situations are the contested cases.

**Proofs.**

The Acts of 1705, 1833, 1917 and 1947 pertaining to wills in Pennsylvania have all prescribed that "the legal declaration" as offered be proved by the oaths or affirmations of two or more competent witnesses and as the Act of 1917 phrased it, "otherwise to be of no effect."

The present act requires subscribing witnesses in two instances, viz., signing by mark and signing by another, making this an innovation, except as once required in a gift to charity.

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5 Fiduciaries Act of 1917, Sec. 2(d) as amended; Sec. 303 Act of 1949, Report of Commission, p. 22.
6 HUTTON ON WILLS, p. 364 and comments.
8 For discussions as to Sections 2 and 4 of present act, see BREGY, WILLS ACT, p. 2301 and following.
Aside from the intricacies of proving the wills of incapacitated persons and the reconciliation of the two sections just cited, it is noteworthy that the law specifies the will as the subject of proof and not the signature alone.9

However, if the paper propounded is obviously testamentary in character, the rule of res ipsa loquitur applies and proof of the signature is sufficient.

Witnesses to a will, other than subscribing witnesses, are of two kinds: (1) persons who were actually present and saw the testator execute his will, (2) persons who were not present at the execution but are qualified to express an opinion as to the genuineness of the signature of testator. It may be noted that those testifying in the first class do so as to their sense perceptions, viz., what they observed, perceived and discerned, whereas, in the second class, the witnesses testify as to opinions alone. If testamentary capacity is at issue, both classes may testify, but again the first class testifies as to facts derived from sense perceptions, the second class as to opinions. The two witness rule is of prime importance in matters of proof.10 Another feature is that of presumptions, dispensing at least primarily with the proving of full age, testamentary capacity and absence of fraud and undue influence, and allowing a paper obviously a will to be proved in the first instance by establishing the genuineness of testator’s signature.11

The importance of subscribing witnesses, even though not required, is apparent in the early cases.12 Paxson, J. explained:

"The signature of a subscribing witness to an ordinary instrument of writing implies nothing more than the instrument was signed by the person whose act or deed it purports to be. It is not so in the case of a subscribing witness to a will. His attestation is an assertion not only that the will was signed by the testator, but of the further fact that the testator was of sound mind when he executed it."13

This feature is of added importance where the witnesses sign a fully descriptive attestation clause and one or both witnesses predecease testator.14

Caveat.

Caveat, let him beware, is a notice given by a party in interest to the register not to probate a will or not to grant letters until the caveator has been heard. It has the effect of a stop order and assures all parties in interest an opportunity to be heard before action is taken by the register. Section 20 of the Register of Wills Act of 191715 stipulates that within ten days after the filing of such caveat a bond

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9 Execution of Wills, 47 Dick. L. Rev. 72 (1942).
10 See note 8, supra; 47 Dick. L. Rev. 72 (1942).
11 Hutton on Wills, p. 71-72.
12 Hays v. Harden, 6 Pa. 409 (1847); idem, 9 Pa. 151 (1848).
13 Egbert v. Egbert, 78 Pa. 326 (1875); called the "court's witnesses," Whitaker's Estate, 10 W. N. C. 139 (1881); Plot's Estate, 335 Pa. 81, 5 A.2d 901 (1939).
14 Breyg, Wills Act, explaining the proofs generally under Sec. 2 of Wills Act of 1947 and subsections (2) and (3) providing for signing by incapacitated persons and the connection with Section 4.
for costs must be filed with the register by the caveator otherwise the caveat will be considered as abandoned and shall be dismissed.

This procedure is only applicable to forestall action by the register. If, however, the register has acted before the caveat has been filed, then the parties aggrieved have their remedy by appeal to the Orphans’ Court from the register’s action within two years from the decree of probate.

Section 17 of the same act\textsuperscript{16} points out the importance of a caveat couched in specific terms alleging as “the ground thereof any matter of fact touching the validity of such writing” by providing for the framing of an issue to be tried in the Common Pleas Court of the respective county upon the precept of the register “at the request of any person interested.” The register is not compelled to issue the precept for such trial and cannot do so unless a person in interest so requests where the specific caveat has been filed. But the action of the register in so granting the issue is appealable to the Orphans’ Court and if the appeal is prompt will defeat the register’s action.\textsuperscript{17}

So far the procedure is thus summarized. (1) The will is offered, together with proofs, in an ex parte proceeding, no caveat having been filed. The register either probates or refuses to probate. Any party in interest may appeal from the register’s decision to the Orphans’ Court within two years. (2) A caveat is filed either with specific reasons or without. A hearing is held by the register on the petition for probate (a) the will is admitted to probate, (b) probate is refused, (c) an issue is granted, (d) issue is refused.

In any of the situations outlined in (1) and (2) the party aggrieved by the register’s decision may appeal within the time specified to the Orphans’ Court.\textsuperscript{18}

Certification.

Another move at any time in proceedings of probate before the register may occur whereby on petition by the register or any party interested, the Orphans’ Court may order the register to certify the entire record to said court. The latter then determines, instead of the register, what shall be done in the premises with the same effect as though the register had already acted and an appeal had been taken from his decision. This certification is under Section 18 of the Register of Wills Act of 1917.\textsuperscript{19} Under this section the court may act or refuse to act. The certification may likewise be made at the instance of the register solely under the terms of Section 19 of the same act,\textsuperscript{20} the latter section differing from the former, (1) in that matters in dispute may be more extensive, (2) there has been

\textsuperscript{16} 20 P. S. 1961.
\textsuperscript{17} Griffith’s Estate, 276 Pa. 277, 120 A. 143 (1923) per Simpson, J., explaining Sections 17, 18 and 21(a) of Register of Wills Act of 1917.
\textsuperscript{18} Section 21(a) of the Register of Wills Act of June 7, 1917, P. L. 415, 20 P. S. 2005.
\textsuperscript{19} P. L. 415, 20 P. S. 1981.
no action for precept to the Common Pleas, (3) the move is by the register alone, not by petition but by actual certification of the entire record. Procedure under this section is within the discretion of the register.21

**Appeals.**

The register of wills, as already observed, is a judicial officer and the Orphans’ Court by statute is the appellate court in which appeals from the judicial acts of the register must be lodged. Section 21(a) of the Register of Wills Act of 191722 gives a period of two years for appeal from the judicial acts of the register but by proviso to the section the period may be shortened by citation to six months from the date of such citation.

The failure to take an appeal within the prescribed time makes the probate conclusive unless an attack is made later and allowed by the court on account of fraud practiced upon the register in the probate proceeding.23

Another form of attack after the expiration of two years from probate is the lack of jurisdiction. In both fraud and lack of jurisdiction attack may be either direct or collateral. In Culbertson’s Estate, supra, the attack was direct whereas in the curious case of Wall v. Wall24 the attack was collateral. The importance of safeguarding rights by appeal from the register’s decision is also illustrated in Freer’s Estate25 where the court held the husband was precluded from attacking the jurisdiction of the register in probating the will after the lapse of two years from the decree without appeal, the contention of the husband being that his wife was a resident at the time of her decease of County Y, whereas in the will the decedent declared she was a resident of County X, and it was in that county that the probate proceedings took place.

**Petition.**

The formal appeal from the register’s decree is filed in the latter’s office by the appellant and is allowed in course upon the posting of the bond required by Section 20(a) of the Register of Wills Act of 1917. This bond is in the sum determined by the register and the parties on the bond must be approved by him.26

Upon the perfection of the appeal the register certifies the entire record over to the Orphans’ Court under his hand and seal of office. The next step is taken by the appellant who files in the Orphans’ Court his petition, setting forth in paragraphs all of the facts pertaining to the matter and relevant to his contention, also naming all of the parties in interest with their addresses and closing with

21 *Hutton On Will*, p. 374.
the appropriate prayer for relief, and that the court issue a citation upon all parties in interest to show cause why the relief prayed for should not be granted.

The relief may be (1) that the matters in controversy be heard and determined by the court, or (2) that the court grant an issue devisavit vel non whereby the matters in controversy may be tried by jury. The petition being ordered marked filed, the court will further order a citation to issue upon all parties in interest as named in the petition, consequently it is important that care be taken in drafting the petition to name all parties having any interest in the controversy. The law defines the interest as a pecuniary one. The order of the court awarding the citation will name a day certain for its return, not less than ten days after the issuing thereof.27

The citation as prepared by the Clerk of the Orphans' Court may then be placed in the hands of the Sheriff or any other fit person for service.

As stated in Gangloff's Estate, supra, the petition being the first step in the proceedings, the second one the award of the citation and the third may be a motion on the part of certain ones as named in the petition to quash the citation because of some fatal defects in form. Careful practice requires therefore a supervision by counsel in the preparation of the citation. Again, the petition may be attacked as insufficient for the reason that it merely states conclusions, whereas it should set forth clearly the facts relied upon.28

In Lave's Estate,29 Stearne, J. pointed out that the pleadings in will contests consist of petition, answer and replication.

Upon the close of the pleadings and the matters being at issue the court will later set a day for hearing at which time the parties present their proofs. Let it be assumed at this point that the petition is for the granting of issues to be tried by a jury.

Preliminary Hearing.

The hearing as set is termed preliminary as it is for the purpose of informing the court whether the issue d.v.n. should be awarded.

Section 20 (e) (1) of the Orphans' Court Act of June 7, 1917, P. L. 363, is as follows:30

"On appeal from the decision of any register of wills, or in proceedings removed from any register of wills by certification, the orphans' court shall hear the testimony de novo, unless all parties appearing in the proceedings shall agree that the case shall be heard on the testimony

27 Orphans' Court Act, June 7, 1917, P. L. 363, Section 17(a), 20 P. S. 2331. The citation is a form of process and is the equivalent of an original writ. Petition of Schoble, 43 D. & C. 459 (1942); Gangloff's Estate, 42 D. & C. 666 (1941).
28 See Notes of Decisions, 20 P. S. 2331, for helpful suggestions in cases as cited.
30 20 P. S. 2561.
taken before such register: Provided, That, in all cases, the court shall have power to require the production before it, for examination, of the witnesses already examined, or of any other witnesses."

Section 20(e) 2 of the same Act reads as follows:

"The testimony of all witnesses examined in any cause litigated before any orphans' court on appeal from any register of wills, or on removal from any register of wills by certification, shall be taken in writing and made a part of the proceedings therein; upon which testimony the court having jurisdiction of such cause by appeal may affirm, reverse, alter, or modify the decree of the orphans' court."

**Order of Proofs.**

It was explained in Sznabl's Estate that in a preliminary hearing the proponents of the will first proceed and that it is sufficient for them to offer in evidence the register's record of probate as certified showing the will to have been duly admitted to probate. Whereupon, proponents may rest and the burden of going forward and dislodging the prima facie case of proponents shifts to the contestants. If no testimony is offered by contestants and there is only the record of probate in evidence and this is not impeached, it must be accepted as conclusive. At the hearing contestants may call or cross examine subscribing witnesses without being bound by their testimony. If the will has been refused probate by the register and the proponents are the appellants, the same order prevails in presenting the proofs, viz., the proponents prove the will by the usual procedure, offer the same in evidence and then rest, the burden of coming forward with evidence to dislodge the prima facie case shifting to the contestants as before. The hearing is de novo and the evidence as taken before the register, if there was any, can be followed or admitted as may be agreed upon. The burden of coming forward with evidence shifts from time to time but the burden of establishing the issue as to the will is always upon the proponents. This order of proof applies to a trial of the issue d.v.n. as well as in the preliminary hearing, but the object of the latter is merely to determine whether an issue should be awarded and may be very quickly determined by the court if the objective of the hearing is kept clearly in mind.

**Judicial Function.**

As pointed out by Stearne, J. in Lare's Estate the court must necessarily dispose of the application in one of three ways: (1) grant the issue, (2) refuse the issue, and sustain the will, or (3) refuse the issue and declare the will invalid.

Section 21(b) of the Orphans' Court Act of June 7, 1917, P. L. 363 provides:

81 20 P. S. 2562.  
82 335 Pa. 89, 6 A.2d 267 (1939); 20 P. S. 2561; Plott's Estate, 335 Pa. 81, 5 A.2d 901 (1939); Geho's Estate, 340 Pa. 412, 17 A.2d 342 (1941).  
83 332 Pa. 323, 42 A.2d 801 (1945).  
84 20 P. S. 2585.
"Whenever a dispute upon a matter of fact arises before any orphans' court, on appeal from any register of wills, or on removal from any register of wills by certification, the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas of the county for the trial thereof . . ."

By judicial interpolation the statute is made to read, "Whenever a substantial dispute upon a material matter of fact arises, etc." which interpolation has created differences of view by the judges as is illustrated in the several opinions in the Lare case. This difference of view is well epitomized in the following portion of the opinion of Stearne, J. in this case:

"The difference in opinion in this Court concerns the scope of the authority of a hearing judge in the orphans' court as to when he should grant or refuse an issue devisavit vel non. The majority have decided that the exclusive function of such hearing judge is to determine whether there exists a substantial dispute of fact. The minority view is that the hearing judge may conclude, despite the testimony, that he would not support a verdict of a jury and therefore no substantial dispute exists.

"To my mind whatever confusion appears is largely due to inapt and unfortunate expressions in some of the cases. It particularly appears in cases where the orphans' court has been required to determine whether or not the dispute is substantial. It is also apparent in defining the function of a trial judge with a jury, where, under the cases, such judge acts as a chancellor."

If the hearing judge determines from the evidence as presented by both sides that a substantial dispute is present concerning material facts in the controversy, the issue as prayed for will be awarded. Such an order is merely interlocutory and is not therefore appealable and the case will be sent to a jury under the law now existing and tried before either the court of common pleas or the orphans' court as provided by the Act of July 1, 1937, P. L. 2665.

On the contrary, if the issue is refused this is a final order and is appealable to the appropriate appellate court.

Issue d.v.n.

In any study of this particular sub-topic, the case of Re Cross' Estate is preeminent, wherein Moschzisker, C. J. reviews this entire subject and points out when such an issue is mandatory and when advisory, and formulated the following rules for the guidance of the profession:
"Rule 1. The orphans' court has power of its own volition to send any issue of fact to the common pleas.

Rule 2. Where a substantial dispute exists on a material point of fact concerning the status of an alleged will or testamentary writing, and the evidence is of the probative value required by the decisions, the orphans' court must send such issue to the common pleas when requested so to do by any party in interest, if that request is made in due season.

Rule 3. After judgment entered on the verdict in the common pleas, so long as the judgment stands undisturbed, the findings of fact by the jury of that tribunal are conclusive on the orphans' court, (a) whenever the issue is of the class mentioned in Rule 2—whether sent to the common pleas on request or otherwise,—or (b) when it involves a decision of a fact upon which depends the jurisdiction of the orphans' court.

Rule 4. When the issue is in neither of the classes mentioned in Rule 3, and merely involves facts as to which the tribunal sending it desires advice, the result in the common pleas is not conclusive in any sense, but, when the judgment on the verdict is not appealed from, if followed by the orphans' court, the Supreme Court may consider the findings of the jury as acquiesced in by appellant.

Rule 5. In cases falling within Rule 3, the date of the entry of the judgment in the common pleas marks the time from which the six-months period for taking an appeal runs, while, in cases within Rule 4, the date of the final decree in the orphans' court marks the date from which the judgment on the issue in the common pleas becomes final for purposes of appeal.

Rule 6. In the class of cases covered by Rule 4, where the verdict is not binding, the refusal of an issue will not be reviewed on appeal; but when the issue is granted, and the facts found thereon are adopted as the basis of a final decree by the orphans' court, the party thus aggrieved may appeal from such decree and at the same time appeal from the judgment of the common pleas on the feigned issue.

Rule 7. The refusal of an issue in cases covered by Rule 2, will be reviewed on appeal when the record shows, by evidence of the probative value required by the decisions, that a substantial dispute on a material question of fact exists, but not otherwise."

(Continued in June Issue)