[Cite as *Mastro v. Glavan*, 2011-Ohio-3628.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

SHARON MASTRO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2010-A-0044
- vs -	:	
JANE GLAVAN, EXECUTRIX OF THE ESTATE OF NORMAN J. HANSLIK,	:	
et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Probate Division, Case No. 2010 CV 005.

Judgment: Affirmed.

John W. Hickey, 3794 Pearl Road, Cleveland, OH 44109, and *Valentine Schrowliew*, The Marion Building, 1276 West Third Street, #411, Cleveland, OH 44113 (For Plaintiff-Appellant).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, #4-F, Concord, OH 44060 (For Appellee-Jane Glavan).

Russell J. Meraglio and *Franklin C. Malemud*, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115 (For Appellee-Cleveland Clinic Foundation).

Martha Van Hoy Asseff, Dinsmore & Shohl, L.L.P., 191 West Nationwide Boulevard, #300, Columbus, OH 43215 (For Appellee-American Cancer Society).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Sharon Mastro, appeals the Judgment of the Ashtabula County Court of Common Pleas, Probate Division, granting summary judgment in favor

of defendants-appellees, Jane Glavan (Executrix of the Estate of Norman J. Hanslik), the Cleveland Clinic Foundation, and the American Cancer Society, in an action to contest the will of decedent, Norman Hanslik. Mastro contends the application of Ohio's noncomplying will statute, R.C. 2107.24, to Hanslik's will violates the prohibition against retroactive laws, contained in Article II, Section 28 of the Ohio Constitution. For the following reasons, we reject Mastro's argument and affirm the decision of the court below.

{¶2} On or about March 18, 2009, Mastro's half-brother, Norman Hanslik, died.

{¶3} On April 9, 2009, Glavan moved the Lake County Probate Court to admit the Last Will and Testament of Norman Hanslik and for appointment as fiduciary of the Estate.

{¶4} Hanslik's Will provided, in relevant part, as follows:

> **{¶5}** I, NORMAN J. HANSLIK, of the Township of Concord, County of Lake, State of Ohio *** do publish this, my Last Will and Testament, revoking all others heretofore made by me.
>
> **ITEM I**
>
> **{¶6}** I specifically make no provision for my half sister, SHARON MASTRO of Wadsworth, Ohio. It is my will that she shall be deprived of any interest whatsoever in property that I may own at the time of my death.
>
> **ITEM II**
>
> **{¶7}** I give, devise and bequeath my entire estate ***, as follows: fifty percent (50%) to the American Cancer Society ***; and fifty percent (50%) to the Cleveland Clinic Foundation ***.
>
> **ITEM III**
>
> **{¶8}** I nominate and appoint JANE GLAVAN of Concord Township, Ohio, Executrix of this, my Last Will and Testament ***.
>
> **{¶9}** IN WITNESS WHEREOF, I have hereunto signed my name and acknowledged and published this instrument ***, as my Last Will and Testament, in the presence of the undersigned witnesses, on this 11th day of May, 2004.

{¶10} The following appears after Hanslik's signature:

> **{¶11}** We hereby certify that NORMAN J. HANSLIK, the testator named in the foregoing instrument of writing, subscribed his name thereto on this day in our presence and to us declared the same to be his Last Will and Testament; that we subscribe our names hereto as witnesses in the presence of each other; and that, at the time of the execution of the instrument as aforesaid and of our subscribing the same as witnesses, the testator was of sound and disposing mind, to the best of our knowledge, information and belief.

{¶12} Subscribed to this declaration was the signature of Tracey A. Gockel. A second signature line prepared for Connie Jo Aquila was left unsigned.

{¶13} As presented for admission, Hanslik's Will failed to comply with the statutory requirements for a last will and testament, specifically, "[t]he will shall *** be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature." R.C. 2107.03.

{¶14} Thus, Glavan sought admission of Hanslik's Will pursuant to R.C. 2107.24 ("An Act *** to provide a procedure for a probate court to treat a document as a will notwithstanding its noncompliance with the statutory formalities for executing wills"), which provides:

> **{¶15}** (A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:
>
> **{¶16}** (1) The decedent prepared the document or caused the document to be prepared.
>
> **{¶17}** (2) The decedent signed the document and intended the document to constitute the decedent's will.
>
> **{¶18}** (3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of

> this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

{¶19} In support of the Will's admission, Glavan submitted the affidavits of Tracey Gockel and Connie Jo Aquila, both attesting that they witnessed Hanslik sign his Last Will and Testament.

{¶20} The matter was heard before a magistrate of the probate court, who determined that "Hanslik caused the document dated May 11, 2004, to be prepared and personally signed it with the full intention that it act as his last will and testament, and that Mr. Hanslik further signed it in a conscious presence of both Tracey Gockel, and Connie Jo Aquila."

{¶21} On November 30, 2009, the probate court issued a Judgment Entry admitting Hanslik's Will to probate. Mastro filed a Notice of Appeal from the Judgment. This court dismissed the appeal for lack of a final order. *In re Estate of Hanslik*, 11th Dist. No. 2009-A-0056, 2010-Ohio-1490.

{¶22} On March 1, 2010, Mastro filed a Complaint to Contest Alleged Last Will and Testament of Norman J. Hanslik in the Lake County Probate Court. Mastro asserted that, upon the death of her half-brother, Hanslik, she became "vested in the assets of his Estate." The "repair statute," R.C. 2107.24, became effective on July 20, 2006, and could not be applied retroactively to Hanslik's Will, defectively executed on May 11, 2004. Such application would defeat her "reasonable expectation of finality and the disposition of his Estate," and would violate Article II, Section 28 of the Ohio Constitution.

{¶23} Glavan, the Cleveland Clinic Foundation, and the American Cancer Society moved for summary judgment.

{¶24} On August 19, 2010, the probate court issued a Judgment Entry, granting the Motions for Summary Judgment.

{¶25} On September 15, 2010, Mastro filed her Notice of Appeal. On appeal, Mastro raises the following assignments of error:

{¶26} "[1.] The Probate Court erred in not conceding that Norman Hanslik died intestate."

{¶27} "[2.] Since Norman Hanslik had no valid will at the moment of his death, should his 'intent' as expressed by that 'will' be relevant?"

{¶28} "[3.] The Probate Court erred in finding that Sharon Mastro, the half-sister of Norman Hanslik, had no vested interest in his estate at the moment of his death."

{¶29} "[4.] The probate court erred in not recognizing that an application of ORC 2107.24 serves to divest Sharon Mastro of her vested interest in Norman Hanslik's estate."

{¶30} "[5.] Since ORC 1.48 presumes a statute to be prospective in its application 'unless expressly made retrospective,' the Probate Court erred in disregarding the fact that ORC 2107.24 can only apply to future decedents' estates with 'wills' executed after its promulgation. Furthermore, the Probate Court failed to recognize the conflict between ORC 2107.24, on [the] one hand, and ORC 2107.084 and ORC 2107.26, on the other, which forces ORC 2107.24 to only apply to future wills."

{¶31} "[6.] Even if ORC 2107.24 is found to be *explicitly* retroactive, it is impermissibly retroactive in that it takes away or impairs (divests) Sharon Mastro's right under the Statute of Descent and Distribution to inherit the property of Norman Hanslik. The Probate Court erred in overlooking such impermissible retroactivity."

{¶32} "[7.] Even if one claims that Sharon Mastro had no vested right (as did the Probate Court) does she or individuals like her 'still ha[ve] a reasonable expectation of finality.' Finally, the Probate Court erred in failing to recognize that it is possible under certain scenarios for ORC 2107.24 to 'impair[] the obligation of contracts' under Article II Section 28 of the Ohio Constitution."

{¶33} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty*. (1993), 87 Ohio App.3d 704, 711 (citation omitted).

{¶34} Mastro's assignments of error may be considered collectively. Essentially, Mastro contends that R.C. 2107.24 may not be applied to cure the defect in the execution of Hanslik's Last Will and Testament.[1] Mastro relies principally upon Article II, Section 28 of the Ohio Constitution, which provides: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may,

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1. The probate court's determination in the estate case (Case No. 2009 ES 221) that the requirements for admission of the document purporting to be Hanslik's Will pursuant to R.C. 2701.24 were satisfied has not been challenged in the present will contest action.

by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

{¶35} Typically, the first step in analyzing whether a statute is unconstitutionally retroactive is "to determine whether the General Assembly expressly intended the statute to apply retroactively." *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 2000-Ohio-451; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, at paragraph one of the syllabus, citing R.C. 1.48 ("[a] statute is presumed to be prospective in its operation unless expressly made retrospective").

{¶36} The section notes for R.C. 2107.24 state the statute "appl[ies] to estates of decedents who die on or after the effective date of this act." Thus, it is the legislature's stated intention, and the holding of this court, that R.C. 2107.24 is prospective in its application to documents admitted to probate as wills on or after July 20, 2006.

{¶37} The determination that the statute applies prospectively does not end our analysis with respect to the retroactivity clause of the Ohio Constitution. "[E]ven with statutes that apply prospectively, [the Ohio Supreme Court] has shown the willingness to also address claims of retroactivity" in particular circumstances. *State v. Adkins*, __ Ohio St.3d __, 2011-Ohio-3141, at ¶14. The Supreme Court has recognized that a law may be described as having a retroactive (or retrospective) effect if it is "made to affect acts or facts occurring, or rights accruing, before it came into force." *Bielat*, 87 Ohio St.3d at 353, quoting Black's Law Dictionary (6 Ed.1990) 1317. Thus, "the constitutional limitation against retroactive laws 'include[s] a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing

so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws.'" *Adkins*, 2011-Ohio-3141, at ¶14 (citations omitted).

{¶38} In the present case, the prospective application of R.C. 2107.24 to Hanslik's Estate does not operate retroactively to divest Mastro of any vested interest in that Estate. The following discussion demonstrates that R.C. 2107.24 is not retroactive in either its application or effect, by establishing that (1) R.C. 2107.24 is a remedial, curative law such as the Ohio Constitution expressly recognizes, (2) Mastro did not have a vested interest in Hanslik's Estate prior to or at the time of his death, and, (3) by the operation of R.C. 2107.24, Hanslik did not die intestate.

{¶39} The analysis of a statute's potential retroactive effect requires a court to determine "whether that statute is substantive or merely remedial." *Van Fossen*, 36 Ohio St.3d 100, at paragraph three of the syllabus. "A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right." *State v. Cook*, 83 Ohio St.3d 404, 411, 1998-Ohio-291, citing *Van Fossen*, 36 Ohio St.3d at 107. "Conversely, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." Id. "A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively." Id.

{¶40} The Ohio Supreme Court has recognized a specific type of remedial legislation denominated a "curative" law, based on the language of Section 28 expressly authorizing the General Assembly to enact legislation that "cur[es] omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state." The Supreme Court "recognized that curative acts are a valid

form of retrospective, remedial legislation when it held that 'in the exercise of its plenary powers, the legislature *** could cure and render valid, by remedial retrospective statutes, that which it could have authorized in the first instance." *Bielat*, 87 Ohio St.3d at 355-356, quoting *Burgett v. Norris* (1874), 25 Ohio St. 308, 317.

{¶41} Ohio's noncomplying will statute, R.C. 2107.24, is the sort of curative law expressly sanctioned in Section 28, Article II of the Ohio Constitution. The statute provides the cure of a defect in Hanslik's Will arising out of its failure to conform to the statutory requirements for executing a will. "There is no right of succession to the property of a decedent except to the extent that such right is created by statute." *Bauman v. Hogue* (1953), 160 Ohio St. 296, 300; *In re Estate of Millward* (1956), 102 Ohio App. 469, 474 ("[t]he enactment of laws permitting inheritance and regulating the status of individuals in respect to their right to inherit property falls within the powers of the Legislature, and, when they do not affect vested rights (as they do not here), cannot be said to be unconstitutional"). Inasmuch as the right of succession to a decedent's property was created by legislative enactment, the terms of that succession may be modified by legislative enactment. *Kluever v. Cleveland Trust Co.* (1962), 173 Ohio St. 177, 179 ("[t]he right to inherit property as well as the right to transmit property to heirs is purely a statutory right in Ohio subject to control by the General Assembly").

{¶42} Mastro contends that she had a vested interest as an heir at law in Hanslik's Estate upon her brother's death, as there was no valid will at the time of death. In other words, until the probate court approved Hanslik's Will in accord with R.C. 2107.24, he was intestate. Accordingly, the application of R.C. 2107.24 divested her of her interest in his Estate. Mastro's arguments are unavailing.

{¶43} Mastro is correct that "[t]he rights of the heir vest, *eo instanti*, with the death of the ancestor." *Jones v. Robinson* (1867), 17 Ohio St. 171, 180. Although "the rights of the heir may depend entirely upon statutory enactments, and require to be, in some sense, upheld by the statute, yet, after the right has distinctly vested it will not be affected, either by a repeal or alteration of existing statutory provisions." Id. From this, it is evident that the application of R.C. 2107.24 did not retroactively divest Mastro of any interest in Hanslik's estate. The statute was enacted prior to Hanslik's death and, thus, prior to the vesting of any potential interest in his Estate. The concession that her rights vested at the time of Hanslik's death undermines her claim that those rights were divested retroactively. Cf. *Ostrander v. Preece* (1935), 129 Ohio St. 625, 632 ("[a]n heir apparent, therefore, has no vested right in the estate of his ancestor prior to the latter's death, and consequently no vested property rights therein," and "[l]egislation dealing with estates of persons who die after its effective date does not deal with vested rights"); *Bielat*, 87 Ohio St.3d at 358 ("[b]ecause [the spouse's] asserted 'rights' as an expectant beneficiary of [the decedent's] estate did not vest until his death in 1996, her claim that the 1993 Act retroactively impaired her vested rights is untenable").

{¶44} In the present case, moreover, Mastro's rights cannot be said to have vested even at the time of Hanslik's death. "The same principle," regarding the rights of the heir, "is applicable to wills." *Jones*, 17 Ohio St. at 180; *Corron v. Corron* (1988), 40 Ohio St.3d 75, at paragraph two of the syllabus ("[a] will is ambulatory in nature, and until the death of the testator, and until the law admits such instrument to probate, it gives no accrued rights to the potential takers of benefit"). "The validity of the will must be determined by the law in force at the time it became operative, *i.e.*, at the death of the testator." *Jones*, 17 Ohio St. at 180. "Subsequent legislation cannot vest in a

supposed devisee an estate which the testator failed to give, and which, on his decease, passed to the heirs freed of any valid testamentary disposition; for, if this could be done, it would be *** taking the property of one person without his consent, and giving it to another." Id. "[B]efore a will can be made available as evidence, it is generally required to be admitted to probate ***; but when so admitted to probate and record, it relates back to the death of the testator, and takes effect from that time." Id.; cf. *Long v. Long*, 11th Dist. No. 2007-T-0047, 2007-Ohio-5909, at ¶¶32-33 ("[t]he title of the real estate devised vests immediately in the devisees upon the probate of the will, and relates back to the time of the death of the testator" whereas "[t]he title of *** personal property passes by the will to the executor, as trustee, for the benefit of the creditors, legatees, and distributees, and, after the payment of the debts of the estate, the executor, as trustee, may *** deliver the remaining personal property to those entitled by the will to receive it, thus vesting the legal as well as the beneficial ownership in the distributees") (citation omitted).

{¶45} The principle that the admission of a will to probate, and, in particular, a document purporting to be a will admitted pursuant to R.C. 2107.24, validates the execution of the instrument is codified in R.C. Chapter 2107.

{¶46} "On the trial of any will contest under section 2107.71 of the Revised Code, the order of probate is prima-facie evidence of the attestation, execution, and validity of the will or codicil." R.C. 2107.74. Accordingly, the admission of a will to probate establishes a rebuttable presumption of the validity of the will and its execution. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 64. Moreover, "[t]he contents of the will established under section 2107.24 of the Revised Code shall be as effectual for all purposes as if the document treated as a will had satisfied all of the requirements of

section 2107.03 of the Revised Code and had been admitted to probate and record." R.C. 2107.27(C). These statutes provide no grounds for the proposition that Hanslik was, in effect, intestate until the admission of his purported Will.

{¶47} The fact that R.C. 2107.24 governed the admission of Hanslik's purported Will to probate and that the admission to probate relates back to the date of Hanslik's death means that Mastro acquired no interest in the Estate upon his death pursuant to Ohio's laws for descent and distribution. Her contention that Hanslik was, in effect, intestate until the admission of the purported Will is incorrect.

{¶48} Finally, Mastro contends that the application of R.C. 2107.24 could impair the operation of contracts, such as an agreement to make a particular will or devise made during the decedent's lifetime. Cf. R.C. 2107.04. Mastro has conceded, however, that Hanslik did not enter any pre-existing agreements to make or not make a will. Thus, she has no standing to raise this argument. *Kent v. Fuster*, 11th Dist. No. 2003-P-0070, 2004-Ohio-3994, at ¶26, fn. 4, citing *Cty. Court of Ulster Cty. v. Allen* (1979), 442 U.S. 140, 155 ("[a]s a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations").

{¶49} In sum, the probate court did not err by failing to find that Hanslik died intestate as the admission of the purported Will to probate related back to the date of Hanslik's death (assignments of error one and two). Thus, Mastro did not have or acquire a vested interest in the Estate at the time of Hanslik's death and the application of R.C. 2107.24 did not divest her of any interest (assignments of error three, four, and six). The application of R.C. 2107.24 to admit the document purported to be Hanslik's Will to probate was a prospective application since Hanslik died subsequent to the law

taking effect (assignments of error five and seven). The assignments of error are without merit.

{¶50} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, Probate Division, granting summary judgment in favor of Glavan, the Cleveland Clinic Foundation, and the American Cancer Society, and confirming the validity of the admission of Hanslik's purported Will, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.