

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

MILDRED FRINKLEY,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2004-P-0022
RICK MEEKER,	:	
Defendant-Appellee.	:	

Civil appeal from the Court of Common Pleas, Probate Division, Case No. 2003 CV 2.

Judgment: Affirmed.

Timothy R. Thomas, 206-B South Meridian Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

Howard T. Welser, Jr., 11 South River Street, P.O. Box 396, Kent, OH 44240 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{¶1} This is an accelerated calendar case, submitted to this court on the record and the parties' appellate briefs. Appellant, Mildred Frinkley ("Mildred"), appeals the judgment entered by the Portage County Court of Common Pleas, Probate Division. The probate court entered judgment as a matter of law in favor of appellee, Rick Meeker ("Meeker").

{¶2} The following facts are undisputed and were relied upon in the trial court's judgment entry. Mildred was married to Boyd Frinkley ("Boyd"). In 1996, Boyd died. Boyd left a will, which was admitted to probate in case No. 1997 ES 383. The will provided a life-estate interest to Mildred in the marital residence located in Kent, Ohio. Mildred was allowed to live in the residence rent-free; however, she was responsible for paying the property taxes and maintaining the property. The remaining ownership interest in the residence was given to a trust. Rick Meeker is Boyd's grand-nephew and was designated as the trustee of the trust. Mildred did not file an election to take against the will.

{¶3} In 2003, Mildred filed the instant declaratory judgment action, seeking the trial court to rule that she had a right to purchase the house from the trust, with an offset for her statutory allowance. The parties agreed to waive an evidentiary hearing and submit the matter to the magistrate for a determination of the legal issues. The magistrate found that Mildred was not entitled to purchase the house with the statutory offset. Mildred filed objections to the magistrate's decision pursuant to Civ.R. 53. The trial court overruled her objections, adopted the decision of the magistrate, and entered judgment in favor of Meeker.

{¶4} Mildred raises one assignment of error:

{¶5} "The trial court erred by ruling that appellant was barred from use of the support allowance and her right to purchase the mansion house."

{¶6} Mildred sought to exercise her rights pursuant to certain provisions of R.C. 2106.01, et. seq., including R.C. 2106.13 and 2106.16.

{¶7} R.C. 2106.05 provides:

{¶8} “If a surviving spouse elects to take under the will, the surviving spouse shall be barred of all right to an intestate share of the property passing under the will and shall take under the will alone, unless it plainly appears from the will that the provision for the surviving spouse was intended to be in addition to an intestate share. An election to take under the will does not bar the right of the surviving spouse to an intestate share of that portion of the estate as to which the decedent dies intestate. *Unless the will expressly otherwise directs*, an election to take under the will does not bar the right of the surviving spouse to remain in the mansion house, and does not bar the right of the surviving spouse to receive the allowance for the support provided by section 2106.13 of the Revised Code.” (Emphasis added.)

{¶9} The trial court’s judgment entry suggests that the trial court reviewed certain portions of the record in the original probate action, including a copy of Boyd’s will. A trial court may not take judicial notice of other proceedings.¹ This is true even if the same parties were parties to the prior proceeding.² “The rationale for this holding is that, if a trial court takes judicial notice of a prior proceeding, the appellate court cannot review whether the trial court properly interpreted the prior case because the record of the prior case is not before the appellate court.”³

{¶10} The trial court erred by reviewing material outside the record. However, for the reasons that follow, we affirm the ultimate judgment of the trial court.

{¶11} In this action, there is no copy of the will in the record. This was a declaratory judgment action and, like any civil action, the burden of proof was on the

1. *Dombelek v. Ohio Bur. of Workers’ Comp.*, 154 Ohio App.3d 338, 2003-Ohio-5151, at ¶26, citing *Calex Corp. v. United Steelworkers of Am.* (2000), 137 Ohio App.3d 74, 85; See, also, *State v. Raymundo* (Aug. 18, 1995), 11th Dist. No. 94-T-5025, 1995 Ohio App. LEXIS 3395, at *8.

2. *State v. Raymundo*, at *8.

plaintiff.⁴ Without a copy of the will properly before the trial court, Mildred failed to meet her burden of proving that the will did not expressly bar her from receiving her additional statutory support allowance.

{¶12} In addition to not having a proper record of the factual matters, it appears this action was untimely. R.C. 2106.16 provides that an application to purchase the mansion house must be filed within one month of the approval of the inventory of the estate. Failure to file the application within this deadline nullifies the election of the property.⁵ Similarly, R.C. 2106.10(B) provides that an election to take the mansion house must be made at or before the time of the final accounting.

{¶13} The trial court did not specifically find that Mildred's action was untimely. However, the trial court noted that Mildred had been living in the residence "some seven and one-half" years since Boyd's death, rent-free. In general, Ohio law favors the expeditious resolution of estates.⁶ It appears Mildred filed this action several years after the death of her husband and the resolution of his estate.

{¶14} Since Mildred failed to meet her evidentiary burden and it appears this action was untimely, the ultimate judgment of the trial court in favor of Meeker is correct.

{¶15} Mildred's assignment of error is without merit.

{¶16} The judgment of the trial court is affirmed.

DONALD R. FORD, P.J.,

JUDITH A. CHRISTLEY, J.,

3. *Dombelek v. Ohio Bur. of Workers' Comp.*, 2003-Ohio-5151, at ¶26, quoting *D & B Immobilization Corp. v. Dues* (1997), 122 Ohio App.3d 50, 53.

4. *Easely v. Thompson* (Oct. 18, 1996), 11th Dist. No. 96-P-0105, 1996 Ohio App. LEXIS 4604, at *8-9.

5. R.C. 2106.16; See, also, *In re Estate of Hrabnicky* (1958), 167 Ohio St. 507, 510.

concur.

6. See, e.g., R.C. 2106.01, et. seq.; R.C. 2117.06.