[Cite as *Tomasik v. Tomasik*, 2004-Ohio-5558.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

GERALD TOMASIK, et al.	C.A. No. 21980
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
THOMAS TOMASIK, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. 2003 CV 145

DECISION AND JOURNAL ENTRY

Dated: October 20, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶1} Appellants in this will contest case have appealed from an order of the Summit County Court of Common Pleas, Probate Division, which dismissed their claim as untimely and barred by the statute of limitations. This Court reverses.

I

{¶2} Upon the death of Hedwig M. Jurkoshek, her last will and testament was admitted to probate. A Certificate of Service of Notice of Probate of Will ("Notice") was filed on May 2, 2003. In her will she designated certain parties as devisees and legatees, and those parties now constitute the nine Appellees to this action. Absent from this will were five people who had been devisees or legatees

in a previous will, and who represent the Appellants in this action. Appellants' substantive complaint was that this latest version of the will had been executed by the deceased after she was deemed incompetent.

{¶3} On August 28, 2003, Appellants filed an action to contest this will, to which Appellees responded with a motion to dismiss based on the statute of limitations. The probate court held that the applicable statute of limitations was three months from the filing of the Notice, pursuant to R.C. 2107.76. This three month period ended August 2, 2003. Therefore the probate court ruled that Appellants' August 28, 2003 will contest complaint was filed too late and granted the motion to dismiss. Appellants have timely appealed, asserting a single assignment of error.

II

Assignment of Error No. 1

"THE TRIAL COURT ERRED BY DETERMINING THAT R.C. 2107.76 CONTAINS THE APPLICABLE STATUTE OF LIMITATIONS AS TO THE CLAIM BROUGHT BY APPELLANTS AND THEREBY, GRANTING APPELLEES' MOTION TO DISMISS."

{¶4} Appellants have contended that the plain meaning of the statute omits Appellants from its requirements, meaning that they are not subject to the three month statute of limitations and therefore the trial court improperly dismissed the claim. We agree.

{¶5} When called upon to interpret a statute:

> "'the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.'" *State v. Hairston* (1998), 101 Ohio St.3d 308, 309-10, quoting *Slingluff v. Weaver* (1902), 66 Ohio St. 621, paragraph two of the syllabus.

Thus, absent some ambiguity, we must apply the meaning of the statute as written.

{¶6} The legislature has enacted a specific statute of limitations for will contest actions as R.C. 2107.76:

> "No person who has received or waived the right to receive the notice of the admission of a will to probate required by section 2107.19 of the Revised Code may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than three months after the filing of the certificate described in division (A)(3) of section 2107.19 of the Revised Code. A person under any legal disability nevertheless may commence an action *** within four months after the disability is removed ***."

Thus, we look to R.C. 2107.19 to delimit the group of persons who must receive the notice as required, and find that it consists of three categories: (1) the surviving spouse, (2) those who would inherit intestate, and (3) those named in the will. Appellants have averred, and the probate court found, that they are not such persons. Therefore, Appellants have concluded that they are not subject to R.C. 2107.76 and their claim is not barred by that statute of limitations. Based on the plain language of the statute, we agree.

{¶7} Appellees have contended that the legislature could not have intended to so limit the coverage, and that such an outcome is against public policy and

contrary to reason. With this we must also agree. A statute of limitations cuts off the rights of otherwise proper parties to an action, for public policy purposes. See *Liddell v. SCA Services of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 10. It would seem illogical to limit the spouse, heirs and devisees to bringing suit within three months, while placing no limit on any and all other contestants, effectively allowing them to contest the will at some immeasurable time, far into the future.

{¶8} Therefore, although R.C. 2107.76 is plain and clear in its language, it appears far from clear in its theory, and warrants some explanation. On review, the legislative history of this amendment suggests that the enacted version, with its vast gap in coverage, is likely the result of legislative error or oversight during the amending process. The pre-amendment version was identical to the current version, but for a four month limitations period and an additional sentence:

> "No person who has received or waived the right to receive the notice of the admission of a will to probate required by section 2107.19 of the Revised Code may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than *four* months after the filing of the certificate described in division (A)(3) of section 2107.19 of the Revised Code. *No other person may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than four months after the initial filing of a certificate described in division (A)(3) of section 2107.19 of the Revised Code.* A person under any legal disability nevertheless may commence an action *** within four months after the disability is removed ***." (Emphasis added.) R.C. 2107.76, repealed eff. Dec. 31, 2001.

When the amendment was sent to the House of Representatives, the amended version removed from the first sentence the designation of certain persons (i.e., those required to receive the Notice), making the four month limitation apply

equally to all persons. This change rendered the second sentence duplicative and unnecessary, so it was deleted accordingly. As stated in the House Bill Analysis report:

> "Under the bill, no person (the bill removes the phrase "who has received or waived the right to receive the notice of the admission of a will to probate . . .") may commence an action to contest the validity of the will more than four months after the filing of the certificate of giving notice or waiver of notice. The bill repeals the provision that *no other person may commence an action to contest the validity of the will more than four months after the initial filing of a certificate of giving notice or waiver of notice.*" (Emphasis in original.) HR Bill Analysis, 124th Leg., 2001 Ohio Sess. Law HB 85.

This version was passed by the House and sent to the Senate on April 3, 2001. 2001 Bill Tracking OH H.B. 85. However, when the bill left the Senate Committee and was brought to the Senate for a vote, it was in its current version. Ohio Senate Comm. Report on OH H.B. 85. The principal change was from four to three months. However, for purposes of the discussion herein, the critical change was that the first sentence still contained the phrase "who has received or waived the right to receive the notice of the admission of a will to probate" while the second sentence had been deleted.

{¶9} Therefore, by failing to change the first sentence, yet still deleting the second, this enacted version does not impose a limitations period on persons other than those designated in the three specific categories of R.C. 2107.19. Appellants are exactly the type of contestant that the prior version would have addressed as "other persons" and who are overlooked by the revised version. Although it was

likely an unintended consequence, according to the plain language of the statute, this limitations period does not apply to these Appellants.

{¶10} Appellants' sole assignment of error is well taken.

III

{¶11} Appellant's sole assignment of error is sustained. The judgment of the trial court is reversed and remanded for an order consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

BETH WHITMORE
FOR THE COURT

SLABY, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

MICHAEL A. PARTLOW, Attorney at Law, 623 West St. Clair, Cleveland, Ohio 44113, for Appellants.

THOMAS TOMASIK, 4122 South Andes Way, Aurora, Colorado 80013, Appellee.

STEPHEN A. FALLIS, Attorney at Law, 19 North High Street, Akron, Ohio 44308, for Executor, Thomas T. Mullen.

STEPHEN M. HAMMERSMITH, Attorney at Law, 50 South Main Street, P. O. Box 1500, Akron, Ohio 44309, for St. Hillary's Church.

DAVID W. WOODBURN, Attorney at Law, 50 South Main Street, P. O. Box 1500, Akron, Ohio 44309, for Habitat for Humanity of Greater Akron.

KEVIN T. BURKE, Attorney at Law, 1404 East Ninth Street, Cleveland, Ohio 44114, for Immaculate Heart of Mary Church.

DAVID J. ESPINOZA, Attorney at Law, 101 East Town Street, 4th Floor, Columbus, Ohio 43215, for Ohio Attorney General.

HAVEN OF REST, 175 East Market Street, Akron, Ohio 44308.

FRANCES M. LIKAR, 507 Marquette Avenue, Cuyahoga Falls, Ohio 44221.