

[Cite as *In re Estate of Bowens-Jackson*, 2004-Ohio-1815.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: ESTATE OF VALLORIE ANN :
BOWENS-JACKSON, deceased :
 :
 : C.A. CASE NO. 20008
 : T.C. CASE NO. 333596
 : (Civil Appeal from Common
 : Pleas Court, Probate Division)
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OPINION

Rendered on the 9th day of April, 2004.

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DAVID R. SCHMIDT, Atty. Reg. No. 0012588, 1200 E. Dorothy Lane, Dayton, Ohio 45419

Attorney for Plaintiff-Appellant

CARL D. SHERRETS, Atty. Reg. No. 0040621, 500 Lincoln Park Blvd., Suite 216, Kettering, Ohio 45429

Attorney for Defendant-Appellee

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FREDERICK N. YOUNG, J.

{¶1} David R. Schmidt, as successor administrator and attorney for the estate of Vallorie Ann Bowens-Jackson, deceased, is appealing from the following judgment

entered by the Probate Court of Montgomery County, Ohio:

{¶2} “This matter is before the Court on exceptions to the account filed by the surviving spouse, Derrell Arthur Jackson. Mr. Jackson is incarcerated and represented by counsel who appeared on his behalf.

{¶3} “Vallorie Ann Bowens-Jackson died on October 3, 2000 in Montgomery County. Her stepson, Stefan L. Bowens, was appointed Administrator of her estate but was subsequently removed for failing to satisfactorily perform his duties.

{¶4} “David Schmidt was appointed successor Administrator and is also the attorney for the estate. He filed the final account on March 4, 2003. Mr. Jackson takes exception to the disbursement for the payment of the funeral and burial expenses to Constance Massey and the fiduciary fee paid to Stefan L. Bowens.

{¶5} “The funeral and burial expenses totaled Seven Thousand Five Hundred Seventy-eight Dollars and 23/100 (\$7,578.23), all of which was paid before the family allowance. The Court finds that the estate does not have enough assets to satisfy the claims on the estate and therefore is insolvent. When an estate is insolvent, R.C. §2117.25 applies to prioritize the disbursement of the assets.

{¶6} “The Court is mindful of the case, *Osborne v. Osborne* (1996), 114 Ohio App.3d 412, raised by the Administrator as authority to reimburse a third party who paid the funeral expenses of a decedent. The Court finds that Constance Massey is entitled to be reimbursed but in accordance with the statute.

{¶7} “Therefore, the Court orders Constance Massey to repay the estate the overpayment of Three Thousand Five Hundred Seventy-eight Dollars and 23/100 (\$3,578.23) within twenty days of this decision. If the payment is not made, the Court

directs the successor Administrator to obtain that amount from his bond and repay the estate immediately thereafter.

{¶8} “The Court further finds that the fiduciary fee of Eight Hundred Nineteen Dollars and 38/100 (\$819.38) to the Stefan Bowens is unreasonable under the circumstances and hereby orders that Mr. Bowens repay to the estate this amount within 20 days. If Mr. Bowens does not pay the estate, then the Court directs the Administrator to obtain this amount from his bond and repay the estate immediately thereafter.

{¶9} “The Court further directs the Administrator to pay these amounts to the surviving spouse, Derrell Arthur Jackson, as required by statute.” (Docket 26).

{¶10} Schmidt’s sole assignment of error is that the Probate Court erred when it confined the reimbursement by the estate to Mrs. Massey to only the \$4,000 set forth in R.C. 2117.25. The appellee argues that the amount of the family allowance set forth in this statute should be paid to the surviving spouse, who has been incarcerated for life for the crime of murder, and since the estate cannot pay the full \$40,000 to him, it is insolvent, and Mrs. Massey is entitled to no more than the statutory priority of \$4,000.

{¶11} We find the assignment of error to be well taken. This court has already ruled that one who has paid the funeral expenses, other than a surviving spouse, and not as an officious volunteer or meddler, but out of necessity of the occasion, is entitled to be reimbursed from the estate of the deceased, providing the bill is reasonable. *Osborne v. Osborne* (1996), 114 Ohio App.3d 412, 683 N.E.2d 365. The Osborne estate was also insolvent in the same manner as the estate in the case before us. Also, in that case as in this case, the funeral and burial expenses exceeded the statutory

\$4,000. The excess of the \$4,000 is to be charged against the surviving spouse's share out of the estate as a surviving spouse's duty to support includes payment of the deceased spouse's funeral expenses. We note in passing that the Seventh District Court of Appeals in Ohio has cited and followed *Osborne*. *In re Estate of Geanangel* (2002), 147 Ohio App.3d 131, 139.

{¶12} Accordingly, the assignment of error is sustained, the judgment is reversed, and the case is remanded for further proceedings in accordance with this opinion.

BROGAN, J., concurs.

GRADY, J. dissents.

GRADY, J., dissenting.

{¶13} Judge Young reverses the judgment of the Probate Court on the authority of our holding in *Osborne v. Osborne* (1996), 114 Ohio App.3d 412. The Probate Court found that our holding in *Osborne* has no application to the issue that was before the court. I agree and would affirm the judgment of the Probate Court.

{¶14} "After ascertaining the assets of the estate and making the appraisal the executor or administrator must proceed to pay all debts of the estate in accordance with the statutory authority." Merrick-Rippner, *Baldwin's Probate Law*, Section 2.26. That authority is set out in R.C. 2117.25(A), which identifies nine classes of debts of the estate and the corresponding order of priority in which they must be paid when presented as claims. First in priority are expenses of administration. Next is the funeral bill. After that, the statutory family allowance. The last class to be paid, when payment

of prior claims has not exhausted the assets of the estate, are “general creditors.” R.C. 2117.25(A)(9).

{¶15} The only similarity between the facts of this case and the facts in *Osborne* is that in both cases the decedent’s parent or parents had paid the funeral bill and then sought reimbursement from the estate. Per R.C. 2117.25(A)(2), as it existed when *Osborne* was decided, the bill of an unpaid funeral director enjoyed a right of priority, up to an amount of two thousand dollars, over the debts owed classes of creditors with a lesser priority. However, and as we stated in *Osborne*, “[w]hen that bill is paid by another, the same priority does not apply.” *Id.*, at p. 414. Therefore, in *Osborne* the parents were classified as general creditors of the estate on their claim for reimbursement.

{¶16} R.C. 2117.25 was amended, after *Osborne*, in 2000 by enactment of H.B. 345. R.C. 2117.25(A)(2) continues to afford the funeral director the same right of priority, but now up to a maximum of four thousand dollars. And, a new provision was added. It now appears as R.C. 2117.25(C), which states:

{¶17} “Any natural person or fiduciary who pays a claim of any creditor described in division (A) of this section shall be subrogated to the rights of that creditor proportionate to the amount of the payment and shall be entitled to reimbursement for that amount in accordance with the priority of payments set forth in that division.”

{¶18} Here, the Appellee paid the funeral director’s bill, and per R.C. 2117.25(C) succeeded to the funeral director’s right of priority over the claims of all creditors in classes awarded a lesser priority by R.C. 2117.25(A). However, that right entitled Appellee to repayment of four thousand dollars, at most. Appellee paid \$7,578.23 and

had been reimbursed that full amount by the executor. The Probate Court ordered her to repay the estate the excess, or \$3,578.23. This appeal is from that order.

{¶19} The Probate Court was correct in ordering repayment. The class of debts with a priority next in succession after the funeral director is the R.C. 2106.13 “family allowance” of up to \$40,000 owed to the surviving spouse per R.C. 2117.25(A)(3). Payment of that amount will exhaust the assets of the estate, rendering it insolvent to pay the claims of creditors in classes with lesser priorities, including general creditors. And, with respect to her claim for the amount in excess of four thousand dollars she paid, Appellee is but a general creditor of the estate and is not afforded the funeral director’s priority.

{¶20} Judge Young writes that the estate in *Osborne* was likewise insolvent. However, our opinion in *Osborne* reflects no such fact. There was no insolvency that barred payment of other debts, including the debts owed general creditors.

{¶21} In *Osborne*, the decedent’s executor, his surviving spouse, had refused to reimburse the parents on their claim for the funeral bill they paid. The parents commenced a civil action on the unpaid claim. We held that the administrator denied payment improperly because the parents in *Osborne* were not officious volunteers or meddlers, the surviving spouse having requested them to pay the bill, which her duty of support would otherwise have required the surviving spouse to pay.

{¶22} Appellee may likewise be neither an officious volunteer nor a meddler, but that cannot change the right of priority she is afforded by R.C. 2117.25(A)(9) as a general creditor of the estate with respect to amount in excess of \$4,000 that she paid and was ordered to repay. As to her right to that amount, she is but a general creditor,

as were the parents in *Osborne* for the entire amount they paid. However, and unlike *Osborne*, there is no money to pay general creditors because payment of the surviving spouse's statutory allowance will exhaust the remaining assets. The surviving spouse may not be worthy, but that prospect doesn't support a judicial modification of R.C. 2117.25, which is the effect of the reversal ordered by the majority.

{¶23} Appellee may have another remedy, however. We observed in *Osborne* that a person who pays funeral or burial expenses has a personal claim against the surviving spouse for having paid for the decedent's "necessaries." Appellee may seek repayment from the monies awarded the surviving spouse in the underlying probate proceeding, but to do so she must file a separate civil action on her claim.

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Copies mailed to:

David R. Schmidt
 Carl D. Sherrets
 Hon. Alice O. McCollum