IN THE SUPREME COURT OF OHIO

	)	S.C. Case No.: 2019-0364
	)	On Appeal from the Lucas County Court of Appeals,
In re Estate of Joseph I. Shaffer	)	Sixth Appellate District
	)	Sixth District Court of Appeals Case No. L-17-1128
	)	Lucas County Court of Common Pleas –
	)	Probate Division Case No. 2015 EST 1856
	)	

REPLY BRIEF OF APPELLANT TERRY S. SHAFFER, ADMINISTRATOR OF THE ESTATE OF JOSEPH I. SHAFFER

Corey L. Tomlinson (0081894)
**Counsel of Record
Paul E. Croy (0042379)
Sarah J. Corney (0086472)
Kayla L. Henderson (0096072)
Robison, Curphey & O'Connell
Ninth Floor, Four SeaGate
Toledo, Ohio 43604
(419) 249-7900
(419) 249-7911 – facsimile
ctomlinson@rcolaw.com
pcroy@rcolaw.com
scorney@rcolaw.com
khenderson@rcolaw.com

Attorneys for Appellant

Zachary Norman, pro se
2212 Talmadge Road
Toledo, Ohio 43606

And

Juley Norman, pro se
2212 Talmadge Road
Toledo, Ohio 43606

Appellees

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ARGUMENT

The decedent executed the 2006 Will at issue in this case in the presence of only two witnesses, Appellees Juley Norman and her son Zachary Norman. The 2006 Will bequests one-fourth of the decedent's estate to Juley Norman. Although R.C. 2107.03 requires that written wills be attested and subscribed by two competent witnesses, neither Appellee attested or subscribed the 2006 Will in the conscious presence of the testator. It is further undisputed that Appellees were the only two witnesses in the room at the time the decedent executed the 2006 Will. (Transcript, p. 11-14).

On those very limited relevant facts, this Court agreed to decide a narrow question of law: whether one of only two witnesses to the execution of a will, under its respective statute governing admission to probate, and whose testimony is necessary[1] for the admission of that will, can receive the bequest to her in the will.[2] The answer to this question must be no. A brief review of the applicable Revised Code provisions demonstrates why.

A. The Clear Statutory Language and Context Mandates an Essential and Interested Witness May Not Take Under Any Will.

In the State of Ohio, every written will:

> …shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The 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.
>
> For purposes of this section, "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

[1] An "essential witness" is one of only two witnesses whose testimony is necessary for the admission of the will. The phrases "essential witness" and "necessary witness" are used interchangeably.

[2] The proposition of law is as follows: Ohio's Voiding Statute, R.C. 2107.15, applies equally to wills executed in compliance with R.C. 2107.03 and wills submitted pursuant to R.C. 2107.24. If a devisee is an essential witness to the will, either by the devisee's signature or the devisee's testimony, the bequest to the interested essential witness is void.

R.C. 2107.03 (emphasis added). If, however, a testator fails to comply with the execution requirements mandated by R.C. 2107.03, Ohio's Remediation Statute (R.C. 2107.24) allows the probate court to admit the will "as if it had been executed as a will in compliance with [R.C. 2107.03]":

> 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:
>
> > (1) The decedent prepared the document or caused the document to be prepared.
> >
> > (2) The decedent signed the document and intended the document to constitute the decedent's will.
> >
> > (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.
>
> (B) If the probate court holds a hearing pursuant to division (A) of this section and finds that the proponent of the document as a purported will has established by clear and convincing evidence the requirements under divisions (A)(1), (2), and (3) of this section, the executor may file an action in the probate court to recover court costs and attorney's fees from the attorney, if any, responsible for the execution of the document.

R.C. 2107.24 (emphasis added); *In re Estate of Pittson*, 5th Dist. Stark No. 2008 CA 00014, 2009-Ohio-1862, ¶ 12. Not just any witness will do because Ohio's Voiding Statute dictates:

> **If a devise or bequest is made to a person who is one of only two witnesses to a will, the devise or bequest is void. The witness shall then be competent to testify to the execution of the will, as if the devise or bequest had not been made.** If the witness would have been entitled to a share of the testator's estate in case the will was not established, the witness takes so much of that share that does not exceed the bequest or devise to the witness. The devisees and legatees shall contribute for that purpose as for an absent or afterborn child under section 2107.34 of the Revised Code.

R.C. 2107.15 (emphasis added). The Voiding Statute contains no language distinguishing its application to wills admitted under R.C. 2107.03 or the Remediation Statute; it plainly applies to all wills.

Despite the clear language of the Voiding Statute, Appellees argue that by enacting the Remediation Statute, the Ohio legislature abrogated the Voiding Statute, but only when applied to erroneously executed wills that are later admitted pursuant to the Remediation Statute. Neither the statutory language nor Ohio precedent supports this conclusion.

The Remediation Statute does not exist in a statutory vacuum. It serves as a supplement to, not a replacement for, the formal will execution statute R.C. 2107.03.[3] Furthermore, the absence of the word "competent" from the Remediation Statute does not remove the fundamental and attendant requirement that witnesses to wills must be competent to so witness, as derived from the accompanying provisions of the Revised Code (and the Ohio Rules of Evidence). *See e.g.*, R.C. 2317.01 ("All persons are competent witnesses except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."); Evid.R. 601(A) (same).

Neither does Ohio's Voiding Statute exist in a vacuum. It likewise serves as a supplement to R.C. 2107.03, and unequivocally holds that if a witness is interested and one of only two witnesses necessary to establish the validity of the will, then the bequest to that interested and essential witness is void. "The witness **shall then be competent** to testify to the execution of the will, as if the devise or bequest had not been made." R.C. 2107.15 (emphasis added). In essence, the Voiding Statute holds that a witness cannot be interested, essential, and competent to testify as to the validity of the will—the witness can be any two, but not all three. The reason for the limitation is obvious—and well-

[3] *See* R.C. 1.49(D), (E) (when determining legislative intent in analyzing an ambiguous statute, the court may consider the "the consequences of a particular construction" and "laws upon the same or similar subjects"); R.C. 1.47 ("In enacted a statute, it is presumed that: *** a just and reasonable result is intended").

settled in Ohio law. *See Hairelson v. Estate of Franks*, 130 Ohio App.3d 671, 675, 720 N.E.2d 989 (10th Dist.1998) ("a person who does not have an interest in the validity of a will is generally a more credible witness than a person who stands to gain from the will."); *Matter of Estate of Morea*, 169 Misc.2d 415, 645 N.Y.S.2d 1022 (1996) (in order to protect testator intent and preserve the integrity of the will execution process, the Voiding Statute "remov[es] the possibility that attesting witnesses who receive a disposition under the will might give false testimony in support of the will to protect their legacies.").

Therefore, the Voiding Statute applies to wills admitted pursuant to the Remediation Statute.

B. Appellees Misconstrue and Evade the Sole Relevant Issue Presented to this Court.

Appellees ignore the fundamental issue in this appeal, which is whether Juley Norman can take under the 2006 Will when she is undisputedly both an interested and essential witness to that will. In fact, Appellees disingenuously claim this case is not about the interplay of interested and essential witnesses at all. (Appellee Brief, p. 26-27). By conflating the concept of competency and essentiality, Appellees circumvent clear statutory language and this Court's prior holdings to allow a person who is both an interested and necessary witness to take under a will admitted pursuant to the Remediation Statute. Appellees' position is not supported by Ohio case law.

This Court previously held:

> the first sentence [of the Voiding Statute], which refers "to a person who is one of only two witnesses to a will," relates to the substantive requirement of "two or more competent witnesses" imposed by R.C. 2107.03. **Thus, if an interested witness is one of two essential witnesses for purposes of establishing the validity of a will, then the bequest or devise to that witness is void pursuant to R.C. 2107.15.** The fact that the General Assembly saw fit to use the expression "witnesses to a will" instead of "witnesses to prove a will" or the like supports this view because the statutory language seems to look to the time the will is executed, which is when the substantive requisites arise.
>
> Conversely, if a witness is not one of two essential witnesses to a will, the voiding provision of R.C. 2107.15 may not be invoked. Inasmuch as appellant was one of three competent witnesses to the controverted will, R.C. 2107.15 as amended is inapposite. **By amending R.C. 2107.15 the General Assembly only voided bequests and**

> **devises to those interested witnesses whose attesting signatures were required to create a substantively valid will under R.C. 2107.03.** If the substantive validity of a will would not be affected by the absence of an interested witness' signature, then R.C. 2107.15 by its terms does not apply.

Rogers v. Helmes, 69 Ohio St.2d 323, 330, 432 N.E.2d 186, 190 (1982) (emphasis supplied).

In this case, Juley Norman is an interested witness whose attesting signature was required to create a substantively valid will under R.C. 2107.03. Her failure to sign the 2006 Will does not change this simple fact. The Remediation Statute allows Appellees, as essential witnesses, to cure the error of their failure to properly attest and subscribe the 2006 Will at the time of its execution. However, the Remediation Statute does not and cannot cure Juley Norman's consequent incompetence. Instead, the statutory cure for Juley' Norman's incompetence is the mandatory voiding of the bequest to her. *See Rogers*, 69 Ohio St.2d at 326-27 (noting that the common law incompetence of interested witnesses has been abrogated by statute subject to the safeguards built into R.C. 2107.15); *Fazekas v. Gobozy*, 78 Ohio Law Abs. 258, 150 N.E.2d 319 (8th Dist.1958) ("Sec. 2107.15, R.C., says, in effect, that one to whom a devise or bequest is made is not a competent witness, where the testimony of such person is necessary to sustain the will, except by declaring the devise or bequest void."); *Chambers v. Davis*, 1st Dist. Hamilton No. C-130635, 2014-Ohio-2804, ¶ 2, 4 (holding a bequest to interested witness Dove was properly invalidated under R.C. 2107.15 because Dove's testimony as a witness to the signing of the will had been necessary for admission of the will.). Consequently, only after the bequest to her is voided can Juley Norman be competent to testify as to the validity of the 2006 Will.

Appellees evade this obvious conclusion by arguing that the exclusion of the word "'competent" in the Remediation Statute, and its inclusion in the Voiding Statute, must lead to the conclusion that the Voiding Statute does not apply to wills admitted under the Remediation Statute. (Appellee Brief, p. 7). However, Appellees' understanding ignores the context of each statute, their connected operation, and their respective roles as supplements to R.C. 2107.03. Moreover, Appellees

ignore that the Voiding Statute's plain language does not differentiate between wills admitted under R.C. 2107.03 and 2107.24—it applies equally to all documents treated as written wills.

Appellees' dissertation on the laws of foreign jurisdictions, and speculative arguments based on laws not enacted, does not change the necessary outcome. Ohio's Voiding Statute is mandatory and does not provide the probate court any option to ignore it. Despite Appellees' argument otherwise, the Remediation Statute's exclusion of "competency" as a requirement for its witnesses does not negate the operation of the Voiding Statute, which purges the interested essential witness' gift.

Had Juley and Zachary Norman signed the 2006 Will, the Voiding Statute would unquestionably apply and void the gift of one-fourth of the decedent's estate to Juley. But as the only two witnesses to the 2006 Will, Appellees' testimony was required to prove the validity of the will. Just as their signatures would be required to prove the will under R.C. 2107.03, and result in the voiding of Juley's gift, the fact that they were necessary witnesses under the Remediation Statute requires the same outcome—voiding her gift.

The remaining arguments set forth in Appellees' merit brief merely distract by focusing on irrelevant and noncontrolling analysis. First, Appellees incorrectly outline and apply a "three-part framework" for "dealing with an interested witness." (Appellee Brief, p. 15-16). Appellees argue that the Remediation Statute does not require the "safeguard" of the Voiding Statute due to the import of a heightened burden of proof required for admission of a will lacking the formal requirements. This ignores that the Voiding Statute equally applies to both formal wills and those admitted under the Remediation Statute—both require two witnesses to prove its validity either through contemporaneous attestation and subscription, or subsequent testimony. As such, the framework Appellees propose does not lead to the result they advocate.

Additionally, Appellees' discussion of the differences between the procedure for wills admitted under R.C. 2107.03 and those examined under R.C. 2107.24 provides no guidance on the question before the Court pertaining to interested necessary witnesses. (Appellee Brief, p. 10-11). R.C. 2107.03 outlines the prima facie elements for a formal will—the legislature's requirements for testators who wish to avoid letting their property fall into intestacy. Recognizing that errors in execution can often occur in the flurry of paperwork accompanying estate planning, the legislature enacted R.C. 2107.24 to allow probate courts to examine purported wills and, if otherwise meeting the requirements, admit that document to probate and treat it as a formal will. Importantly, a will witnessed, attested, and subscribed by only two witnesses, one of whom was interested, does not meet the requirements of R.C. 2107.03.

Likewise, Appellees' reliance on other jurisdictions' adoption of "harmless error" laws, and noncontrolling secondary sources, provides no guidance on the narrow issue before this Court, as Appellees provide no analysis regarding whether an interested yet necessary witness can take her gift under a will admitted under the harmless error law. (Appellee Brief, p. 11, 17-18). Appellees' voluminous yet irrelevant analysis should not be considered. Neither should Appellees' discussion of the "substantial compliance doctrine," which ponders a speculative answer to a question not asked pursuant to a doctrine not adopted, be considered here. (Appellee Brief, p. 13). Similarly, analysis of wills executed under other states' laws is irrelevant and has no bearing on the legal analysis at hand, as the decedent was undisputedly living in Ohio when he executed the 2006 Will. (Appellee Brief, p. 16). Only Ohio law applies.

Moreover, R.C. 2107.15 does not create an "irrebuttable presumption" that this Court should abandon, as Appellees urge. The Voiding Statute provides a safeguard by disallowing a gift to a necessary and interested witness, as it is a fundamental understanding set by the legislature that such a witness is less credible. Appellees broadly state, without support in Ohio case law, that "[a]lthough

cases of undue influence could occur with interested witnesses, most cases of undue influence actually involve individuals who are not in fact witnesses to the execution of a will."(Appellee Brief, p. 21). The legislature clearly set out its priority by enacting the Voiding Statute and applying it to all wills. (Appellee Brief, p. 20-21). Additionally, the constitutionality of the Voiding Statute is not at issue in this case, despite Appellees' suggestion otherwise. Appellees' comparison to *Shriners' Hosp. for Crippled Children v. Hester*, 23 Ohio St.3d 198, 204, 492 N.E.2d 153 (1986) provides no useful analysis here in that regard. (Appellee Brief, p. 19-21).

CONCLUSION

The simple conclusion that this Court should reach is consistent with the statutory scheme the General Assembly has outlined. Applying the Voiding Statute to wills admitted pursuant to the Remediation Statute, and treated like a formally executed will, ensures that the integrity of the will execution process is upheld.

For these reasons, this Court must reverse the Sixth District Court of Appeals' decision and hold that Ohio's Voiding Statute applies to wills admitted to probate under the Remediation Statute.

Respectfully Submitted,

Corey L. Tomlinson (0081894)
**Counsel of Record
Paul E. Croy (0042379)
Sarah J. Corney (0086472)
Kayla L. Henderson (0096072)
Robison, Curphey & O'Connell
Ninth Floor, Four SeaGate
Toledo, Ohio 43604
(419) 249-7900
(419) 249-7911 – facsimile
ctomlinson@rcolaw.com
pcroy@rcolaw.com

scorney@rcolaw.com
khenderson@rcolaw.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

Toledo, Ohio
November 4, 2019

I certify that the foregoing REPLY BRIEF OF APPELLANT TERRY S. SHAFFER, ADMINISTRATOR OF THE ESTATE OF JOSEPH I. SHAFFER was this day mailed to the following by ordinary U.S. mail on November 4, 2019:

Zachary Norman, pro se
2212 Talmadge Road
Toledo, Ohio 43606

and

Juley Norman, pro se
2212 Talmadge Road
Toledo, Ohio 43606

Corey L. Tomlinson (0081894)
Attorney for Appellants