

IN THE SUPREME COURT OF OHIO

MARY ANN DILLER,	:	
	:	Supreme Court Case No. 2022-0058
Plaintiff-Appellee,	:	
	:	On Appeal from the Mercer County
-vs-	:	Court of Appeals, Third Appellate
	:	District
PHYLLIS DILLER, CO-EXECUTOR,	:	
	:	
Defendant-Appellee.	:	Court of Appeals Consolidated
	:	Case Nos. 10-21-03 and 10-21-04
And	:	
	:	
LINDA PENNUCCI, CO-EXECUTOR,	:	
et al,	:	
	:	
Defendants-Appellants.	:	

**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS
AS IMPROVIDENTLY ACCEPTED PURSUANT TO S. CT. PRAC. R 7.10**

Ashley R. Doty (0100671) (Counsel of Record)

J. Alan Smith (0041980)

Dalton J. Smith (0099159)

CORY, MEREDITH, WITTER & SMITH

A Legal Professional Association

101 North Elizabeth Street, 6th Floor

Lima, OH 45801

T: 419-228-6365 F: 419-228-5319

Email: adoty@corylpa.com

asmith@corylpa.com

dsmith@corylpa.com

COUNSEL FOR DEFENDANTS-APPELLANTS

Judy A. Koesters
KOESTERS LAW OFFICE
201 East Vine Street
Coldwater, OH 45828
T: 419-678-2378 F:419-678-8653
Email: jkoesters@koesterlaw.com
CO-COUNSEL FOR DEFENDANTS-APPELLANTS,
LINDA PENNUCCI AND DAVID PENNO

Jeffrey P. Knapke (0061120)
KNAPKE LAW
115 North Walnut Street
P.O. Box 504
Celina, OH 45822
T: 419-586-6444 F: 419-586-5767
Email: knapkelaw2@bright.net
CO-COUNSEL FOR DEFENDANT-APPELLANT,
LINDA PENNUCCI, AS CO-EXECUTOR OF THE
ESTATE OF THEODORE C. PENNO,

Travis J. Faber (0092492)
John R. Willamowski (0099613)
FABER AND ASSOCIATES
7706 State Route 703
Celina, OH 45822
T: 419-586-6886 F: 419-586-6887
Email: faberlaw@bright.net
COUNSEL FOR DEFENDANT-APPELLEE PHYLLIS DILLER

Paul E. Howell (0029631)
HOWELL, GAST-SCHLATER & CO., L.P.A.
397 North Eastern Avenue
P.O. Box 317
St. Henry, OH 45883
T: 419-678-7111 F: 419-678-7332
Email: phowell@howellcolaw.com
COUNSEL FOR PLAINTIFF-APPELLEE

Appellants, Linda Pennucci, as Co-Executor of the Estate of Theodore C. Pennucci, Linda Pennucci, individually, David Penno, hereby oppose Appellees' Motion to Dismiss as Improvidently Accepted Pursuant to S. Ct. Prac. R 7.10 for reason that the issues in this case require a decision to fully adjudicate this matter. Counsel for Appellees argue two points in their motion. First, Appellees argue that the newly approved statutory language creates a constitutionality issue that should be decided by the lower courts. Appellees alternatively request that the parties be permitted to brief the potential issue of the constitutionality of the language included in Am. Sub. S.B. 202.

Appellants disagree with Appellees position on this issue. By their Motion, Appellees have confirmed that while Am. Sub. S.B. 202 does retroactively correct the statutory definition of "Devise" to include a primary devise, effectively confirming the legislature's intent to include a primary devise throughout the anti-lapse statute, they have set forth a new objection to the statute by claiming the corrected statute is unconstitutional. Appellees argument hinges on whether Mary Ann Diller ever received any vested interest in the real estate owned by Theodore Penno when he died. That argument will only be available to Appellees if this Court's decisions on the issues currently before it are decided in favor of Appellees by determining that the 2012 version of R.C. 2107.52 did NOT include a primary devise. In fact, should this Court rule in favor of Appellants' position on the currently briefed issues, determining that the 2012 version of R.C. 2107.52 DID include primary devise, then the interest in the real estate would have vested in Appellants at the time of Decedent's passing, and Appellees' constitutionality argument would be moot.

The Court's decision on the matters currently before it are now more important than ever. Had it not been for Appellees' foreshadowing of their intended constitutionality argument, the decision of this Court on the interpretation of the 2012 version of R.C. 2107.52 may have been

moot, however, Appellees have now made it clear that the interpretation of the 2012 version of the statute continues to be necessary, even if the Court were to dismiss the current matter. The Appellees argument is only possible IF Mary Ann Diller had some vested interest in the real estate before the current amendment to R.C. 2107.52. That decision will be determined by the interpretation of the 2012 version of R.C. 2107.52 currently sought herein. Should this Court determine that a primary devise was to be included in the provisions of the 2012 version of R.C. 2107.52, then the interest in the real estate would have vested in Linda Pennucci and David Penno upon the passing of Theodore Penno and Mary Ann Diller would have no issue to argue with the language of the newly amended version of R.C. 2107.52.

Further, for the above reasons, the constitutionality of the amendment to R.C. 2107.52 may be moot. The newest version of 2107.52, including the retroactivity language, was not used to decide the underlying issues herein. It is not proper or appropriate to brief the issue of the constitutionality of the subsequent statutory revision. The retroactivity language of the amended statute may well not even be a factor in the final decision of this matter, depending upon the outcome on the current issues before this Court. Further, the retroactivity language included is so narrow that it may never become an issue in any future cases.

Lastly, the delay allegedly sought to be avoided by Appellants would, in fact, only be exacerbated by a decision to dismiss the current appeal. Should this Court dismiss the appeal, this case would return to the Mercer County Probate Court for decision. Whether the 2012 or the 2023 version of R.C. 2107.52 should apply would undoubtedly be at issue for the Probate Court and would very likely create another decision ripe for further appeal. The most judicially efficient route to completion of this matter is a decision on the issues currently before this Court.

WHEREFORE, Appellants hereby move for the Court to deny Appellees' Motion to Dismiss and move forward with oral arguments as scheduled on January 10, 2023.

Respectfully submitted,

/s/ Ashley R. Doty

Ashley R. Doty (0100671)
J. Alan Smith (0041980)
Dalton J. Smith (0099159)
CORY, MEREDITH, WITTER & SMITH
A Legal Professional Association
101 N. Elizabeth Street, 6th Floor
Lima, Ohio 45801
Phone: 419-228-6365 Fax: 419-228-5319
E-mail: adoty@corylpa.com
Attorney for Appellants

CERTIFICATE OF SERVICE:

This is to certify that a copy of the foregoing has been sent by regular U.S. Mail this 4th day of January, 2023, to the following:

Judy A. Koesters
Koesters Law Office
201 East Vine Street
Coldwater, OH 45828
Co-Counsel for Defendants-Appellants,
Linda Pennucci And David Penno

Jeffrey P. Knapke (0061120)
Knapke Law
115 North Walnut Street
P.O. Box 504
Celina, OH 45822
Co-Counsel for Defendant-Appellant,
Linda Pennucci, As Co-Executor of The
Estate Of Theodore C. Penno

Travis J. Faber (0092492)
John R. Willamowski (0099613)
Faber And Associates
7706 State Route 703
Celina, OH 45822
Counsel For Defendant-Appellee Phyllis
Diller

Paul E. Howell (0029631)
Howell, Gast-Schlater & Co., L.P.A.
397 North Eastern Avenue
P.O. Box 317
St. Henry, OH 45883
Counsel For Plaintiff-Appellee

/s/ Ashley R. Doty

Ashley R. Doty (0100671)
J. Alan Smith (0041980)
Dalton J. Smith (0099159)