38th Annual Probate Practice Seminar

October 5, 2018

Trumbull County Probate Court

Judge James A. Fredericka

Ciminero's Banquet Centre
123 N. Main Street
Niles, Ohio 44446

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38th ANNUAL PROBATE PRACTICE SEMINAR

October 5, 2018

8:00 - 8:30	**Registration**	
8:30 - 9:15	**Probate Updates: Estates/Guardianships**	John T. Shorts, Magistrate Christopher J. Schiavone, Magistrate Jeffrey R. Davis, Magistrate Emily Clark Weston, Magistrate Trumbull County Probate Court
9:15 - 10:15	**Probate Litigation/ Professionalism**	Bart Leonardi, Esq.
10:15 - 10:30	**Refreshment Break**	
10:30 – 12:00	**Active Shooter Plan of Action Training**	Officer Dan Pignatelli, PhD Officer John Jeffries Westerville Division of Police
12:00 – 1:00	**Lunch**	
1:00 – 1:30	**Supreme Court**	Milt Nuzum, Director Judicial & Education Services Division Supreme Court Ohio
1:30 – 2:30	**Legal Ethics and Professionalism Social Media Considerations/ Professional Conduct**	Kim Vanover Riley, Esq. Montgomery, Rennie & Jonson Co., L.P.A.
2:30 – 2:45	**Refreshment Break**	
2:45 - 3:45	**Current Topics in Probate Panel Discussion**	Hon. Robert N. Rusu, Jr. Mahoning County Probate Court Hon. Albert S. Camplese Ashtabula County Probate Court Hon. Robert W. Berger Portage County Probate Court
3:45 – 4:15	**Case Law Update**	Hon. James A. Fredericka Trumbull County Probate Court

PROBATE UPDATES: ESTATES/GUARDIANSHIPS/ ADOPTIONS

John T. Shorts, Chief Magistrate
Christopher J. Schiavone, Magistrate
Jeffrey R. Davis, Magistrate
Emily Clark Weston, Magistrate
Trumbull County Probate Court

Jeffrey R. Davis

J.D. - Case Western Reserve University, School of Law, 1994

Employment
Private Practice, 1994-1996
Assistant Prosecuting Attorney - Fayette County Prosecutor's Office, 1996-1998
Assistant Prosecuting Attorney & Deputy Director of Drug Unit, Franklin County Prosecutor's Office, 2000-2008
Special Assistant, - United States Attorney, 2006-2008
Private Practice (general practice including probate), 2008-2012
Violent Crimes Unit, Mahoning County Prosecutor's Office, 2012-2014
Magistrate, Trumbull County Probate Court, 2014-present

Duties
Wrongful death and Litigation Estates
Change of Names
Minor/Adult Ward Settlements
Minor Guardianships
Civil Commitment Hearings
Transfers of Structured Settlements

Christopher J. Schiavone

J.D. - Ohio Northern University, Claude W. Pettit School of Law, 2000

Employment
Associate Attorney - Friedman & Rummell Co., LPA, April 2001 to December 2012
Partner - Friedman & Rummell Co., LPA, January 2013 - February, 2015
Magistrate - Trumbull County Probate Court, February 2015 to present

Duties
Estates without Litigation
Land Sales
Transfers of Structured Settlements

Emily Clark Weston

J.D. University of Akron, 2011

Employment
Law Clerk - Neuman Law Office, January to July, 2012
Private Practice Attorney, July 2012 to February 2014
Attorney/Landman - Larkspur Land Group, July 2012 to January 2014
Staff Attorney, Trumbull Co. Probate Court, February 2014 to June 2016
Magistrate - Probate Court, June 2016 to present

Duties
Civil Commitments
Release from Administration
Adoptions
Minor Settlements

John T. Shorts

J.D., University of Pittsburgh, School of Law, 1999

Employment
Trumbull County Probate Court - Staff Attorney since 1999
Magistrate - Probate Court, 2003 to present

Duties
Adult Guardianships
Trusts
Veterans Assistance Program
Senior Court Assistance Program

PROBATE COURT OF TRUMBULL COUNTY, OHIO
JAMES A. FREDERICKA, JUDGE

GUARDIANSHIP OF _____

CASE NO. _____

REPRESENTATIONS WITH RESPECT TO GUARDIANSHIP REAL ESTATE SALE BY CONSENT
R.C. 2127.012

The Guardian of the Estate in this case makes the following representations to support the intended sale of real estate of the ward pursuant to RC 2127.012:

1. Filed contemporaneously are consents from the ward's spouse, if any, and all persons entitled to the next estate of inheritance from the ward in the real property.

2. All of the persons executing a consent are adults.

3. Neither the ward's spouse nor any or of the next of kin is a minor.

4. Attached hereto is a copy of the real estate appraisal (not more than one year old) from which the 80% minimum sale price shall be calculated.

5. Filed contemporaneously is:
   a guardian's bond, or additional bond, establishing a total guardian's bond in the amount of $_____.

   or

   a motion to waive bond.

6. A copy of the settlement/closing statement shall be filed with the Court within 30 days of completion of each real estate sale, and shall be reported on the next accounting.

NOTE: This form, all consents, the appraisal, and the bond or motion to waive bond shall be filed together at the same time.

_____ _____

Guardian's Signature Attorney for Guardian

_____

Guardian's Typed or Printed Name

PROBATE COURT OF TRUMBULL COUNTY, OHIO
JAMES A. FREDERICKA, JUDGE

GUARDIANSHIP OF _____

CASE NO. _____

CONSENT TO POWER TO SELL REAL ESTATE - GUARDIANSHIP
R.C. 2127.012

The undersigned are the ward's spouse and all persons entitled to the next estate of inheritance from the ward in the property. Each declares to be an adult. Each acknowledges that if the guardian of the estate is the spouse of the ward, the sale may be to the guardian's self.

The undersigned empower(s) the Guardian of the ward's estate, at any time, to sell the real estate of the ward, as indicated below, at public or private sale and to execute and deliver the necessary deeds or other conveyances, consistent with law and this power of sale.

Any such sale shall be on terms consistent with law and at a price of not less than eighty percent of the appraised value indicated in an appraisal not more than one year old (appraisal being $_____).

☐ [Check one of the following]

☐ The power of sale consented to herein is general, and extends to all real estate of the Ward.

☐ The power of sale consented to herein is limited, and applies only to the parcels of real estate particularly described on page two of this form.

_____ _____

(Signature) (Signature)

_____ _____

(Typed or Printed) (Typed or Printed)

CASE NO. _____

LEGAL DESCRIPTION

The particular parcels of real estate in the ward's estate and to which this power of sale is limited are described as follows (use extra sheets if necessary)

PIN _____

Address _____

Clear

PROBATE COURT OF TRUMBULL COUNTY, OHIO
JAMES A. FREDERICKA, JUDGE

ESTATE OF _____, DECEASED

CASE NO. _____

APPLICATION FOR TRANSFER OF MOTOR VEHICLE

The undersigned, qualified fiduciary of the above estate, represents that he has in his possession the following described motor vehicle, belonging to said estate:

Year _____ Body Type _____ Model _____ Make _____

Mfrs. Serial No. _____ Cert. Of Title No._____

_____

Applicant states that the following person is entitled to such motor vehicle--☐ by virtue of the Will --
☐ by the statute of descent and distribution --☐ by family allowance--☐ by purchase for $_____.
☐ by consent--☐ for reimbursement

Applicant requests that the above mentioned motor vehicle be transferred to:

_____
Name

_____
Address

_____
Applicant

ENTRY TRANSFER OF MOTOR VEHICLE

The Court finds that all of the statements in the above application are true and that the above transferee is entitled to such motor vehicle.

It is therefore ordered that said fiduciary transfer said motor vehicle as prayed for.

_____
James A. Fredericka
Probate Judge

PROBATE COURT OF TRUMBULL COUNTY, OHIO
JAMES A. FREDERICKA, Judge

ESTATE OF _____, DECEASED

CASE NO. _____

APPLICATION TO REOPEN ESTATE AND APPOINT FIDUCIARY

Applicant states that the decedent died on _____, that his/her estate was administered in Trumbull County, and that the fiduciary or Commissioner was discharged on _____. Applicant asks that the estate be reopened and that he/she be qualified as the _____ for the following reason(s):

☐ Newly Discovered Assets:
Nature of Asset(s): _____

_____

☐ There is a wrongful death or survival action or litigation (in favor of/against) the estate pending in (specify the court, case number, and trial date): _____

_____

☐ Other Claim(s):
Nature of Claim(s): _____

_____

☐ Other (please specify): _____

_____

[Check one of the following:]

☐ The decedent's will waives bond or bond is not required by law.

☐ Applicant offers the attached bond in the amount of $_____

[For a full Administration, check one of the following:]
Applicant is:

☐ Prior fiduciary of the estate (Completed Form 1.0, Surviving Spouse, Children, Next of Kin, Legatees and Devisees, attached)

☐ Alternate fiduciary named in decedent's will (Completed Form 4.0, Application for Authority to Administer Estate, attached)

☐ Sole beneficiary under decedent's will or sole heir at law (Completed Form 4.0, Application for Authority to Administer Estate, attached)

☐ A next-of-kin (Completed Form 4.0, Application for Authority to Administer Estate, attached. If there are additional next-of-kin with equal rights to serve as fiduciary, completed Form 1.0, Surviving Spouse, Children, Next of Kin, Legatees and Devisees, attached)

☐ Other: _____

[For releases from administration, check one of the following:]
Applicant is:

- ☐ The prior commissioner of the estate and the SAME form of release is being filed (Completed Form 1.0, Surviving Spouse, Children, Next of Kin, Legatees and Devisees, attached)
- ☐ The prior commissioner of the estate and a DIFFERENT form of release is being filed (All forms required for the new form of release, attached)
- ☐ Not the prior commissioner (All forms required for the release from administration attached—Waivers from all other next of kin or beneficiaries of the decedent's will or an additional fee to send notice is required)

_____	_____
Attorney for Applicant	Applicant
_____	_____
Typed or Printed Name	Typed or Printed Name
_____	_____
Address	Address
_____	_____
City State Zip	City State Zip
_____	_____
Telephone Number (include area code)	Telephone Number (include area code)

Attorney Registration No. _____

PROBATE COURT, TRUMBULL COUNTY, OHIO

ESTATE OF: _____, Deceased

CASE NO: _____

APPLICATION TO FILE WILL FOR RECORD ONLY

Applicant states that decedent died on _____

Decedent's domicile was _____
Street Address

_____
City or Village, or Township if unincorporated area County

_____
Post Office State Zip Code

A document purporting to be the original of the decedent's Last Will is attached and offered for filing.

Decedent's surviving spouse, children, next of kin, legatees and devisees, known to applicant, are listed on the attached Form 1.0.

_____	_____
Attorney for Applicant	Applicant
_____	_____
Typed or Printed Name	Typed or Printed Name
_____	_____
Address	Address
_____	_____
(____) _____	(____) _____
Telephone Number	Telephone Number
Attorney Registration No. _____	

ENTRY

A document purporting to be the original Last Will of the above named decedent has been filed with this Court. The Court finds that no application for admission to probate has been filed.

It is hereby ORDERED that the document and all related papers be filed for record only with the Court and unless additional pleadings for administration or release have been contemporaously filed with this Application, this proceeding is closed without prejudice.

_____
JAMES A. FREDERICKA, JUDGE

1 OJI-CV 633.01, 1 CV Ohio Jury Instructions 633.01

Ohio Jury Instructions
Volume 1 - Civil

Ohio Judicial Conference

January 2018
Title 6 - Civil Matter Instructions: Property-Related Issues
CHAPTER CV 633: WILLS

CV 633.01 Wills, issue, burden

1. DEFINITIONS.

(a.) WILL. A will (last will and testament) is a written instrument executed with the formalities required by the Ohio Revised Code whereby a person makes a disposition of his property to take effect after his death.

(b.) TESTATOR. A person who dies leaving a will is said to have died testate and is referred to as testator if a male, and as testatrix if a female.

(c.) PROBATE. Probate is a court procedure by which a will is proved to be valid or invalid.

2. LEGAL REQUIREMENTS OF WILL. There are certain legal requirements set forth in the Ohio Revised Code that must be met for a will to be valid. They are:

(a.) The person must be 18 years of age or older;

(b.) The person must be of sound mind and memory;

(c.) The person must not be under restraint.

3. ADMISSION TO PROBATE. For a will to be admitted to Probate it:

(a.) Must be in writing;

(b.) Must be signed at the end by the testator (party making it) (some person at the testator's request and in his presence) in the presence of at least two witnesses (signed at the end by the testator who later acknowledges his signature to at least two witnesses).

4. OPTIONAL. In this case the parties agree, and there is no dispute that the testator signed (in the presence of at least two witnesses) (and later acknowledged his signature to at least two witnesses).

5. DISPOSITION OF PROPERTY. Even though a will is admitted to Probate, it does not mean it validly disposes of the property of the testator according to his wishes.

1 OJI-CV 633.03, 1 CV Ohio Jury Instructions 633.03

Ohio Jury Instructions
Volume 1 - Civil

Ohio Judicial Conference

January 2018
Title 6 - Civil Matter Instructions: Property-Related Issues
CHAPTER CV 633: WILLS

CV 633.03 Mental capacity, capacity to make a will, sound mind and memory

1. GENERALLY. In determining the soundness of the mind and memory of the testator, the law does not undertake to determine the level of a person's intelligence nor to define the exact quality of mind and memory which a testator must possess at the time a will is made.

2. ELEMENTS. However, the law requires:

(a.) That the testator understand that he is making a will to dispose of his property at death.

(b.) That the testator understand generally the nature and extent of his property.

(c.) That the testator have in his mind the names and identity of those persons who are his relatives, next-of-kin, or the natural objects of his bounty and understand his relationship to them.

3. MENTAL CAPACITY REQUIREMENTS. A testator is not required to have sufficient mental capacity to make a contract or to conduct normal business affairs. He must, however, have a sufficiently active mind and memory to understand the three conditions just given to you. He must be able to remember them a sufficient length of time to consider their obvious relations to each other, and to be able to form a rational judgment with reference to them, even though he may not be able to understand and appreciate these matters as well as a person who has vigorous health, in both mind and body. It is not necessary that he be aware of these three conditions and have them in his mind at all times, since his health and mental condition may vary from time to time. But he must have them in mind during the time that he signs the will.

6. ISSUE. The plaintiff(s) claims that the testator (was not of sound mind or memory) (was under restraint) and therefore the will is not valid and should be set aside. The issue in this case for you to decide is whether the will of _____ admitted to Probate is valid. You must decide if the testator was (not of sound mind and memory) (was under restraint).

COMMENT

There probably will be no dispute that the testator was 18, that the will was properly executed or that the testator's or witnesses' names were not forged. If the latter becomes a jury question, apply R.C. 2913.01 or OJI-CR 513.31(A) § 7. The judge may need to draft a special conclusion paragraph if the issue is forgery or improper execution.

7. BURDEN. The burden of proof rests upon the plaintiff(s) to prove by a preponderance (greater weight) of the evidence that the testator (was not of sound mind and memory) (was under restraint or undue influence).

8. PREPONDERANCE. OJI-CV 303.05.

COMMENT

Though the words "sound mind and memory" and "not under restraint" have been in the statute at least since 1932, no brief definition has been (before now) attempted. "Undue influence" and "restraint" have been used interchangeably. Note deletion of instruction on presumption. See West v. Henry (1962), 173 Ohio St. 498, 501, 502, 20 O.O.2d 119, 184 N.E.2d 200; OJI-CV 309.01.

9. SOUND MIND AND MEMORY. If one at the time of making a will understands the nature, extent, and scope of the business he is about to transact, and possesses that degree of mental strength which would enable him to understand the nature and extent of his property, the identity of those who have natural claims on his bounty, and his relation to members of his family, he is, in law, considered a person of sound mind and memory.

COMMENT

See OJI-CV 633.03, mental capacity.

10. RESTRAINT (ADDITIONAL). The restraint necessary to invalidate a will must be such a prohibition of action or a holding back from action that the mind of the (testator) (the person making the will) is controlled in the (making) (execution) (completion) of the will (questioned) (being contested).

COMMENT

See OJI-CV 633.05.

1 OJI-CV 633.05, 1 CV Ohio Jury Instructions 633.05

Ohio Jury Instructions
Volume 1 - Civil

Ohio Judicial Conference

January 2018
Title 6 - Civil Matter Instructions: Property-Related Issues
CHAPTER CV 633: WILLS

CV 633.05 Under restraint (undue influence)

1. ELEMENTS. Being under restraint and being subject to undue influence are one and the same. The essential elements of undue influence are:

(a.) A testator is a person who is or can be influenced by reason of advanced age, physical infirmities, mental condition, fear, or for any other reason would yield to the desire or will of another person or persons;

(b.) The opportunity for a person or persons to exert it;

(c.) The fact of improper influence exerted or attempted;

(d.) A will showing the effect of such influence.

2. GENERAL INFLUENCE. General influence, however strong or controlling, is not undue influence unless it is brought to bear directly upon the act of preparing the will and imposes another person's plans or desires upon the testator. If the will, as finally executed, expresses the free and voluntary plans and desires of the testator, the will is valid, regardless of the exercise of influence.

3. UNDUE INFLUENCE. Undue influence sufficient to invalidate a will is that which substitutes the plans or desires of another for those of the testator. The influence must be such as to control the mind of the testator in the making of his will, to overcome his power of resistance, and to result in his making a distribution of his property which he would not have made if he were left to act freely and according to his own plans and desires.

4. UNDUE INFLUENCE (ADDITIONAL). The mere existence of undue influence or an opportunity to exercise it, although coupled with interest or motive to do so, is not sufficient to invalidate a will. Such influence must actually be exerted on the mind of the testator with respect to the execution of the will in question. It must be shown that the undue influence resulted in the making of a will containing the disposition of property that the testator would not have otherwise made.

5. ALTERNATIVE. To invalidate a will, the undue influence exercised must overpower and control the mind of the testator so as to destroy his freedom of thought, and force him to express the plans and desires of another rather than his own. The mere presence of influence is not sufficient. Undue influence must be present and effective at the time of the execution of the will, causing the testator to make a disposition of his property which he would not otherwise have made.

1 OJI-CV 633.07, 1 CV Ohio Jury Instructions 633.07

Ohio Jury Instructions
Volume 1 - Civil

Ohio Judicial Conference

January 2018
Title 6 - Civil Matter Instructions: Property-Related Issues
CHAPTER CV 633: WILLS

CV 633.07 Conclusion or summary

1. The fact that a person who has the capacity to make a will disposes of his property in an unnatural manner, or unjustly, or not equally and at variance with earlier statements by the testator concerning his relatives or next-of-kin, or the natural objects of his bounty, does not invalidate his will unless the contestants prove by the greater weight of the evidence that the testator was not of sound mind and memory or that undue influence was actually exercised on the testator at or prior to the time of the making of the will, and that such (lack of mental capacity) (undue influence) was in operation at the time of the execution of the will, and that the (lack of mental capacity) (undue influence) (resulted in a) (was used for the purpose of obtaining, producing or coercing a) will in favor of particular individuals.

2. CONSIDER. You have the right to consider evidence tending to show that the will was just or unjust, reasonable or unreasonable, natural or unnatural; the value and nature of testator's estate; financial condition of those who might naturally expect to be beneficiaries at the time this will was made, and any other factors that you find from the evidence, in determining whether, at the time of the execution of the will, the testator was (of sound mind and memory sufficient to legally execute a will) (under restraint or subject to undue influence).

PROBATE COURT OF TRUMBULL COUNTY, OHIO
JAMES A. FREDERICKA, JUDGE

IN THE MATTER OF THE ADOPTION OF _____
(Name after adoption)

CASE NO. _____

PETITION FOR ADOPTION OF MINOR

[R.C. 3107.05]

The undersigned petitions to adopt _____, a minor, and to change the name of the minor to _____.

PETITIONER

The petitioner states the following:

Full Name: _____ Age _____

Full Name: _____ Age _____

Place of Residence: _____
Street Address

_____

_____
Post Office State Zip Code Duration of residence

Marital Status: _____ Date and Place of Marriage: _____

Relationship of Minor to Petitioner: _____

The petitioner has facilities and resource suitable to provide for the nurture and care of the minor and it is the desire of the petitioner to establish the relationship of parent and child with the minor.

MINOR TO BE ADOPTED

Birth Name: _____ Date of Birth: _____

Place of Birth: _____ Property and Value: _____

☐ The minor is living in the home of the petitioner, and was placed therein for adoption on the _____ day of _____, 20____ by _____.

☐ The minor is not living in the home of the petitioner, and resides at _____
_____.

A certified copy of the birth certificate of the minor is filed with this petition or is not available due to the following:

_____
_____.

CASE NO. _____

A Preliminary Estimate Accounting (Form 18.9), if required, is filed with this petition.

☐ The minor is in the permanent custody of _____
whose address is _____.

☐ The guardian ad litem during the permanent custody proceedings was _____
whose address is _____.

☐ The attorney representing the minor during the permanent custody proceedings was
_____
whose address is _____.

PERSONS OR AGENCIES WHOSE CONSENT TO THE ADOPTION IS REQUIRED

☐ Name: _____ Relationship: _____ Age, if minor _____
Address: _____ ☐ Consent filed

☐ Name: _____ Relationship: _____ Age, if minor _____
Address: _____ ☐ Consent filed

☐ _____, the agency has permanent custody of the minor filed under, _____, _____ ☐ Consent filed

PERSONS WHOSE CONSENT TO THE ADOPTION IS NOT REQUIRED

☐ No person has timely registered pursuant to R.C. 3107.062 as a putative father of the minor. Attached is Ohio Department of Jobs & Family Services Form 1697.

A The consent of _____
Name Address Relationship

B The consent of _____
Name Address Relationship

is/are not required because:

A B
☐ ☐ The parent has failed without justifiable cause to provide more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner.

☐ ☐ The parent has failed without justifiable cause to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner.

☐ ☐ State other grounds under R.C. 3107.07 (includes putative father of the minor).

_____

_____

_____
Attorney for Petitioner

_____
Typed or Printed Name

_____
Street Address

_____
City State Zip Code

_____
Phone Number (include area code)

Attorney Registration No. _____

_____
Petitioner

_____
Typed or Printed Name

_____
Petitioner

_____
Typed or Printed Name

_____
Street Address

_____
City State Zip Code

_____
Phone Number (include area code)

PROBATE COURT OF TRUMBULL COUNTY, OHIO

IN THE MATTER OF	)	CASE NO. _____
THE ADOPTION OF	)	
_____	)	SUPPLEMENTAL ADOPTION FORM
(NAME AFTER ADOPTION)		

This form shall be filed with the Petition for Adoption and shall indicate if any of the following apply:

1. **Either birth parent is deceased,**
2. **A support order has been issued by any court or agency,**
3. **Any other court action has ever been filed regarding this child, or**
4. **Either birth parent has been previously married.**

G None of the above apply.

G Birth parent is deceased.

Name of deceased parent:	Date of Death:
Name of deceased parent's mother:	
Address of deceased parent's mother or date of death:	
Name of deceased parent's father:	
Address of deceased parent's father or date of death:	

G A support order has been issued regarding this child.

Court/Agency:	Case Number:
Case Name:	

G Other court action regarding this child (guardianship, juvenile, domestic relations):

Court:	Case Number:
Case Name:	Pending or closed?
Nature of Action:	Name of Attorney or Guardian ad Litem for Child:

☐ Birth mother was previously married.
_____Number of previous marriages.

☐ Birth father was previously married.
____Number of previous marriages.

If more than one marriage, list the marriages chronologically. Duplicate as necessary.

Name of birth mother:	Name of birth father::
Address:	Address:
Name of former spouse #1:	Name of former spouse #1:
Date of termination of marriage:	Date of termination of marriage:
County of termination proceedings:	County of termination proceedings:
Case Name:	Case Name:
Case Number:	Case Number:

Name of former spouse #2:	Name of former spouse #2:
Date of termination of marriage:	Date of termination of marriage:
County of termination proceedings:	County of termination proceedings:
Case Name:	Case Name:
Case Number:	Case Number:

_____
Attorney for Petitioner

_____
Address

_____

_____
Telephone Number

_____
Facsimile Number

_____
Ohio Supreme Court Registration Number

_____
Petitioner

_____
Address

_____

_____
Telephone Number

PROBATE COURT OF TRUMBULL COUNTY, OHIO
JAMES A. FREDERICKA, JUDGE

IN THE MATTER OF THE ADOPTION OF _____

(Name after adoption)

CASE NO. _____

CONSENT TO ADOPTION

[R.C. 3107.06, 3107.08 & 3107.081]

The undersigned _____

[check one of the following seven capacities by which your consent is given]

- □ Mother
- □ Father
- □ Parent
- □ Putative father who has registered under R.C. 3107.062
- □ Agency having permanent custody
- □ Minor, who is more than twelve years of age (this consent must be executed in the presence of the Court)
- □ Other_____

hereby waives notice of the hearing on the Petition For Adoption to be filed in the court, and consents to the adoption of _____

(Name before adoption)

as proposed in the petition.

The undersigned further states that this consent is voluntarily executed irrespective of disclosure of the name or other identification of the prospective adopting parents.

_____

Sworn to before me and signed in my presence this _____ day of _____, 20_____

_____
Person authorized pursuant to R.C. Chapter 3107 to take this acknowledgement

_____
Title

PROBATE COURT OF TRUMBULL COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF _____

(Name after adoption)

CASE NO. _____

PETITIONER'S ACCOUNT

(R.C. 3107.055)

PRELIMINARY ESTIMATE ACCOUNTING
(To be filed not later than date petition filed)

FINAL ACCOUNTING
(To be filed not later than 10 days prior to date of final hearing)

This accounting specifies all disbursements of anything of value the petitioner, a person on the petitioner's behalf, and the agency or attorney made and has agreed to make in connection with the minor's permanent surrender under division (B) of Section 5103.15 of the Revised Code, placement under Section 5103.16 of the Revised Code, and adoption under Chapter 3107. (Attach extra sheets if necessary)

DATE	NAME AND ADDRESS	DISBURSEMENTS MADE OR AGREED TO BE MADE	ACTUAL COSTS
	PHYSICIAN		
	HOSPITAL/MEDICAL FACILITY		
	ATTORNEY		
	ACTUAL COST TO THE ATTORNEY		
	AGENCY		
	ACTUAL COST TO THE AGENCY		
	MAINTENANCE AND MEDICAL CARE REQUIRED UNDER R.C. 5103.15		
	FOSTER CARE		
	GUARDIAN AD LITEM		
	COURT COSTS		
	ALL OTHER DISBURSEMENTS		
TOTAL			

Case No: _____

CERTIFICATION OF PETITIONER'S ACCOUNT

The undersigned certifies this _____ day of _____, 20___, that this accounting is true and accurate.

_____
Attorney or Agency

_____
Typed or Printed Name

_____
Address

_____
City State Zip

_____
Telephone Number (include area code)

The petitioner has reviewed this accounting and attests to its accuracy this _____ day of _____, 20_____.

_____
Petitioner

_____
Petitioner

ORDER APPROVING PETITIONER'S ACCOUNT

The Petitioner's Account filed in accordance with R.C. 3107.10 is hereby approved.

_____
James A. Fredericka, Probate Judge

PROBATE LITIGATION/
PROFESSIONAL CONDUCT

Bart Leonardi, Esq.

JAMES BART LEONARDI, LLC
ATTORNEY AT LAW

EDUCATION

J.D., Ave Maria School of Law
B.S.B.A. in Finance, John Carroll University

CERTIFICATIONS

Specialist in Estate Planning, Trust and Probate Law – Ohio State Bar Association

ADMISSIONS

Ohio, Kentucky and
United States District Courts:
Northern District of Ohio
Western District of Kentucky
Eastern District of Kentucky

PROFESSIONAL ORGANIZATIONS

-Ohio State Bar Association
-Kentucky Bar Association
- Lawyers Guild of the Diocese of Cleveland

Bart Leonardi is a Certified Specialist in Estate Planning, Trust and Probate Law by the Ohio State Bar Association. He concentrates his practice in three areas: Estate Planning, Probate/Trust Administration and Probate Litigation. He counsels married couples, individuals, physicians, business owners and other professionals regarding their estate planning, asset protection and wealth transfer needs. This includes helping clients with everything from a simple will and power of attorney, to revocable trusts and complicated trust planning designed to achieve specific goals including wealth transfer, business succession, asset protection, charitable giving or minimizing estate tax liability.

Bart also has a significant probate practice. He represents executors and administrators in probate courts in Cuyahoga, Lorain, Lake, Geauga, Medina and Summit counties and throughout the Greater Cleveland area. In addition to counseling executors and administrators, Bart serves as estate administrator when the facts of the case dictate. His probate litigation practice includes representing the interests of individual beneficiaries, heirs and other interested parties when they have concerns about the way an estate is being administered. This includes will contest actions, fiduciary removal, creditor claims, wrongful death settlements, minor settlements, trust litigation and other litigation matters.

A native Clevelander, he obtained his B.S.B.A. in Finance from John Carroll University and his J.D. from Ave Maria School of Law. He is admitted to practice in all state courts in Ohio, Kentucky and in the United States District Courts for the Northern District of Ohio and the Eastern and Western Districts of Kentucky.

Bart has been selected by Super Lawyers as an Ohio Rising Star in Estate Planning and Probate in 2018 and 2019.

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Westlake, OH 44145

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Probate Litigation

Bart Leonardi
James Bart Leonardi, LLC
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Westlake, OH 44145
440-937-8364
Bart@bartleonardi.com

The Ability of the Estate to Sue or be Sued

- The estate can sue through the estate fiduciary (executor or administrator depending on whether the decedent died with/without a will).
- Lawsuit is in the name of the estate, not in the name of the beneficiaries or heirs of the estate.
- There are a variety of causes of action that can be maintained by or against an estate.

Wrongful Death

- The estate can sue for the wrongful death of the decedent. The action is brought under 2125.01 and it states in relevant part,
- "When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person."…

Parties

- The proper party to the action is the executor or administrator of the estate.
- The action is brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children and the parents of the decedent. All of whom are rebuttably presumed to have suffered damages. RC 2125.02
- Other Next of Kin may also maintain an action, but they are not rebuttably presumed to have suffered damages. They have to prove their damages. *In re Estate of Payne, (Ohio App. 10 Dist., Franklin, 05-17-2005) No. 95 No.04AP-1176, 2005-OH-2391*

- Statute of Limitations – 2 years (Generally) RC 2125.02(D)
- Medical Malpractice is usually one year from when the claim accrues, with a 180 day letter, time frame expanded.
- However, 2125.02(D) takes precedence in a wrongful death case and the action can be maintained even if the malpractice claim is time barred. *Brosse v. Cumming,* 20 Ohio App. 3d 260, 485 N.E.2d 803 (1984), *Evans v. S. Ohio Med. Ctr. (Ohio App. 4 Dist., 05-04-1995)*
- Product Liability cases – the action must generally be commenced within ten years of the date the product was first delivered to its first purchaser or first lessee, subject to certain exceptions. RC 2125.02(D)

Determination of Damages

- RC 2125.02 (B) – The jury or the court may award damages, as it determines in proportion to the injury and loss resulting to the beneficiaries. An award may include damages for the following:
  - Loss of support from the reasonably expected earning capacity of the decedent;
  - Loss of services of the decedent;
  - Loss of society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;
  - Loss of prospective inheritance to the decedent's heirs at law the time of decedent's death;
  - Mental Anguish incurred by surviving spouse, dependent children, parents or next of kin of decedent.

Distribution of Wrongful Death and Survival Claims

- Distinguish between Survival Claims and Wrongful death.
- Survival claims are estate assets and pass through the estate. Wrongful death claims are not estate assets and do not pass through the estate.
- The probate court has sole jurisdiction to determine the distribution of any wrongful death award or settlement.
- The court that appointed the personal representative adjusts the share of each beneficiary in an equitable manner considering the amount of injury and loss to each beneficiary resulting from the death of the decedent. RC 2125.03(A)
- If all beneficiaries are on an equal degree of consanguinity they may decide the manner of distribution among themselves.
- Once they decide on a distribution an Application to Approve Settlement and Distribution of Wrongful Death and Survivor Claims should be filed with the court for approval -Probate Form 14.0.
- ***Always check the local rules to see requirements for approving contingency fee contracts, notices to levels of kin, etc.

Distribution Continued

- If they are unable to come to an agreement, or if the parties are not on an equal degree of consanguinity, the court shall determine the distribution. RC 2125.03(A)(1)
- The probate court has wide discretion in reaching a fair and equitable distribution. See *In re Estate of Marinelli*, 99 Ohio App.3d 372, 650 N.E.2d 935, see also *In re Estate of Cline* (1964), 1 Ohio Misc. 28, 30 O.O.2d 221, 202 N.E.2d 736
- There is no precise mathematical formula(e) that the court has to rely on in making its determination. *In re Molitor*, (Ohio App. 12 Dist., Brown, 02-19-2013) No. CA2012-06-013, 2013-Ohio-525.
- Two Examples of that broad determination that reach completely different results:

- *In re Estate of Hackworth*, (Ohio App. 3 Dist, Hancock, 06-04-1993) No. 5-93-2, 93-LW-2341 (3rd)
  - Decedent was killed in an automobile accident. His surviving spouse was appointed executor in accord with his will and was the sole beneficiary of the last will and testament.
  - Decedent had three adult children from a prior marriage and several siblings.
  - Surviving Spouse as executor, settled a wrongful death action against the driver of the vehicle that struck decedent for $850,000.
  - The children consented to the settlement and the court approved it.
  - Surviving spouse made application to the court to distribute the proceeds. At the hearing, surviving spouse, children, and one brother presented evidence in support of their claims to share in the wrongful death proceeds.
  - The court awarded 61% to spouse, 13% each to the three children and nothing to sibling of the decedent.

- Spouse appealed. Among her assignment of errors were:
  - The probate court erred in considering collateral sources that she received as a result of decedent's death such as life insurance benefits, retirement benefits and property she inherited from decedent.
  - Spouse presented expert testimony that showed her loss was $750,000 in lost wages as the result of decedent's death. The evidence was unrefuted at trial.
  - The appellate court held that the assets received by spouse were of no consequence and irrelevant to the distribution of wrongful death proceeds.
  - It held that she presented evidence, at a minimum of $750,000 in losses.
  - That amount exceeded the roughly $600,000 available after attorney fees and costs and the court reversed the decision and awarded the entire amount to spouse.

Engle v. Schilling, (Dec. 22, 2000), 4th Dist. No. 99CA50, unreported

- Similar facts, decedent was killed in an automobile accident. He was survived by a spouse and three adult children from a previous marriage. Additionally, by his parents and four siblings.
- The case settled before trial and the spouse and children could not agree on the distribution. A hearing was held in the probate court to determine distribution of the wrongful death proceeds.
- The entire amount of the proceeds was distributed to the children and none to the surviving spouse.
- The trial court concluded that the non-wrongful death assets received by the spouse (life insurance, pension benefits, proceeds from the sale of personal property, the distribution from the estate and net value of the home) adequately compensated her for her loss.
- Ms. Engle appealed and in her fourth assignment of error stated:

- "The probate court erred in setting off collateral benefits appellant received as a result of her husband's death against the proven loss and awarding all of the proceeds to the children as compensation for their emotional loss."
- In affirming the trial court's distribution, the appellate court held that the trial court had the discretion to consider all the assets the surviving spouse received as the result of the decedent's death.
- It directly addressed the *Hackworth* case and stated:

We disagree with the Hackworth court that a trial court is strictly prohibited from considering the value of assets that a surviving spouse may otherwise have received as a result of the deceased's death. Rather, in keeping with the language of R.C. 2125.03(A) we believe that a trial court retains discretion to do what is equitable in view of the unique facts and circumstances present in each particular case. We do not believe that a bright-line rule prohibiting a trial court from considering money inherited or money received through life insurance benefits effectuates the statute's intent to afford a trial court discretion in fashioning an equitable distribution of the wrongful death proceeds.

- It went on to say, ""We note that no "precise mathematical formulae" exist for apportioning wrongful death proceeds among beneficiaries." See also, *In re Cline* (1964), 1 Ohio Misc. 28, 30, 202 N.E.2d 736.
- The facts indicated a troubled marriage and that the marriage was of relatively short duration which played a role in the decision.
- However, the holding is directly at odds with *Hackworth.* The Ohio Supreme Court has not ruled either way on the issue. It did decline to accept *Hackworth,* however.

Claims Against the Estate

Presentment of claims - RC 2117.06

- All Creditor claims must be presented in a writing to the fiduciary within 6 months from the date of death. (Medicaid Estate Recovery is not subject to the 6 month limitation RC 2117.061)
- If an estate has not been opened the creditor must open the estate to preserve their claim.
- Filing a claim with the court is not good enough; it must be presented to the Fiduciary too.
- If a claim is not presented within 6 months from date of death, it is forever barred as to all parties and no payment can be made and no action maintained on the claim (RC 2117.06(C))
- If the fiduciary rejects the claim, in whole or in part, the creditor has 2 months to file an action on the claim or they are forever barred. R.C. 2117.12
- The rejection must be plain and unequivocal to start the 60-day time period. If it is ambiguous, it can be argued that the claim was not rejected. See *In re Estate of Liggons*, 187 Ohio App.3d 750, 933 N.E.2d 1118, 2010-Ohio-1624, appeal not allowed, 126 Ohio St.3d 1548, 932 N.E.2d 341, 2010-Ohio-3855

Wilson v. Lawrence, 150 Ohio St.3d 368

- Joseph Gorman, the former Chairman and CEO of TRW, died on January 20, 2013.
- His estate was opened July 1, 2013 in Cuyahoga Probate Court and William Lawrence was appointed Executor.
- July 11, 2013, James Wilson's lawyer sent a letter addressed to Gorman's personal secretary, Patricia Clark, and to William Meyeroff, his accountant and trustee of his trust.
- While Wilson intended the letter to be a presentment of claim, he did not send it to the Executor nor to his attorney.

Wilson continued

- Both Clark and Meyeroff forwarded the letter to Goldsmith, Counsel for the Executor.
- September 24, 2013, Goldsmith informs Wilson's lawyer that he is aware a letter was sent to Clark and Meyeroff. Goldsmith asserts the letter was not presented to the Executor and therefore insufficient to effectuate filing of an appropriate claim and it will not be considered as it wasn't presented in accordance with the Revised Code.
- In November of 2013, Wilson files suit against the Executor in common pleas court.
- The trial court granted Executor's Motion for Summary Judgment.

- The Eighth District reversed, rejecting Lawrence's strict interpretation of 2117.06.
- It stated "the fact that Wilson's claim was forwarded to the estate attorney and the executor by a third party, who was connected with the decedent is of no consequence."
- The Ohio Supreme Court accepted jurisdiction on the case.

- The Supreme Court reversed the 8th District, holding that 2117.06 is not ambiguous and the statute says, "shall" present their claims… to the executor or administrator in a writing.
- Shall means must
- The court cited the 9th district case, *Beacon Mut. Indem. Co. v. Stalder*, 95 Ohio App 441, 445, 447 "A presentation of a claim to a so-called agent of the administrator falls outside the requirements of the statute, because the functions of the office cannot be delegated to agents."
- An agent does not owe the fidelity required of an officer of the Court.
- Presentation to the probate fiduciary ensures the orderly, efficient and legally proper administration of the estate.

- The Court concluded:

A claimant against an estate does not meet the requirement under R.C. 2117.06(A)(1)(a) to present a claim to the executor or administrator of an estate if the claimant delivers the claim to someone who has not been appointed by a probate court to serve as the executor or administrator of the estate.

Removal of Fiduciary (R.C. 2109.24)

- Sometimes an executor of administrator (fiduciary) may have to resign their appointment for one reason or another. They may resign by filing a writing with the court after giving at least fifteen days notice to those interested in the estate.
- Upon notice or a motion of the fiduciary to resign the court may set a hearing where interested parties can object. Presumably, the court also can just accept the resignation.
- Regardless, the fiduciary cannot resign without a court order allowing them to do so.

- In some instances the court can remove a fiduciary sua sponte.
  - Failure to file an inventory or account, if the omission isn't remedied within 30 days of notice to the Fiduciary.
  - The court may also remove a fiduciary after ten days' notice for habitual drunkenness neglect of duty, incompetency, or fraudulent conduct, because the interest of the estate demands it, or for any other cause authorized by law.
- The probate court has broad power to remove a fiduciary under this code section. *Hopkins v. Barger* (Lawrence 1935) 21 Ohio Law Abs. 386
- The removal of a fiduciary pursuant to R.C. §2109.24 is within the sound discretion of the trial court, and absent a clear abuse of discretion, a reviewing court will not reverse an order of a lower court removing a fiduciary. *In re Estate of Jarvis* (Cuyahoga 1980) 67 Ohio App. 2d 94, 97, 425 N.E.2d 939, 942.

- In fact, as long as the court grounds its decision to remove in one of the bases provided for in the statute, removal is proper; there is no requirement that such a finding be supported by clear and convincing evidence. *In re Estate of Bost* (Cuyahoga 1983) 10 Ohio App. 3d 147, 149 460 N.E.2d 1156, 1159.
- Moreover, the fiduciary's actions *need not amount to a violation of the law or even cause injury to the estate* [emphasis added] to warrant a finding that the best interests of the estate were served. *Id.*
- Of course, the court has wide latitude in allowing a fiduciary to continue to serve, despite a motion calling for removal.
- If the court does remove the fiduciary, the letters of authority are revoked.

Lost Wills

- It is possible to admit a will that has become lost, spoliated or destroyed if the proponent of the will establishes by clear and convincing evidence that,
  - 1) the will was executed with the formalities required at the time of execution by the jurisdiction it was executed and the contents of the will, and
  - 2) no one opposing the admission of the will establishes by preponderance of the evidence that the testator had revoked the will. R.C. §2107.26
- Copies of a will can be admitted to probate by filing an Application for Admission to Probate of Spoliated or Lost Will. R.C. §2107.27(A), see also Summit County Probate Form ES 15
- Notice must be given to the surviving spouse of the testator, all persons who would inherit under R.C. §2105 if the testator had died intestate, all legatees and devisees named in the will and all legatees and devisees named in the will immediately prior to the lost or spoliated will that is known to the applicant.

- The proponent of the copy shall cause the witnesses to the will and any other witnesses with relevant and material knowledge about the will to appear before the court to testify. R.C. §2107.27(B)
- The term "witnesses" is not to be taken to mean that both witnesses to the will need appear. "Nowhere in R.C. 2107.26 or 2107.27 that the unavailability of one of the witnesses is fatal to the admission of the will." *In re Estate of Witt* (Ohio App. 1 Dist., Hamilton, 03-11-2011) No. C-100551, 2011-Ohio-1107
- In *Witt*, the testimony of one witness was sufficient to establish that the original will had been executed with the required formalities and the copy accurately established the contents of the original will.

Will Contests

- Wills usually contested for:
  - Failing to comply with formalities, lack of testamentary capacity or undue influence.
  - Generally, capacity exists if the testator:
    - Is of sound mind and memory to understand that he/she is making a will;
    - Is able to comprehend, generally, the nature and extent of his/her property;
    - Is able to remember the names and identity of those who have a natural claim upon the property; and,
    - Can appreciate his/her relationship with family members. *Niemes v. Niemes* (1917), 97 Ohio St. 145.
  - What is undue influence?
    - It is that which substitutes the wishes of another for those of the testator. It must overcome his power of resistance and oblige him to make a disposition he would not have made if left to act freely according to his own wishes and pleasure. *West v. Henry*, 173 Ohio St. 498, 184 N.E.2d 200, 20 O.O.2d 119 (1962)

- Undo influence must so overpower and subjugate the mind of the testator as to destroy his/her free agency and make him express the will of another. *West v. Henry*
- The mere presence of influence is not enough. It must be present or operative at the time of execution. *West v. Henry.*
- Rules of Rules of Civil Procedure govern all aspects of a Will Contest action.
- There is a right to a jury trial. Demand must be made in the complaint or answer.

- Necessary Parties
  - Any person designated in the will to receive a testamentary disposition of real property;
  - Heirs who would have take property pursuant to section 2105.06 if the testator had died intestate;
  - The executor or administrator with will annexed;
  - The Attorney General as provided by R.C. 109.25; and
  - Other interested parties.
- The Order of Probate is prima facie evidence of Attestation, execution and validity of the will or codicil.
- Burden is on the contestants of the will.
- Contesting party may call any witness to the will as upon cross.

- The defense of a questionable will are taxed as a cost of administration subject to the court approval as reasonable compensation.
- Will contests must be brought within three months of the filing of the certificate of notice of probate.

ACTIVE SHOOTER
(Plan of Action Training)

Officer Dan Pignatelli, PhD.
Officer John Jeffries
Westerville Division of Police

Officer Pignatelli, PhD

Officer Daniel Pignatelli has been serving in law enforcement since 1998. Throughout his career, he has worked as a patrol officer, school resource officer, community services liaison and is currently assigned to the Professional Standards Bureau as the policy and accreditation manager. He is a certified OPOTA unit instructor and has been a police academy instructor, Division training instructor and adjunct professor.

He holds a PhD in business with an emphasis on active shooter incidents and police response, as well as a master's degree focusing on disaster preparedness and domestic/international terrorism. He has received numerous certifications for active shooter training, security assessment procedures and prevention and deterrence of terrorist acts. He is also the lead instructor/trainer for civilian response to active shooter events and has partnered with over 300 corporate and government entities.

Officer Jeffries

Officer John Jeffries has a Bachelor of Science Degree in Criminal Justice from Bowling Green State University. He started his law enforcement career as a police officer for the City of Springfield, Ohio in 1985. He transferred to the Westerville Police Division in 1988 where he has served as a patrol officer, the Division training officer, and a 19 year member of the Delaware Tactical Unit S.W.A.T. Team. Officer Jeffries has been an instructor for the Division for over 24 years and is currently assigned as Crime Prevention Officer in the Community Services Bureau. In 2014, Officer Jeffries was awarded the "Award of Excellence" from the Ohio Tactical Officer's Association.

NOTES:

"What Will Probate Practice Look Like When People Do Not Die – Technologically Speaking?"

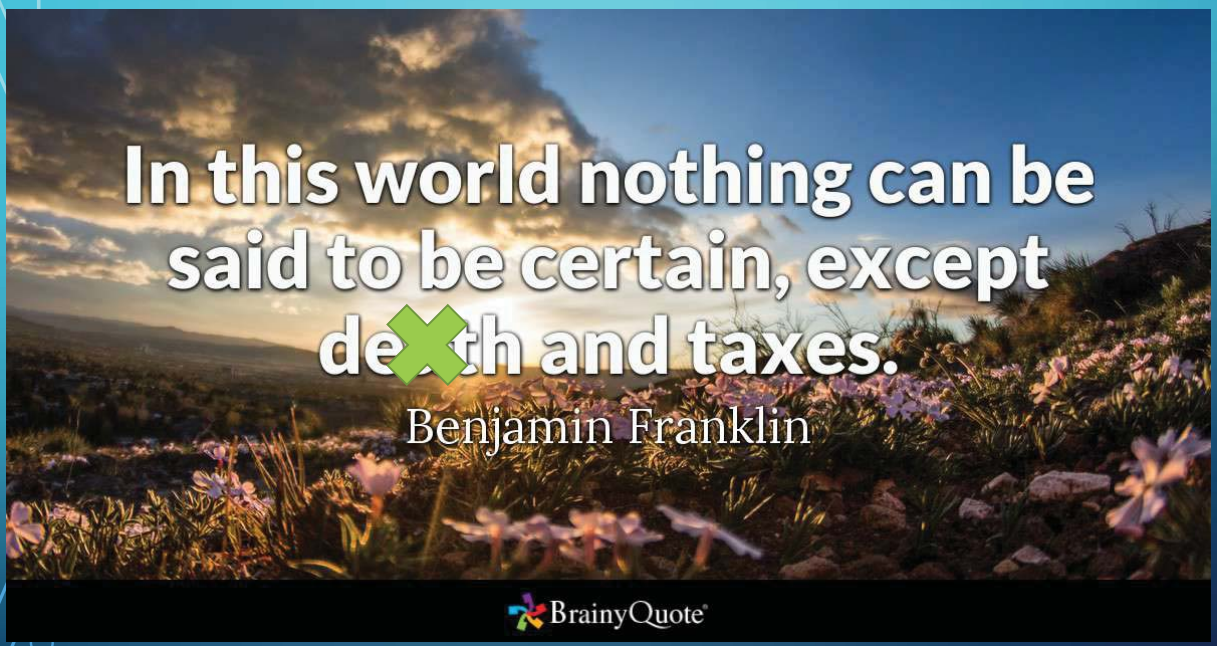
Milt Nuzum, Director
Judicial & Education Services Division
Supreme Court of Ohio

W. MILTON NUZUM, III (Milt Nuzum) is Director of the Judicial and Education Services Division at the Supreme Court of Ohio. He has been with the Court since 2007. Prior to joining the staff at the Supreme Court of Ohio, Mr. Nuzum served as an elected trial court judge in Ohio for 13 years. In his career, Mr. Nuzum has also been employed as a pharmaceutical process engineer, pharmacist, attorney, and information technology policy consultant. He has presented seminars and taught courses on various legal, adult education, and court administration topics in Ohio, nationally, and internationally. He is a graduate of The Ohio State University College of Pharmacy and the Indiana University School of Law.

38TH ANNUAL PROBATE PRACTICE SEMINAR

WHAT WILL PROBATE PRACTICE LOOK LIKE WHEN PEOPLE DO NOT DIE – TECHNOLOGICALLY SPEAKING?

Milt Nuzum, Director
Judicial & Education Services Division
Supreme Court of Ohio



FUTURE TECHNOLOGY

The idea behind digital computers may be explained by saying that these machines are intended to carry out any operations which could be done by a human computer.

~ Alan Turing (circa 1950)

https://www.brainyquote.com/authors/alan_turing

WAR GAMES (1983)

ARTIFICIAL INTELLIGENCE

Matthew U. Scherer. "***Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, And Strategies. Spring 2016***

YOUR VIRTUAL SELF

- EACH ONE OF US GENERATES VAST AMOUNTS OF DATA
- THIS BECOMES A VALUABLE FORM OF CURRENCY
- WHO OWNS THIS DATA? WHO OWNS YOUR VIRTUAL LIFE?

"Data is Life. Own Yours."

~ The Locker Project

ONLINE DISPUTE RESOLUTION

- Information and Communication Technology (ICT)
  - "Fourth Party"
  - Used as a tool by neutral 3rd party
    - Organize information and make communication more polite & constructive
    - Send automatic replies, schedule meetings and monitor performance
  - May soon reduce role of neutral 3rd party
    - Increase in skill with more advances in technology
    - More efficient and cost effective

Katsh & Rifkin, 2001

ONLINE DISPUTE RESOLUTION

- Wave of the Future
  - Attorneys are often not required
  - E-Bay
    - 60 million disputes a year
    - 90% did not require human input
    - Too expensive to use traditional model of dispute resolution

Victor Li. *Is Online Dispute Resolution the Wave of the Future?* 2016

ONLINE DISPUTE RESOLUTION

- Wave of the Future
- Pros
  - Attorneys often not required
  - Cost Savings
  - Convenience
  - Avoid Jurisdictional Issues
- Cons
  - Limited Range
  - Impersonal
  - Potentially Inaccessible
  - Confidentiality Concern

Victor Li. *Is Online Dispute Resolution the Wave of the Future?* 2016
Goodman, Joseph. *The Pros and Cons of Online Dispute Resolution.* 2003

MMORPG

- Massively Multiplayer Online Role-Playing Game
  - World of Warcraft
- Gamers make real money playing them
  - Sophisticated economies
  - Real estate
  - Retail items in the game
  - Mine virtual world for currency

Laurence H.M. Holland. *Making Real Money in Virtual Worlds.* 2006

BLOCKCHAIN TECHNOLOGY

- High Fidelity
  - A start-up by Second Life co-founder
  - A social Virtual Reality framework using blockchain
  - Recently received $35 million to build the framework
  - Players can move between user-generated worlds & bring purchases with them by tying them to a digital persona
- Second Life has $700 million in peer-to-peer transactions annually
- Forecast VR reaching 1 billion people with $1 trillion in transactions

Lucas Matney. *VR Blockchain startup founded by Second Life co-creator raises $35M.* 2018

SECOND LIFE

- Created by Linden Labs 2003
- Simulates the real world with 1 million users per month, with transactions of virtually traded goods and services using real or virtual currency
- 2015 GDP estimated at $500 million
  - "Resident" earnings averaged $60 million gross
- Anshe Chung avatar

https://www.investopedia.com/terms/s/second-life-economy.asp

BITCOIN

- Cryptocurrency created in 2008
- Peer-to-peer system for online payments
- Transactions are verified by network nodes through cryptography and recorded in a public distributed ledger called a blockchain.
- A volatile commodity
  - 750% increase in 2016
  - Rapper 50 Cent forgotten commodity

Leah Thomas. Newsweek: Rapper 50 Cent Makes $8 Million in Bitcoin: 'I Forgot I Did That.' 2018

A.I. LEGAL WORK

- Estimates that 23 percent can be automated
- Apply human defined rules and AI takes actions
- Start-up Ross Intelligence created program
  - Reads thousands of cases and ranks most relevant
  - Attorney Luis Salazar tested the Ross program
  - The Ross program instantly found a similar case; it took Salazar 10 hours

www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html

VIRTUAL ACTORS

- Used in movies instead of actors for heavily populated scenes and deadly stunts
- Computer enhanced images of deceased actors
- Third-party use without permission – digital kidnapping

www.zdnet.com/article/virtual-actors-cheaper-better-faster-than-humans/

R.C. 2741.04 RIGHT OF PUBLICITY IN INDIVIDUAL'S PERSONA IS FREELY TRANSFERABLE AND DESCENDIBLE.

R.C. 2741.09 EXCEPTIONS.

R.C. Chapter 2137: UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETTS ACT

Eff: 4/6/2017

R.C. 2137.01 DEFINITIONS.

- (I) "Digital asset" means an electronic record in which an individual has a right or interest. "Digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record.
- (R) "Personal representative" means an executor, administrator, special administrator, or other person acting under the authority of the probate court to perform substantially the same function under the law of this state. "Personal representative" also includes a commissioner in a release of assets from administration …

R.C. 2137.02 APPLICABILITY

This chapter applies to all of the following:

- POWER OF ATTORNEY
- PERSONAL REPRESENTATIVE OF DECEDENT
- GUARDIAN
- TRUST
- CUSTODIAN

This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

R.C. 2137.03 USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS

- User may give directions
  - Online toll priority one
  - Will, trust, POA or other record, priority two
  - Terms of service agreement priority 3 (unless the user affirmatively and distinctly assented)

R.C. 2137.04 TERMS-OF-SERVICE AGREEMENT.

- A fiduciary's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of- service agreement if the user has not provided direction under section 2137.03 of the Revised Code.

R.C. 2137.05 PROCEDURE OF DISCLOSING DIGITAL ASSETS.

- Custodian not required to disclose digital assets deleted by the user.

R.C. 2137.06 DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF DECEASED USER.

- Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications
- A finding by the court that … the following applies
  - Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

R.C. 2137.07 **DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED USER.**

- DIGITAL ASSETS THAT ARE NOT COMMUNICATION

R.C. 2137.08, ET. SEQ.

- Power of Attorney
- Trust
- Guardianship

WHAT DOES TECHNOLOGY HOLD FOR THE AFTERLIFE OF "NORMAL PEOPLE"?

- Advise clients to think about addressing their digital assetsin a will.
- Letter of authority from a probate court make it easier to gain access to digital assets than proof of agency under a trust.
- Advise clients to keep a list of digital accounts with username and passwords.

THANK YOU

Legal Ethics and Professionalism
Social Media Considerations
PROFESSIONAL CONDUCT

Kim Vanover Riley, Esq.
Montgomery, Rennie & Jonson Co., L.P.A.

Kimberly Vanover Riley

Kim Riley is a partner with the law firm of Montgomery, Rennie & Jonson Co., L.P.A., where she practices in the areas of employment, civil rights, and disciplinary defense. She concentrates her practice on designing and implementing personnel policies for private and public sector employers, and defending them in civil litigation. In addition, she specializes in the areas of attorney and judicial ethics, and she defends disciplinary matters before the Ohio Board of Professional Conduct of the Supreme Court.

Ms. Riley received her Bachelor of Arts in Communication Arts from the University of Cincinnati in 1994, with distinction as an Honors Scholar. She received her Juris Doctorate from the University of Cincinnati in 1997, graduating in the Order of Barristers.

Ms. Riley is a certified instructor in Human Resources for the National Center for State Courts' Institute for Court Management, and is an Ohio State Bar Certified Specialist in Labor and Employment Law. She has also been selected as one of Ohio's Super Lawyers/Super Lawyer Rising Stars on multiple occasions, and she has a 10.0 Avvo Rating. She is a member of the Cincinnati, Cleveland Metropolitan, West Shore, Ohio, Kentucky, and American Bar Associations, as well as the Defense Research Institute. She is a member and former Chair of the Ethics and Professionalism Committee of the Cleveland Metropolitan Bar Association and its Labor and Employment Section. She also serves on the CMBA Bar Admissions Committee, and she is a Master of the Bench in the Cleveland Employment Inn of Court.

Ms. Riley is the original and sole author of the Ohio chapter of BNA's *State-by-State Wage and Hour Law Survey* and its annual supplements, now in its third edition. She has served as a contributing author to the ABA's annual FMLA and ADEA updates on several occasions, and as a co-author of articles in the *Journal of the Law and Social Work* (*Morgan v. Fairfield Family Counseling*: Duty to Control?) and *Women's Studies in Communication* (The Role of Gender and Feminism in Perceptions of Sexual and Sexually Harassing Communication). In addition, she has written articles for the Bar Journal of the Cleveland Metropolitan Bar Association and the Ohio Judicial Conference's *For the Record*.

Ms. Riley frequently speaks to groups of employers, managers, judges, and attorneys on various aspects of employment law, civil rights, and legal ethics. She has served as an adjunct professor at the University of Cincinnati and Cuyahoga Community College, and she has served as a guest lecturer at the Northern Kentucky University and the University of Louisville. She is a regular instructor for the Ohio Judicial College, and she has also presented seminars for the Arkansas Administrative Office of Courts, the Arkansas Judicial Conference, the Ohio Common Pleas Judges Association, the Association of Municipal/County Judges of Ohio, the Ohio Association of Probate Judges, the Ohio Association of Juvenile Court Judges, the Ohio Judicial Conference, the Ohio Association for Court Administration, the Ohio Association of Municipal/County Court Clerks, the Ohio Juvenile Detention Director's Association, the Ohio Urban Courts Conference, the Cincinnati Bar Association, the Cleveland Metropolitan Bar Association, the West Shore Bar Association, the Clermont County Chamber of Commerce, the Ohio Society of CPAs, the Society for Human Resources Management, the Southwestern Ohio Chiropractic Association, Lorman Education Services, the Council on Education in Management, and the National Business Institute. She is also independently retained to conduct employee and supervisor training for public and private sector employers.

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Social Media Considerations:

Legal Ethics and Professionalism

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Social Media 101
(Why are we talking about this? I hate this stuff.)

Where can social media be especially relevant to legal professionals?

- In addition to environments we don't have time to discuss today (e.g., parents, spouses, friends), a few frequently implicate our professional lives:
  - Practitioners
  - Human Beings
  - Business Owners/Marketers
  - Employers

Social Media

Wearing your practitioner hat

Bad news for luddites

- Lawyers have an ethical duty of technological competence.
- Ohio RPC 1.1: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changed in the law and its practice, including the benefits and risks associated with relevant technology.
  - Also, failing to uncover the most relevant information in your cases.

The best information isn't in the same places it used to be

- General—Are you missing valuable information about witnesses' whereabouts, activities, friends, emotional state?
- Probate – Do your estate plans contemplate virtual assets; passwords; what happens to social media accounts when people die?
- Litigation—Is there important, publicly accessible information about the parties, expert witnesses, fact witnesses, and jurors?

Spoliation & Preservation

- Are you adequately protecting your clients from spoliation concerns?
- Are you taking measures to ensure your opponents preserve past social media information?
  - Litigation Hold

Lester v. Allied Concrete, CL-08-150, CL09-223 (VA 2011)

- 2007 accident killed plaintiff's wife and injured plaintiff.
- 2010 discovery request included questions regarding Facebook photo of the widower holding a beer and wearing a shirt that said, "I ♥ hot moms."
- Attorney told client to "clean up" his Facebook-"we don't want blowups of this stuff at trial."
- Plaintiff deactivated Facebook page; after an order to reactivate it, plaintiff deleted 16 photos from his Facebook page including the one at issue.
- Judge ordered attorney to pay $542,000; client to pay $180,000 for spoliation

Online interactions with witnesses and jurors

- Is it proper for lawyers to undertake a pretrial search of prospective jurors' social networking sites?
- Provided lawyer does not contact, communicate, 'friend', or subscribe to juror's twitter account; lawyer may visit publicly available Twitter, Facebook or other social networking site of a juror.

NYCLA Committee on Professional Ethics, Formal Opinion # 743 (May 18, 2011)

Online interactions with witnesses and jurors

A lawyer may not ethically send a 'friend' request to an opponent or a potential witness with the goal of getting inside information for a client's matter.

Such 'friending' seen as possibly improper contact, and likely deceitful unless the true purpose of the 'friend' request is revealed.

San Diego Bar Legal Ethics Comm., Op. 2011-2 (May 24, 2011)

Online interactions with witnesses and jurors

May a lawyer directly or through another contact an unrepresented person through a social networking website and request access to her information to obtain information for use in litigation?

NO: 8.4(c)- fraud, deceit, dishonesty or misrepresentation; 4.1 Knowingly make a false statement to a third person; 8.4(a) Induce another to violate the Rules.

BUT: A lawyer *may* use information that is public or readily accessible as long as no deception is used to gain access. If it is public, it is fair game.

NY City Bar Ass'n, Formal Op. 2010-02

Online interactions with witnesses and jurors

Lawyer cannot ask a third person to seek to become a friend or a witness' Facebook page in an effort to gain access to the information posted to impeach the credibility of the witness at trial. Communication through a third party on Facebook is deceptive. (8.4(c))

Philadelphia Ethics Opinion 2009-02

Online interactions with witnesses and jurors

Using fictitious Facebook profile to contact alibi witnesses violated 8.4(c),(d).

ODC v. Brockler, 2016-Ohio-657.

Ohio BPC 2010-7

Judges may "friend" and "tweet" if exercising proper caution. Biggest restrictions:

- CJC 1.2—maintain dignity
- CJC 2.4(C)—avoid interactions that would erode confidence in independence of judiciary
- CJC 2.9(A)/2.10—no commenting on matters pending before judge, or pending/impending anywhere.
- CJC 2.9(C)—can't investigate case/parties using social media
- CJC 2.11(A)(1)—should disqualify himself from proceedings where relationship could create bias
- CJC 3.10—no giving legal advice.

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OSBA Opinion 2010-7

- Judge may "friend" attorney who appears before the judge.
- Judge must maintain dignity in every comment, photograph, and other information shared on the social networking site.
- Must not engage in communications that may erode confidence in judicial decision-making.
- Should not ever make any comments on social networking site about a pending case.
- Judge should not view a party/witness's social media page
- Should not use social media to obtain information regarding matter before the judge
- Judge should disqualify himself if social network relationship with a lawyer creates bias or prejudice

Judicial Canons

Prohibit 'blogging' about pending matters and from reading blogs about matters on the judge's docket.

- Neither initiate nor consider ex parte communications (Rule 2.9),
- Avoid public comment on pending or impending matters (Rule 2.10), and
- Avoid impropriety and the appearance of impropriety (Rule 1.2).

Where does all this information show up?

- Blogs –authors regularly post entries, often with the ability for feedback from viewers.
- Microblogs—Twitter, Tumblr, Reddit
- Social Networking—Facebook, LinkedIn, Google+
- Photo sharing (Instagram, Snapchat, Pinterest)
- Messaging (Facebook Messenger, Whats App)
- Video sharing (YouTube, Facebook Live, Periscope, Vimeo)
- Bookmarking sites (Pinterest, StumbleUpon)
- Literally ***thousands*** of others available—accessible on every platform imaginable.

Tailor your practice accordingly.

Facebook

- 2.23 billion monthly active users; 1.47 billion daily active users as of June 2018
- 68% adult Internet users have used it
- Average user – 338 friends
- People "Friend" personal pages; "Like"/follow public pages
- Public, semi-public, "private" posts; comments on public posts
- Closed/Private/Secret groups; Messaging ability
- Users can comment (so monitor regularly)
- Records maintained almost indefinitely.

Google+/Google Hangouts

- Similar to FB; owned and operated by Google
- Google+ Circles: enables users to organize contacts into groups or lists for sharing across various Google products and services
- Google Hangouts: video-conferencing capabilities available through Google+
- Google+ Communities: Lawyers and Law—over 22,000 members
  - **Mind state-by-state ethics differences!**

LinkedIn

- Started in 2003 and has more than 500 million users.
- Network, post, market, develop business opportunities, collaborate on projects, and share job opportunities.
- Groups can be a good way to connect with others in your industry; recruiting; sharing info.

Twitter

- Conversational, informal platform
- 335 million monthly active users
- 500 million tweets are sent per day
- Tweets: ≤ 280 characters
- @ Reply / RT
- DM for direct-to-consumer messages

Blogs

- Personalized diaries online
- Typically longer posts than on other social media sites
- Blogger
  - Operated via Google
- WordPress
  - Publicize feature allows users to connect to Facebook, Twitter, LinkedIn, and Tumblr for automatic sharing
  - Most popular blogging system online

Other Social Media

- Location-based (e.g., Foursquare)
  - Local search and discovery service app
  - Provides personalized recommendations of places to go in user's current location
- Instagram
  - Photo- and video-sharing social networking service
  - Users can "follow" friends and "like" or comment on pictures
- Photobucket / Flickr
  - Image and video hosting website
  - Widely used to share and embed personal photographs

Other Social Media

- YouTube
  - Video-sharing website for viewing by third-parties
  - Users can create their own channel and other user's can subscribe to and receive notice of new videos
- Snapchat
  - Photo messaging application that enables users to take photos, record videos, add text and drawings, and send them to a controlled list of recipients.
  - Users set a time limit for how long recipients can view their messages after which they will be hidden and deleted

Social Media

Wearing your human being (who happens to be a lawyer) hat

Legal Practitioners' Social Networks

- Personal: keep in touch with family, friends, acquaintances
- Business:
  - Network with colleagues – ideas, referrals
  - General information for clients and potential clients – much like a firm web site
  - Specific contacts with clients, potential clients, opponents, judges
  - Information on adversaries, judges, parties, witnesses

Social Media is differentiated from other speech

- Social interaction that's published
- (Semi-) Permanent
- Using the Internet to communicate to a large number of people on a rapid basis
- Often executed with little editing, premeditation, or filter

Too helpful for your own good?

- Dispensing legal advice over quick-and-dirty platforms ≠ dispensing advice about other stuff you know a lot about
  - Do you intend to form an attorney-client relationship? (and would you dispense that advice over a public forum, anyway?)
  - Did you run a conflicts check?
  - Do you have all the factual information you need to dispense advice?
  - Are you licensed to practice in the state where the recipient is obtaining advice?

Venting? Want to be Funny? Be Mindful of Confidentiality

- ABA Formal Opinion 479: Public record ≠ Public
- Attorneys' obligation to maintain confidentiality of information from prospective clients (1.18) and active clients (1.6) and former clients (1.9)
- Some exceptions, but typically must remain confidential→much broader than privileged.
- RPC 1.6(c) protects "information related to the representation." Comment [3] notes this is broader than facts shared in confidence—all information relating to the representation, whatever its source.

"Trial Prep by day; trial prep by night. #LawyerLife"

Be Deferential to Judicial Officials

- RPC 8.2(a):
  - A lawyer shall not make a statement
  - That the lawyer knows is false (or has reckless disregard for its truth or falsity)
  - Concerning the qualifications or integrity of a judicial officer or candidate
- *Disciplinary Counsel v. Pullins*, 2010-Ohio-6241.

Extend similar courtesy to your opposing counsel

- Grievances (past, pending, or contemplating for the future) cannot be disclosed. *(*Gov Bar Rule V(8)(A)(3))
  - Doing so is a standalone ethical violation. (*Pullins)*
- Also consider 8.4(d)(engaging in conduct prejudicial to the administration of justice)

Other 8.4 violations that are easy to overlook on social media

- (a) violating RPC, knowingly assisting/inducing another to do so
- (e) state or imply an ability to improperly influence a government agency/official
- (g) professionally based EEO discrimination
- (h) any other conduct adversely reflecting on the lawyer's fitness to practice law

Public Perception & Social Media

- Consider Facebook or Twitter posts like these:
  - "Guess which local celebrity I'm defending in her divorce?"
  - "Just finished assisting a guy who smelled like day-old sweatsocks, wrapped in roadkill."
  - " Too bad my defendant drew Judge Johnson—I would have had a better shot before my old poker buddy, Judge Smith."
  - "When DUI checkpoint pops up 5 minutes after you swerve home from the Browns game. #Blessed"
  - "Pretty sure I spent the day watching my client lie on the witness stand."

Considerations when Posting

- Be wary of complaints (even benign ones) about clients, decisions, judges
- Be mindful of confidentiality issues.
  - Even discussion of *issues* can violate privilege
- Don't put it out there if you wouldn't want a competitor or a reporter to see it.
- Don't claim expertise.

Socializing Ethically for Lawyers

- Off limits: client info, client identity / fact of representation
  - Even wins may need to be shielded (to avoid future claims)
    - But see Ohio BPC Op. 2018-3 (lawyers not bound to abide by settlement agreements' restriction on their practices)
- No such thing as a truly private listserv, message group, chat room.
- Social media is largely public. Don't communicate with a client about their matters using social media.
- Not a place to seek strategic or legal advice on a particular matter, even if you obscure a client's identity.

Social Media

Wearing your business owner / marketing hat

Rule 7.1: Communications Concerning a Lawyer's Services

"A lawyer shall not make or use a false, misleading or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading"

Advertising

- Rule 7.2
  - A lawyer may advertise services through written, recorded, or electronic communication, including social media
  - A lawyer shall not give anything of value to a person for recommending the lawyers services except that a lawyer may pay any of the following:
    - The reasonable costs of advertisements or communications;
    - The usual charges of legal service plan;
  - Any communication shall include the name and office address of at least one lawyer or law firm responsible for its content
  - A lawyer shall not seek employment in connection with a matter in which the lawyer or law firm does not intend to participate actively in the representation, but that the lawyer or law firm intends to refer to other counsel

Client websites: OSBA Op. 2004-7

May a law firm be identified on a business client's Web site and be referred to as the company's preferred attorneys?

- NO.
- Communication to the public through the company Web site that a law firm is the company's "preferred attorneys" is misleading.
- Risk of implying that the law firm and client are in business together

Client websites: OSBA Op. 2004-7

- Lawyer/firm can't request that a client promote the lawyer/firm on the client's business website.
- If lawyer/law firm becomes aware that client is improperly promoting lawyer/law firm on its website, lawyer must counsel client and withdraw from representation if it persists.
- This opinion pre-dated the social media boom; consider whether your clients are doing the same on their social media pages.

Solicitation

- Rule 7.3
  - A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain unless:
    - The person contacted is a lawyer
    - The person contacted has a family, close personal, or prior professional relationship with the lawyer
  - Every written, recorded, or electronic communication from a lawyer soliciting professional employment shall:
    - Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee
    - Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's claim
    - Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital – "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY"

Texting Potential Clients: BPC 2013-2

- Technically acceptable, but still a *really* bad idea.
- Rule 7.2 allows text message advertising but "all lawyer advertising, including text message advertising, must comply with Prof. Cond. R. 7.1 and 7.3"
  - Must state how you learned of the prospective client's need for legal services
  - Must verify that civil defendant has been served
  - Can't happen in real time; lawyers must pay data charges.
  - Texts sent within 30 days of accident or disaster must include the "Understanding Your Rights" statement in the body of the text and not as a link, attachment, or photograph

Lawyer's Response to Client's Bad Avvo Review Leads to Disciplinary Complaint

- Illinois attorney Betty Tsamis posted a response on Avvo to a negative review she received from a former client on Avvo
- In an effort to defend her representation and embarrass her client, Tsamis wrote that her client did not reveal all the facts of the situation that led to his firing, and when she reviewed his personnel file, she advised him he would likely lose
- A disciplinary complaint was later filed against Tsamis for revealing confidential information about a client online

Social Media
Wearing your employer hat

FCRA, ECPA/SCA/2933.51, and privacy (public sector)

- FCRA requires written consent/disclosures before conducting third-party background checks
- ECPA/SCA/ORC 2933.51 prohibit wrongful access of stored electronic communications
- Employees maintain an expectation of privacy
  - *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001)—no expectation of privacy in publicly posted materials, BUT
  - Avoid violating terms of service to surreptitiously access SM sites
  - Don't adopt aliases to "friend" employees or circumvent proper channels to see their sites. (*Pietrylo v. Hillstone Rest. Group*, 2008 US Dist LEXIS 108834 (D. NJ)

What does EEO have to do with anything?

- It's tempting to use social media to winnow down your stack of resumes, or check up on your employees.
  - You might find information that would merit addressing with an employee (workplace harassment; evidence of FMLA abuse), or appropriately eliminate applicants (spelling/grammar errors, maligning former employer, unlawful behavior)
  - BUT you may also learn information you wouldn't know—that you don't want to know, whether employed (disability, politics, religion) or applying (race, sex, age, pregnancy, marital status, etc.).
  - And don't even think about searching for something that's not public (e.g., via fake friend requests; a third party; or hacked password)

Is there any way to avoid that problem?

- For applicants, consider having someone else in your organization do the social media search, with heavy controls in place:
  - That person is entirely removed from the hiring process in every other respect
  - S/he has training on proper boundaries of social media research, and the information you can appropriately consider in a hiring decision.
  - S/he provides a sanitized report to the hiring committee with the information that's appropriate, but filters out the information that's not.
  - Weigh the relative costs/benefits of human error and missing valuable information

What about checking up on employees?

- Bad practice to require subordinates to accept your friend requests/disclose their passwords. (SCA concerns)
- It will usually be a bad idea to monitor employees' every move on social media if you're not otherwise "connected"—at their election.
  - However, think "reasonable suspicion."
  - Co-worker volunteers information about an inappropriate post / someone with proper access forwards you something = fair game

Productivity

- Poll of 1,200 employees:
  - 12% didn't check social media from work
  - 60% checked it 1-5 times/day
  - 10% checked it 6-10 times/day
  - 18% more than 10 times per workday

ComPsych (EAP) Poll (2017)

Productivity

- Social media = constantly plugged in, updating, and changing
- You still control the workday—okay to limit personal Internet use, social media access, cell phone/smartphone during work time (not breaks)
- Balance productivity against
  - realistic ability to enforce these rules
  - Potential perception / morale issues with employees
- Most practical approach may be to address performance/productivity over an all-or-nothing rule.

Drafting a social media policy

- 1st / 4th Amendment considerations (Public); NLRA/Boeing (Private)
- Cover what is prohibited
  - Revealing confidences / private information
  - Airing internal grievances in a manner where employer's interests outweigh employee's right to exercise 1st Am. (public) or confer (private)
  - Anything that would otherwise violate workplace policy (e.g., workplace harassment)
- Cover what is required
  - Maintaining duties of confidentiality, impartiality, UPL
  - Maintaining civility/respect for co-workers, privacy of clients

Sample

- A clearinghouse of over 200 social media policies is available at http://www.compliancebuilding.com/about/publications/social-media-policies
- If you copy one, be sure to use one developed for your particular sector (public vs. private) and coordinate with counsel.

Social Media Considerations:

Legal Ethics and Professionalism

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CURRENT TOPICS IN PROBATE
PANEL DISCUSSION

Hon. Robert N. Rusu, Jr.
Judge, Mahoning County Probate Court

Hon. Albert S. Camplese
Judge, Ashtabula County Probate Court

Hon. Robert W. Berger
Judge, Portage County Probate Court

Hon. Albert S. Camplese
Ashtabula County Common Pleas Court
Juvenile-Probate Division

Judge Albert S. Camplese graduated, with honors, from Ohio Northern University in 1980, and received his Juris Doctor from Cleveland-Marshall College of Law in 1985. He served 22 years as the Judge of the Ashtabula Municipal Court before being elected to the bench of the Ashtabula County Court of Common Pleas, Probate-Juvenile Division in 2014.

In thirty-five years of public service, Judge Camplese has received national and statewide recognition as an innovator. In 1991, he received the United States Inspector General's Office "Integrity Award" for developing a much streamlined method of prosecuting welfare fraud. In 1994, his court was one Ohio's first to adopt voice recognition technology for use in an Electronically Monitored House Arrest system. He has received three commendations from the Ohio Auditor's Office for cost-savings, dedication and efficiency in office.

In the Probate Division, Judge Camplese has partnered with local government and service providers to create a volunteer guardianship program focused on the unique needs of adults between 18 and 60 years of age who are in need of ongoing guardianship services. The Court is currently working to expand the scope and focus of its Ashtabula Senior Advocacy and Protective Network [ASAPN].

In 2017, the Ashtabula County Juvenile Court was one of two Ohio juvenile courts invited to join the Juvenile Detentions Alternatives Initiative [JDAI]. This national juvenile justice model is rooted in eight core strategies demonstrated to safely reduce detention populations. The Court implements these strategies via a newly created 24/7 Juvenile Resource Center [JRC]. JRC staff are directed to identify and implement "The right intervention for the right child at the right time and nothing more." Detention sanctions are still utilized in matters affecting public safety.

Applying these strategies, Ashtabula County has safely reduced daily Youth Detention Center populations from its initial daily average population of 17-18 detained youths to its current daily average of 1-2 detained youth. The county's juvenile recidivism currently stands at less than 9 percent (9%). The success of this approach has allowed the Court to close its Youth Detention Center. The JRC is now the sole entry point for all youth entering Ashtabula County's juvenile system.

Biography
of
Judge Robert N. Rusu Jr.
Mahoning County Common Pleas Court,
Probate Division

Judge Robert N. Rusu, Jr. is the 20th Probate Judge of Mahoning County taking the bench on July 8, 2014. Prior to becoming the judge, he practiced exclusively in the area of Probate Administrations, Guardianships, Estate Planning, Medicaid, and issues regarding aging.

Judge Rusu is active as an officer with the *Ohio Probate Judges Association* and a member of the *Ohio Judicial College, Probate Law and Procedure Committee.*

Judge Rusu obtained his undergraduate degree from Youngstown State University and earned his Juris Doctorate from the Thomas M. Cooley Law School in Lansing, Michigan.

JUDGE ROBERT W. BERGER

Wife: Patty Berger

Son: Colin K. Berger

1968 - Graduate of Theodore Roosevelt High School (Kent, OH)

1972 - Graduate of Kent State University (BS in Education)

1972-74 - Served in the U.S. Army

1977 - Graduate of University of Baltimore School of Law (J.D.)

Am Jur Award Family Law

Am Jur Award Trial Advocacy

Top 1/3 of Class

1977 - 1980 Solo Practice in Kent, OH

1980 - 2007 Giulitto & Dickinson, Ravenna, OH

Guilitto & Berger, Ravenna, OH

2007 - 2015 Magistrate of Portage County Court of Common Pleas, General Division, Civil

2015 to
Present - Judge of Portage County Probate & Juvenile Courts

2015 - Acquaintance of Judge Robert Rusu

NOTES:

CASE LAW UPDATE
2018

Hon. James A. Fredericka
Judge, Trumbull County Probate Court

CASELAW DIGEST
compiled by:
Judge Jack R. Puffenberger
Magistrate Nancy Miller
Lucas County Probate Court

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James A. Fredericka, life-long resident of Trumbull County, Ohio; admitted to the Ohio State Bar, 1978; also admitted to practice before U.S. Court of Appeals, Sixth Circuit; U.S. District Court, Northern District of Ohio.

Preparatory Education: John F. Kennedy High School (1971); University of Notre Dame (B.A., 1975, Economics, graduated with highest honors); Legal education: Case Western Reserve University (J.D., 1978). Honor Fraternities: Phi Beta Kappa; Omicron Delta Epsilon (Economics).

Personal: Married to Lou Ann Malone Fredericka, 39 years; Children - Gina Marie (Graduate, St. Mary's College 2013, Graduate, Kent State University, B.S.N. 2016); Michael James (Graduate, University of Notre Dame 2015, University of Akron, School of Law, J.D. 2018).

Work History: Trumbull County Probate Court Judge, February 9, 2015 to present; Private Practice 37 years, primarily with Ambrosy and Fredericka; Richards, Ambrosy and Fredericka; Trumbull County Assistant Prosecuting Attorney, 1978-1984.

Martindale-Hubbell: Peer Review Rating - AV Preeminent, highest rating for professional ethics and legal ability.

Community Service & Organizations: Past Chairman, Warren Civil Service Commission; Former Board Member: American Red Cross, Trumbull County Chapter, Catholic Community Services, Inc., of Trumbull County, Notre Dame Schools, Saint John Paul II Parish Board and Finance Council.

Organizations: Trumbull County Bar Association (President, 1998-99); Member: Probate Law and Procedure Committee of the Ohio Judicial Conference, Ohio Association of Probate Judges, the National College of Probate Judges, and the American Judges Association.

Teaching Experience: University of Notre Dame - Non-Regular Teaching Staff; Guest Speaker - Ohio Association of Probate Judges, Trumbull County Probate Practice Seminar

CASELAW DIGEST

Ohio Association of Probate Judges Conference
Judge Jack R. Puffenberger
Lucas County Probate Court

June 5, 2018

INDEX

ESTATES

JURISDICTION

MANDAMUS

MISCELLANEOUS

NAME CHANGE

POWER OF ATTORNEY

TRUSTS

WILLS/WILL CONTEST

WRONGFUL DEATH

ADOPTIONS

TOPIC: Adoption decree vacated by Ohio Supreme Court.

TITLE: In re P.L.H., 2016-Ohio-8453 and In Re Adoption of P.L.H, 2017-Ohio-5824.

Months prior to his birth, on September 4, 2015, Father registered as P.L.H.'s putative father. Mother and Father were never married.

Three days after P.L.H. was born, appellees filed a petition to adopt the child. Mother consented to the adoption and P.L.H. was subsequently placed in the temporary custody of appellees as his prospective adoptive parents. Father filed a timely objection. It is undisputed that Father did not have any in-person contact with Mother during her pregnancy, nor had Father had any contact with P.L.H. following the child's birth and placement with appellees.

The probate court held a hearing to determine whether Father's consent to appellees' petition to adopt P.L.H. was necessary. At this hearing, Mother and Father both testified. The probate court issued a written decision finding appellees had proven by clear and convincing evidence that Father willfully abandoned Mother during her pregnancy and up to the time of the minor's placement in the home of the appellee's. As a result, the probate court determined that "the consent of Father was not required for this adoption to go forward."

Father appealed, raising a single assignment of error for review in which he argued that the probate court erred by finding his consent to appellee's petition to adopt P.L.H. was not necessary.

The Court of Appeals for Butler County found that in this case, just as the probate court found, Father never provided Mother with any support during her pregnancy, financial or otherwise, nor did Father even attempt to provide such support to Mother after learning she was pregnant with his child. Rather, upon learning Mother was pregnant, Father never called Mother to inquire about the pregnancy or even when the child was due, but instead opted to sporadically contact Mother via text and only occasionally touched on the fact that Mother was pregnant at all.

It further noted that just as the trial court found, the record revealed Father did not have any contact with Mother for a period of nearly three months beginning on June 8, 2015 until September 1, 2015 and when Father actually did have contact with Mother, the record indicated Father was generally willing to consent to the adoption and sign the necessary paperwork, a willingness that completely changed after Father spoke with his own mother on September 2 or September 3, 2015, shortly before Father registered as a putative father on September 4, 2015.

The record further indicated Father's only attempt to provide any financial support was a check for $100 he sent to appellees over a month after P.L.H. was born. As the record demonstrated, Father provided her with no financial, emotional, or physical support. While acknowledging Father's concerns, the Court of Appeals could not say the probate court's

decision finding Father willfully abandoned Mother during her pregnancy was against the manifest weight of the evidence.

In so holding, although not raised within a separate assignment of error, the Court of Appeals noted that Father claimed there was an issue as to whether the probate court had the authority to proceed "on the merits" because there was a "parenting issue" pending in Juvenile Court. However, the juvenile court dismissed these matters upon finding the probate court "had exclusive jurisdiction over the pending action and no appeal was taken."

The judgment of the Butler County Probate Court was affirmed. Judge Hendrickson dissented, presenting a detailed analysis of "willfully abandoned." He found that appellees did not establish by clear and convincing evidence that Father willfully abandoned Mother during her pregnancy, as contemplated by R.C. 3107.07(B)(2)(c). He further noted that if courts are going to give any real meaning to the protection of a natural parent's right to the care and custody of his child, rather than mere lip service, then in the present case, Father's rights need to be honored. Father accepted responsibility and grasped the opportunity to be a parent to P.L.H. He did not abandon Mother during her pregnancy, but rather expressed his desire to have custody of P.L.H. and his willingness to pay for expenses related to the child. Father should be permitted to enjoy the blessing of the parent-child relationship and make uniquely valuable contribution to P.L.H.'s development.

Accordingly, as the probate court's determination that Father's consent to the adoption was unnecessary is against the manifest weight of the evidence, he would have sustained Father's assignment of error and reversed the judgment of the probate court.

The case was further appealed to the Ohio Supreme Court. The Supreme Court found that it was error to hold that consent of the putative father was not necessary for adoption, on reasoning that the putative father failed to provide financial support to the mother during pregnancy, since R.C. 3107.07(B)(2)(c) does not require the putative father to care for and support mother, and it was not established that putative father willfully abandoned mother.

Writing for a five member Court majority Justice French stated that the law does not make the putative father's failure to care for and support the mother during the pregnancy a basis for approving an adoption without his consent. The adoption statute does not equate the failure to financially support the mother with willful abandonment. The majority concluded that the father's actions did not meet the Court's interpretation of "willfully abandon" because he did not "desert, forsake, or abdicate all responsibility" for the mother during her pregnancy.

The decision vacated the adoption decree and dismissed the adoptive parents' application. It does not indicate who should have legal custody of the child, identified in court documents as P.L.H.

Justice DeWine, in a concurring opinion joined by Chief Justice O'Connor, maintained that the majority unnecessarily limits evidence that can be used by lower courts when considering future claims that a father willfully abandoned a mother. Justice DeWine argued that

while not a key factor in P.L.H.'s case, a father's lack of financial support could be a factor in other cases.

TOPIC: Stepfather did not meet burden to show by clear and convincing evidence father failed without justifiable cause to provide maintenance and support to the child as required by law or judicial decree.

TITLE: In re Adoption of B.I., 2017-Ohio-9116

In February 2016 stepfather filed a petition to adopt his stepson B.I. with consent of mother. The petition alleged that birthfather was not required to consent to the adoption because he had failed without justifiable cause to provide maintenance and support for B.I. as required by law for a period of at least one year immediately preceding the filing of the petition.

Father filed objections. Prior to the hearing the parties stipulated to several facts, including that father had been in prison since 2009, that in August 2010 the Clermont County Juvenile Court had set father's child-support obligation at zero and had also set his arrearage to zero, that during the one-year period father had received $18 per month as prison income, and friends and family had deposited $5152 into his prison account and that during the one-year period father had spent $4681.62 at the prison commissary.

At the consent hearing before the magistrate mother testified that after father requested that support be terminated and that she agreed to the zero support order and zero arrearage. She testified that she had no communication with him during the one-year period but she would have accepted money from him for B.I.'s support if he had offered.

Father testified by phone that he had spent $4000 in the prison commissary because he did not like the prison food. He never attempted to provide maintenance and support for B.I. while in prison and never inquired regarding B.I.'s financial support. He did testify that mother never requested support.

After the consent hearing the magistrate determined that as a parent, father, had an obligation to support his child despite the fact that he did not have a judicial decree. The evidence was uncontroverted that he did not, and that he spent thousands of dollars in the commissary. The magistrate therefore found his consent not required.

Father filed objections arguing that the zero child support order excused any legal obligation to provide support. The trial court sustained father's objection, overruled the decision of the magistrate and dismissed the petition. Stepfather appealed.

The question presented to the First District Court of Appeals was whether the natural father failed without justifiable cause to provide maintenance and support as required by law or judicial decree, where father had a zero child support order, Because it determined that, under the plain language of R.C. 3107.07(A), a parent cannot fail without justifiable cause to provide maintenance and support of a minor as required by law or judicial decree when that parent has a

zero child support order, it affirmed the judgment of the trial court. An appeal was accepted by the Ohio Supreme Court and consolidated with two other cases. (See 2018-Ohio—1600)

TOPIC: Court of Appeals for Montgomery County affirmed Probate Court determination that father's consents to adoptions were not needed as he failed without justifiable cause to provide more than de minimus contact with his children for one year prior to the filing of the petition.

TITLE: In re Adoption of D.D.G., 2018-Ohio-35

Stepfather filed petitions to adopt two minor children of his wife alleging that his consent was not needed because father had not had sufficient contact with the children. Father objected, a hearing was held, and the trial court filed judgment entries finding that father's consent was not required. Father appealed.

The evidence before the trial court was undisputed that father's last actual contact with the children was April of 2013 when he and his girlfriend appeared at the home of the children, mother, and step-father, in order to inquire whether the children could attend his father's funeral. Father and his girlfriend were allowed in the home where they visited for about an hour, although mother would not allow the children to attend the funeral. Subsequently, father testified that he attempted to contact the children through Facebook but did not indicate the times or dates. Mother testified that she did not become aware of any attempted Facebook contact until after the initiation of the court proceedings when she learned Facebook has a spam folder which she then checked. She found one.

The Court of Appeals determined that the trial court's decision was not against the manifest weight of the evidence. It noted that the probate court had found that Appellant knew of the children's address for four years and did not send cards, gifts, or letters. He did not contact their school. Even though there was a juvenile court order for standard visitation with the older child, father did not seek court intervention to enforce that order before the adoption petition was filed. The trial court was in the best position to see the witnesses and make credibility determinations. After carefully reviewing the record it found that the record supported the trial court and it could not find that the trial court clearly lost its way and created a manifest miscarriage of justice.

TOPIC: When a natural father asserts equal protection and due process violations by not receiving court-appointed counsel in an adoption case, the "plain error doctrine" applies, and he must establish that 1) a plain error/deviation from a legal rule occurred, 2) that the error was an obvious defect in the trial proceedings, and 3) that this obvious error affected substantial rights, namely the outcome of the trial. For an error to be plain or obvious, it must be plain under current law at the time of appellate consideration.

TITLE: In the Matter of J.R.F, 2017-Ohio-8125

In 2016, R.J.F filed a petition to adopt his stepdaughter in the Vinton County Probate Court. The petition alleged that the natural father's consent was not required because he had failed without justifiable cause to provide for the maintenance and support of his child as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition or the placing of the minor in R.J.F's home. The natural father filed his objection pro se and asked the court to provide him counsel to protect his "Constitutional right to have an ongoing parent/child relationship" with his daughter. When the judge denied the motion for an attorney, natural father appealed.

The 4th District Court of Appeals reviewed the matter, noting that the father's pro se brief was well-researched but convoluted, not stating actual assignments of error. However, the Court stated that the father was actually asserting that the denial of counsel in this case violated his rights under the due process and equal protection clauses of the US and Ohio Constitutions.

The Court first noted that in the probate court, appellant did not assert any of the arguments he raised on appeal, other than in his motion, wherein he argued that he is indigent and the trial court should appoint counsel to safeguard his right to have a parent-child relationship. The Court found he forfeited his right to raise these arguments on appeal.

However, the Court considered his arguments under the "plain error doctrine." To be applicable, the party must establish that 1) a plain error/deviation from a legal rule occurred, 2) that the error was an obvious defect in the trial proceedings, and 3) that this obvious error affected substantial rights, namely the outcome of the trial. For an error to be plain or obvious, it must be plain under current law at the time of appellate consideration.

The Ohio Supreme Court sets a "very high standard" in invoking the doctrine in civil cases, limiting it to the "*extremely rare case where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself*."

The 4th District Court of Appeals found that the probate court did not err plainly by failing to appoint counsel for the natural father and that, as a matter of law, failure to appoint counsel in an adoption case does not constitute "*plain or obvious error under current law*."

After reviewing societal norms and law that demonstrates the precious nature of parent-child bonds and the seriousness of having to sever those bonds, the Court first found that Ohio law does not give one a right to court-appointed counsel in adoption proceedings, even though such a right exists in abuse/dependency/neglect cases. Even applying the strict scrutiny standard of equal protection cases, the Court found that there is no plain or obvious error in denying an indigent parent a right to court-appointed counsel in adoption cases that rise to an equal protection violation.

The Court next reviewed the Due Process Clause of the 14th amendment to the US Constitution and found that federal and state case law reduced the principle to "fundamental

fairness." The Court found that ordinarily an indigent person does not have the right to court-appointed counsel in civil cases. Further, the US Supreme Court has not recognized a federal due process right to appointed counsel for indigent parents in parental termination proceedings. The Court noted that it had previously rejected a constitutional right to counsel in private adoption proceedings. In the instant case, the Court concluded that the appellant's interests do not outweigh all other factors to justify appointing counsel. Finding no procedural due process error, the Court noted that it is not the judicial branch's place to set possibly "wise public policy," (by allowing court-appointed counsel in adoption proceedings) but the legislative branch's responsibility. Since current legislation and case law does not support the appellant's position, there is no fundamental unfairness. Affirmed. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: Father's request for counsel and free transcript denied, and his consent was not found necessary in adoption proceeding.

TITLE: Adoption of R.M.T., 2017-Ohio-8639

Step-father filed for adoption in 2015. The probate court, after paternity testing established appellant was the biological father, held father's consent was not required in order to proceed with the adoption because he had failed without justifiable cause to provide more that de minimis contact with the child in the year preceding the filing of the petition.

Father argued that though incarcerated, he had attempted to contact the child by phone and letters. He did not file a transcript or narrative statement on his appeal and the Court found that "it is well-settled that civil litigants are not entitled to free trial transcripts on appeal." Appellate rules allow for a narrative statement to be filed, and this was not done.

Father also requested counsel, which was denied despite his incarcerated status. Provisions for an attorney in some juvenile cases were found not applicable in this probate adoption matter.

Finally**,** *R.C. 3107.07(A)* provides an exception to the need for parental consent, due to the fundamental rights of a natural parent to the care and custody of their children, if a parent fails without justifiable cause to have more than de minimis contact with the child in the year prior to the filing of the petition for adoption.

The appeals court affirmed, noting that the lack of a transcript or narrative statement bound it to assume the regularity of the proceedings below with regard to its treatment of any factual issues. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: Father's request for counsel denied with dissent.

TITLE: In re J.M.P., 2017-Ohio-8126.

A step-parent adoption was initiated in 2016. The father requested that counsel be appointed for him, but the trial court denied his motion. Father appealed, arguing violation of both equal protection and due process clauses.

The appeals court affirmed, choosing to proceed after first noting that the father had failed to file assignments of error and that propositions of law are more appropriate to Supreme Court appeals.

The court then thoroughly examined the equal protection clause under a plain-error analysis, requiring the deviation by a court from a legal rule that creates an "obvious" defect in the legal proceedings affecting both substantial rights and the outcome of the trial. It found no such error on the part of the trial court below in addressing a fundamental right subject to strict scrutiny, determining that "we do not find it plain or obvious that denying an indigent parent appointed counsel in an adoption proceeding deprives the parent of the equal protection of the law."

The court also noted that the U.S. Supreme Court has not recognized a federal due process right to appointed counsel for indigent parents in all parental rights termination proceedings. Trial courts "must evaluate the facts and circumstances of each case in light of the three factors identified in Eldridge: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." Further, "in the case at bar, it is not clear that the circumstances of the present adoption proceeding may combine to overwhelm appellant." The trial court did not plainly err by "failing to determine that the Eldridge factors balance in favor of appointing counsel for appellant."

The dissenting Judge felt that the stricter plain error analysis taken by the majority was not necessary and that the matter should have been remanded to allow the trial court to give full consideration to the father's request for counsel without resort to "a blanket rule prohibiting the appointment of counsel in all contested private adoption cases."

TOPIC: Father's consent required under circumstances in which he was subject to a protection order preventing contact, but he made an effort to modify it for visitation.

TITLE: In re Adoption of B.A.A, 2017-Ohio-8137.

Trial Court determined that father's consent was not needed on a step-parent petition for adoption filed shortly after father filed for visitation with child, despite the presence of a protection order. B.A.A. was born on August 11, 2011. The couple's relationship ended in 2012 and mother and child moved in with maternal grand-parents. Father was convicted of criminal trespass in early 2013 after trying to visit the child, despite warnings to stay away. Mother soon sought and obtained an ex parte, temporary protection order and both later appeared before a magistrate in April 2013 regarding the protection order. The protection order was extended to last five years. Mother married in 2015 and father filed to modify the protection order to visit his child two months later. The adoption petition was then filed a month later.

The trial court concluded that the protection order did not constitute justifiable cause for father's lack of contact with B.A.A. and held that his consent to the adoption was not required under *R.C. 3107.07(A)*. Father appealed.

The appeals court noted that the Ohio Supreme Court "has repeatedly emphasized" that "any exception to the requirement of parental consent must be strictly construed so as to protect the right of natural parents to raise and nurture their children." It concluded that the protection order provided justifiable cause for father's failure to have contact with B.A.A. during the relevant one-year period. "As the Ohio Supreme Court emphasized in Masa, the term "justifiable cause" must encompass a parent's ability to fulfill parental obligations to his child and we "ought not ask the impossible as a condition of preserving fundamental parental rights." In light of the father's adherence to the order and attempt to modify it, he had a justifiable reason to stay away from the child and his consent is required. The matter was reversed and remanded.

TOPIC: Consent from father not required where no contact with child was made for requisite period, despite a desire to forge a relationship with the child sometime in the future.

TITLE: In re G.D.C., 2017-Ohio-8302

G.D.C. was born December 15, 2013. The parents' relationship ended in January 2015 and father had a no contact with the child since January or February of 2015. Mother married in January of 2016 and stepfather filed a petition to adopt in July of 2016. Father objected, arguing that mother blocked his attempts to contact the child. The trial court found after hearing that father's consent was not required and no appeal was taken at that time. In March 2017 the trial court granted the petition for adoption, finding that father chose not to provide financial support to the child and that he chose to not visit, call, or write the child after the couple separated.

Father appealed with one assignment of error, that the trial court abused its discretion by concluding that the best interests of the child were served by granting the adoption.

The appeals court affirmed, noting that "the focus in not upon whether the natural parent should retain any rights, but upon whether the adoption is in the child's best interest." Further, "the primary purpose of an adoption proceeding is to find a child a stable and loving home." The father failed to meet his burden to show that allowing the father to maintain his parental rights and to visit with the child was the better alternative to allowing the adoption to stabilize the child's life. The child considers her stepfather her "daddy" and does not recognize the biological father as her father.

"The adoption will allow the child to maintain a stable and permanent family relationship and will remove the potential for future custodial conflicts. Nothing in the record suggests that the father is an unfit parent such that the child would be unable to be safely reunified with him within a reasonable period of time. The trial court, however, believed that the child needs permanency, stability, and the continuity of her current relationships. The court found that the child does not share a bond with the father but that she is very bonded to her stepfather. The court also found that the child is well adjusted to her current home and community. We cannot

state that the trial court abused its discretion by determining that the foregoing factors weigh in favor of granting the adoption."

TOPIC: Mother's consent was determined to be necessary on appeal where issue was whether amount of support justified exception to consent requirement.

TITLE: In re Adoption of D.J.S., 2017-Ohio-8567.

Mother appealed trial court finding that consent from her and the natural father was not necessary in adoption petition filed in 2017 by custodians of D.J.S. since 2008. The issue was whether mother's provision of food, shelter and care to her son on a regular bi-weekly and overnight visitation justified her otherwise lack of financial support for the child.

The appeals court reviewed the current approach taken by the different Ohio districts and determined that "Looking at Appellant's action objectively and construing R.C. 3107.07 strictly in her favor, the Trial court erred in finding clear and convincing evidence that Appellant failed to support her son and that failure was of such a magnitude as to be the equivalent of abandonment. Appellant had regular visitation with her son, including overnight visits, and provided support and maintenance during those visits. Although Appellant concedes she did not pay any support during the one year preceding Appellee's filing of the adoption petition, she did supply sufficient support and maintenance during regular and overnight visits to avoid the forfeiture of her right to consent to the adoption. The Court of Appeals noted that because it was bound to strictly construe the exception to the requirement for parental consent, it was obligated to find that the record lacked competent, credible evidence going to all the essential elements of the case, and that the finding that the Appellant's consent to the adoption was unnecessary was against the manifest weight of the evidence." The trial court holding was reversed.

TOPIC: Tenth District Court of Appeals affirmed a trial court's involuntary dismissal of appellant's petition for writ of habeas corpus to compel return of her biological child, where appellant signed a permanent surrender agreement and failed to present evidence that surrender agreement was invalid.

TITLE: In re C.C.S., 2016-Ohio-388 and 2016-Ohio-7472.

Appellant, C.L.S., and her five children lived with J.G., her boyfriend, beginning in 2008. In 2013, appellant became pregnant by an old friend. In March 2014, J.G. told appellant the new baby could not come home. On March 27, 2014, appellant met with a social worker, Ms. Schumaker, to receive information about adoption, birth parents' rights, alternatives to surrender, and other details. Appellant signed papers to surrender the child. Appellant made no request to seek counseling and affirmatively stated that no one was forcing her to go through with the adoption. On April 13, 2014, appellant told Ms. Schumaker that the decision to surrender was never hers. Appellant asserted that she was pressured to surrender the child. Appellant requested the child be returned to her and petitioned the Franklin County Probate court to revoke the

permanent surrender agreement. Before the trial court, appellant claimed the permanent surrender was made involuntarily.

After the hearing, Gentle Care, appellee, moved for an involuntary dismissal under Civ. R. 41(B)(2). On August 22, 2014, the trial court granted appellee's motion for involuntary dismissal. Appellant appealed to the Tenth District Court of Appeals. On June 2, 2015, the appellate court remanded the issue to the trial court to further investigate and weigh the pressures Appellant faced when making her decision. In a thirty-five (35) page decision, the trial court concluded Appellant did not meet her burden of proof to receive habeas corpus, and that the execution of the permanent surrender was appellant exercising her freedom of will. As a result, the trial court granted appellee's motion for involuntary dismissal under Civ. R. 41(B)(2).

On appeal, the Tenth District Court of Appeals affirmed the judgment of the Franklin County Probate Court. Having found the C.L.S. really had a choice, the Court of Appeals ruled that it would not invalidate the permanent surrender agreement. It found that the evidence presented by C.L.S. at trial was insufficient to overcome the prima facie evidence of the signed permanent surrender agreement, indicating essentially that this case was a question of fact, not law. The trial court, as the fact finder, made its determination after a lengthy trial that C.L.S. failed to present clear and convincing evidence that the surrender agreement was invalid, as a result of duress or other factors. The court noted that it is a great misfortune therefore that this case resulted in a newborn child living in foster care since birth for the last 21 months.

Having overruled the four assignments of error, the judgment of the trial court was affirmed. An appeal of this case was accepted on one proposition of law by the Ohio Supreme Court on May 4, 2016 but the cause was dismissed on October 27, 2016 as having been improvidently accepted. (See In re C.C.S., Slip Opinion No. 2016-Ohio-7472).

TOPIC: Consent of father not required in light of his involvement in the issuance of a lifetime no-contact order.

TITLE: In re A.K., 2017-Ohio-9165.

Maternal grandparents sought to adopt their grandchildren without their father's consent. He had murdered their mother and was sentenced to twenty-three years to life in prison and a life-time no-contact order, barring any contact whatsoever with his children. The magistrate had recommended that his consent be required on the basis that his failure to communicate and support his children was justified after two days of hearings. The magistrate found that no support order was in effect, that the maternal grandparents had substantial resources and did not need support from the father, that paternal grandmother visited quarterly with the children and brought them small gifts and delivered some money to the grandparents together with letters from the father for the children. The father also took interest in his children's extensive special needs and took up knitting and learned sign language in support. The probate court sustained the grandparent's objections and ruled in their favor that on the consent issue the father's consent was not required.

The appeals court found that: "The sole assigned error presented for review is whether the Probate Court erred in holding that petitioners could adopt the children without respondent's consent. While recognizing a parent's fundamental rights, it found the trial court's decision was within its' broad discretion. The majority wholly agreed with the probate court's conclusion that: "public policy dictates that the very unique circumstances of this case not be disregarded" and that "it would be entirely unjust to allow Respondent to use his imprisonment" to justify the failure to contact and support when his actions necessitated the prison sentence in the first place. The probate court judgment was affirmed and it was noted that the trial court could choose to examine the transcript that the grandparents had filed after the applicable deadline, and that a continuance to do so was within the discretion provided by the civil rules to the trial court.

A dissenting Judge framed the issue as: "whether respondent had justifiable cause for his failure to contact and support his children" This judge found that the magistrate was correct in concluding that the father was willing but unable to contact the children due to the mandates of the no-contact order and that this justified his failure to do so. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: Probate Court judgment that consent of father was not necessary reversed.

TITLE: In re Adoption of S.S., 2017-Ohio-8956

Father paid support pursuant to support order for his child's life, but no court order addressed visitation, which father and mother had worked out until sometime between October 2015 and January 2016, during which time both parents relocated. Stepfather filed an adoption petition on October 31, 2016 claiming no more than de minimis contact between father and daughter for one year. Father filed for shared parenting in juvenile court where the support order had issued on September 30, 2016 after having been earlier informed by the mother that any further visitation would not be allowed until he sought legal representation.

Both the probate court and appeals court needed to review widely divergent fact presentations from both parents. The probate court, in finding that father's consent was not needed, first determined that the mother's date of October 4, 2015 as the last visitation between father and daughter was more credible than father's, that his last visit with his daughter was on January 10, 2016. Both parties recalled that the condition to seek counsel was made about two weeks after the last visitation, resulting in the condition being made prior to the filing of the adoption petition. Second, while determining it unusual, the trial court did not find that mother's request that father not see daughter until getting an attorney amounted to an obstacle that the father could not overcome.

The appeals court focused on two of four assignments of error. One questioned why the court did not find father's filing for shared parenting through an attorney was more than a de minimis attempt at contact during the year prior to the adoption filing. The second questioned the court's determination that mother's interference with his ability to contact his daughter did not rise to a significant level.

The appeals court determined that the father met mother's condition for continued visits by seeking an attorney and filing in juvenile court for shared parenting prior to the adoption petition and that he should have been credited for his actions. Further: "the trial court terminated Michael's parental rights while another court was actively exercising jurisdiction over issues that directly addressed Michael's parental rights and responsibilities with respect to S.S." The trial court "did have notice that there was an active case pending in another court that addressed the long term care and custody of S.S." Whether mother's claims that she had not received notice of such a filing when the adoption petition was filed was irrelevant. Both of these assignments of error were sustained and the probate court judgment that the father's consent was not necessary was reversed without any need to address the other assignments of error.

APPEALS

TOPIC: In action by children of decedent claiming that trustee breached his fiduciary duty and interfered with children's expectation of inheritance under trust, appeal is dismissed for lack of a final appealable order where distribution order was not final, since the order did not affect a substantial right because an immediate appeal did not foreclose children from seeking appropriate relief on their complaint.

TITLE: Garden v. Langermeier, 2017-Ohio-972.

During her lifetime, decedent Betty Garden, placed her assets into a revocable trust and named her long-time companion, defendant George Langermeier to succeed her as trustee upon her death. Two beneficiaries of the trust, plaintiffs-appellants Alan and William Garden (Betty's sons), demanded an accounting of all trust assets, liabilities, receipts and disbursements, but Langermeier did not respond to them. The Gardens brought this action alleging that Langermeier breached his fiduciary duties, converted trust assets for his personal use, and intentionally interfered with their expectation of inheritance under the trust.

While the complaint was pending, Langermeier filed an application for an order of distribution of the trust assets. The Gardens objected to the application on grounds that Langermeier had breached his statutory and fiduciary duties with respect to the trust. They asked the court to allow the matter to go to trial on their complaint.

The court scheduled a trial on the complaint but on the day of trial the parties instead agreed to proceed solely on the merits of Langermeier's application for an order of distribution. After conducting an evidentiary hearing, the court overruled the objections with respect to Langermeier's conduct in administering the trust. The court ordered that Langermeier be paid a trustee fee, ordered that the attorney fees of both parties be paid from the trust estate, and that Langermeier retain $10,000 from the trust for completion of all tax returns and payment of taxes. Finally the court ordered that after payment of the above expenses, and upon determination of actual final values of Trust assets, distribution, be made to the beneficiaries according to the terms of the Trust, and that the successor Trustee file with the Court a final account. The Gardens appealed.

After the parties filed their merit briefs, the Court of Appeals ordered them to brief the issue of whether the granting of the application to distribute is a final appealable order, especially in light of the trial court not explicitly resolving the complaint for breach of fiduciary duties and expectation of filing the final accounting. The parties complied with the order. After consideration of the respective arguments made by the parties, the Court of Appeals held that under the circumstances of the case that the order of distribution was not a final appealable order, as the Gardens failed to show that without an immediate appeal they would be foreclosed from additional relief when the court considers the causes of action on the merits. The appeal was therefore dismissed. The Court of Appeals acknowledged there is a difference of opinion among the appellate districts as to whether probate court judgments are "special proceedings" coming under the purview of R.C. 2505.02(B)(2).

ATTORNEY FEES

TOPIC: Court of Appeals affirmed sanctions and attorney fees in estate administration.

TITLE: In Re Abraitis, 2017-Ohio-5577

Abraitis was named guardian for his mother in 2004 but was later removed. Alada, mother, died in 2008 and no will was offered at the time. In June 2011 the IRS issued a final notice of intent to levy on assets he held in an investment account under his name and social security number, to satisfy his tax obligation for prior years. Abraitis claimed that the proceeds of the investment account had been deposited into the account by his mother. Abraitis made the argument to the IRS that the account belonged to his mother, and that the probate court "had ruled that all of the assets held by him originated from and were the sole property of V. Abraitis" and that they were no longer under his control. Those tax matters were resolved adversely to Abraitis with a notice of levy. A final disposition of the tax case occurred in March 2013 after the United States Court of Appeals for the Sixth Circuit rejected his appeal.

With the tax matter finally adjudicated, Abraitis offered into probate a will that his mother executed in 1978. The will named Abraitis and his brother as equal beneficiaries of the estate. The court named Abraitis as the executor of the estate. An inventory of the estate listed a single asset-the investment account that the IRS ruled belonged to Abraitis-and noted that the funds were the subject of state and federal tax proceedings.

Abraitis's brother died in November 2013 in Florida and his ex-wife was named as his personal representative pursuant to his will. One day after she was appointed, Abraitis filed an application to probate a new will, executed in 1993 by his mother. The will named Abraitis as the sole heir; the brother would take under the will only if he survived Abraitis. Abraitis then filed a motion to correct the inventory to remove the investment account from the estate on the grounds that the investment account was misidentified as an asset and belonged to him. The court noted that removing the investment account from the estate inventory would reduce the estate assets to zero. The ex-wife filed a separate action to contest the 1993 will.

The court removed Abraitis as executor and named Fried the successor executor. The court found that Abraitis acknowledged that he was aware in 2011 when he opened his mother's estate that there was a later will that was not presented for probate. The court also found that Abraitis had no explanation for why he did not probate the later will right away, but instead put it away for later. It also found that Abraitis said that he did it because his brother had died and he wanted to prevent the brother's ex-wife from being a beneficiary of his mother's estate. The court also ordered Abraitis to deposit the investment funds into an estate bank account. Abraitis not only failed to comply with the order but refused to testify at a subsequent contempt hearing on the advice of his attorney, Brady. The court found Abraitis in contempt and ordered him to serve 10 days in jail. Despite the punishment, it appears he never deposited any money into an estate account.

A multitude of motions and filings in the probate court, appeals court and the Supreme Court were made. Relevant to this matter was the Complaint filed in the probate court by Fried, alleging that Abraitis concealed assets. Abraitis defended by claiming that the IRS determined they were his so he had no choice but to amend. The court rejected that assertion when finding him guilty due to the fact that Abraitis could not explain how the funds were listed in his name and how they were funded, as Abraitis testified that he had not worked or had taxable income from employment for many years, if ever. It concluded that it was clear that the money got there from his mother, father, or both, since he had not had income.

After the court ruled, Fried filed a motion for attorney fees against Brady under Civ.R. 11 and R.C. 2323.51, asserting Brady and Abraitis frivolously listed the investment account, then when they amended the inventory to remove the account, Fried was forced to litigate. In addition, Fried maintained that Brady acted in bad faith by filing the new will. The motion noted that Abraitis was in violation of the contempt order and that the estate was forced to file a separate motion seeking relief from the concealment of the asset. The motion claimed the estate had incurred reasonable attorney fees of $104,485 along with expenses of $1,214.59 to defend the frivolous conduct. The court granted the attorney fees and expenses requested after finding the billable hours and rates charged to be reasonable.

The Court of Appeals for Cuyahoga County first considered whether the court erred by imposing sanctions against Brady under R.C.2323.51. It found that the court had found that Brady engaged in frivolous conduct that it summarized as the concerted effort ***to convince the taxing authorities that funds listed in the inventory of the estate belonged to the decedent only to argue to this court that the money belongs to Abraitis after the tax cases were resolved. Brady maintained that she acted properly by listing the investment account as an estate asset at the same time that Abraitis was arguing to the IRS that the investment account belonged to his mother; she claimed it was only after the IRS determined that the account belonged to Abraitis that she filed a new inventory to reflect the determination. After considering the various positions taken by Abraitis, and the pleadings filed and decided in the various state and federal courts, the court of appeals found that the probate court acted within reason to find Brady acted frivolously by taking inconsistent positions when representing Abraitis in the estate matters, and reached a similar conclusion with respect to the award of sanctions levied against Brady under Civ.R. 11.

The court noted that Brady was subjectively aware that she filed an estate inventory which claimed that the investment account was an estate asset even though she claimed years earlier that the money had been transferred to Abraitis. It also noted that Brady filed inventories and motions that she knew were unsupported by the record which spawned needless and expensive litigation that required Fried's response. It concluded that the court acted rationally by finding that Brady's inconsistencies with the positions she took during the litigation amounted to bad faith.

The court next addressed Brady's arguments relating to the amount of fees and costs awarded. She first argued that the court erred by awarding Fried attorney fees and expenses for professional services rendered by him in the court of appeals. The court rejected the argument based on R.C. 2323.51 (B)(1), which states that the court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct..

Brady next argued that the court erred by awarding Fried his expenses. She maintained that Fried failed to authenticate or properly introduce into evidence the claimed expenses. But Brady failed to object on this basis at the hearing, and therefore, according to the court of appeals, forfeited the argument on appeal. It rejected Brady's argument that the trial court was required to verify the amounts requested for fees under oath and that the amount of fees "shocks the conscience." The court noted that the fees were substantiated in his fee statement. It noted that the fees were somewhat high, but Brady's relentless litigation resulted in the escalation of the number of hours he billed. Brady's argument that Fried failed to mitigate the damages also fell short with the court. Brady characterized Fried as engaging in a blitzkrieg of expensive countermeasures while ignoring some of the basic tasks associated with being an administrator. And that he failed to contact Brady to strike deficient filings. The court noted that there is no obligation to mitigate fees and suggested that efforts probably would have been unsuccessful. It stated that the conduct at the heart of the court's decision to award attorney fees was existential to the manner in which Abraitis and Brady pursued their claims.

The Court of Appeals therefore affirmed the Judgment of the Cuyahoga County Probate Court.

TOPIC: Court of Appeals reversed and remanded denial of application for attorney fees.

TITLE: Estate of Bertina Hards, Deceased, 2017-Ohio-7290.

Bertina Hard's Estate was opened in 2002 and Ms. Adams was appointed as administrator. The Shore law firm filed a lawsuit in Geauga County Court of Common Pleas against Ms. Adams as administrator and against Ms. Adams and Kenneth, individually, seeking payment for legal services. In 2004 the Adamses moved for summary judgment and sought a determination regarding whether Shore's claims were frivolous. The final hearing in that matter did not take place until 2015. On August 20, 2015 the common pleas court found Adamses complaint frivolous and awarded the Adamses $10,000 as reasonable compensation for the expenses they incurred as a result.

The Adamses filed a notice of appeal, pro se, from the common pleas court's decision and Shore filed a cross-appeal. The court issued a judgment entry on December 28, 2015, which held that the Adamses were only permitted to proceed on appeal in their individual capacities, not on behalf of the estate, as they were not licensed counsel in Ohio. Citing Kinasz v. S.W. Gen. Health Ctr. , 2014-Ohio-402 (" See also R.C. 4705.01). Under Ohio law, a non-attorney personal representative of an estate may not litigate claims on behalf of the estate pro se because allowing a pro se litigant to represent others would constitute the unauthorized practice of law").

The Law Firm of Witschey, Witschey, & Firestone (WWF) represented it was hired by the estate on an hourly fee basis to resolve procedural issues in the previous appeal, including Ms. Adams' inability to represent the estate pro se, and that no portion of the fee agreement involved contingent fees. WWF filed an administrative claim in the probate court, providing notice of its performance of legal services on behalf of the estate in the appellate case, which occurred prior to the court dismissing the estate from that appeal. WWF requested that the probate court allow and instruct the administrator to pay counsel fees from the estate in the amount of $9,851.26. The administrator filed a brief in opposition. The probate court denied the motion for fees without the presentation of evidence or testimony. In an entry the probate court held in relevant part that "The Probate Court was not informed of the appellate action and was not asked to approve the estate's retention of attorney Witschey prior to providing legal services. Moreover, the court did not approve the estate's retention of attorney Witschey or his firm. Therefore, attorney Witschey's administrative claim is denied." WWF was allowed to file certain documents in support of its application for fees under seal.

WWF also requested findings of fact and conclusions of law which the Probate Court denied. In its entry the Court stated that it had "provided sufficient basis, to wit: The applicant did not get attorney fees approved by the court, pursuant to the Ohio statute and the Court's local rules. Therefore, the Court previously rendered its decision, and that decision sufficiently set forth the basis of the ruling." It referenced, for the first time, that it had denied the application on the authority of R.C. 2117.25 and its own Local Rule 11. WWF filed an appeal and assigned as error that the Probate Court abused its discretion by denying appellant (WWF's) claim for attorney fees because of an incorrect application of Geauga County Probate Court Local Rule 11 and by not allowing (WWF) to present evidence as to the reasonableness of its attorney fees.

The Court of Appeals for Geauga County held that pursuant to Local Rule 11 the only time counsel must obtain approval from the probate court prior to providing services is prior to a fiduciary entering into a contingent fee contract with an attorney for services. It found also that the probate court's refusal to allow the presentation of evidence or to consider WWF's application at the hearing to be an abuse of discretion. The documents under seal indicated the fee contract did not include any contingent fees, thus approval was not required by the probate court. The probate court's subsequent attempt to justify its decision by referencing R.C. 2117.25 and Local Rule 11 amounted to an improper application of the law.

The judgment of the Geauga County Probate Court was reversed and remanded for the probate court to hold a hearing on the application for attorney fees and to approve those fees that it finds comply with state law and are based upon the actual services performed by the attorney and the reasonable value of services, pursuant to Geauga County Probate Court Rule 11. A

request for a visiting judge on remand was denied as the court indicated it did not have the authority to entertain the request.

ATTORNEY/JUDICIAL DISCIPLINE

TOPIC: Sibling attorneys who mismanaged funds suspended for one year.

TITLE: Cleveland Metro Bar Assn. v. Zoller and Mamone, 2016-Ohio-7639; 20018-Ohio-188; and 2018-Ohio-302.

Eleanor Locher hired Joseph Mamone and his two children, Nancy Zoller and Edward Mamone, in 2004 to administer her late husband's estate, and once that was completed, she hired the firm to help her manage her money, pay bills, and handle other aspects of her financial and personal life.

Ralph Locher, who served as Cleveland mayor from 1962 to 1967, as a Cuyahoga County Common Pleas, General Division and Probate Judge, and as a Justice of the Ohio Supreme Court, left more than $1 million in his estate. After her husband died, Locher lived briefly at a nursing home, and then with the help of the Mamones and Zoller, sought to live independently with around-the-clock care and to make generous gifts to family members and charitable causes.

Zoller established a special account for managing Locher's money. Because it was not an interest-bearing trust account, it did not comply with professional rules governing the maintenance of client funds. Locher, Zoller,, and Edward Mamone were the only authorized users of the account. Locher used the account to give away about $400,000 to relatives and several thousands of dollars to her charitable causes, while also making cash withdrawals.

Zoller wrote most of the checks. Although Joseph Mamone was not designated to sign for the account, he wrote and signed a number of account checks. Joseph Mamone also exercised primary control of the firm's attorney-client relationship with Locher.

As designated signatories on the account, Edward Mamone and Zoller shared responsibility to keep the account in order. But their failure to maintain complete and accurate records or to perform monthly reconciliations led the account to become overdrawn on 34 occasions, which caused the bank to assess more than $1,000 in overdraft fees.

For managing her money and arranging for her needs, Locher agreed to pay the law firm a $500 monthly account maintenance fee from 2004 through early 2010. Payment amounts sometimes varied, and she paid a total of $30,900 in fees.

Locher was also charged $329,000 in attorney fees, many of which were not fully documented or explained, and more than $258,000 was paid to Joseph Mamone over a period of two years. Many nonlegal tasks were billed at $300 per hour. The Supreme Court accepted Joseph Mamone's resignation from the practice of law in April 2014 with disciplinary action pending.

Edward Mamone and Zoller testified that they were not aware until the disciplinary investigation began that Locher had paid fees directly to their father. They acknowledged some of the attorney fees that were paid using the account should have been covered by the maintenance fee, which resulted in Locher being charged twice for the same work.

The professional conduct board found Zoller and Edward Mamone violated several rules, including the requirement that client funds be held in an interest-bearing account, that complete record must be maintained by the lawyer holding the client's funds, and that lawyers not charge or collect excessive fees. The court noted in its earlier opinion that Locher died at age 95 with only modest assets remaining, including approximately $289 in the special account, and the house that she had lived in until her death, which was the subject of a reverse mortgage.

The professional conduct board also considered that Zoller and Edward Mamone had not previously been disciplined, had no dishonest or selfish motive, fully cooperated in the disciplinary process, and provided evidence of good character. However, the board noted that Zoller was responsible for overcharging Locher and prepared improper after-the-fact billing statements that clearly showed Locher was charged attorney-fee rates for nonlegal services. The board also found Edward Mamone failed to oversee the account and his dereliction facilitated the misconduct by his father and sister.

The Court's opinion stated that Zoller and Edward Mamone failed to maintain "even a modicum of oversight" of the account. The Court wrote that: "If Zoller and Mamone had properly monitored the special account, they would have discovered obvious improprieties that would have alerted them to the fact that their father was taking advantage of Mrs. Locher – an elderly client who depended on their services to remain in her own home and out of a nursing home." It concluded that the siblings' behavior not only caused harm to their client, but also allowed Locher to be exploited by their "unscrupulous father." The two claimed to be minor players at the firm, restrained from protecting Locher because of their father's power. The opinion stated the claim was not credible given their authority and obligations as the signatories on the account.

The court noted that given the magnitude of the harm that Zoller and Mamone caused to Mrs. Locher, it believed that an actual suspension from the practice of law was necessary to protect the public from future harm.

In addition to the one-year suspension, the Court adopted the parties' stipulation that Zoller and Mamone each owed restitution of $11,116 based on the overdraft fees, costs of checks improperly written by their father, and excessive fees paid from the account. It also agreed that Zoller owed another $19,350 representing 64.5 hours of nonlegal tasks that were billed at attorney-rates.

Chief Justice O'Connor and Justices Pfeifer, O'Donnell, and O'Neill joined the majority opinion.

Without a written dissenting opinion, Justice Lanzinger indicated she instead would suspend the pair for two years. In a separate dissent, Justices Kennedy and French expressed

they would suspend Zoller for one year, and Mamone for six months, with both suspensions fully stayed.

Edward Mamone was reinstated by the Ohio Supreme Court decision of January 19, 2018 in Cleveland Metro. Bar Assn. v. Zoller and Mamone, 2018-Ohio-188. Nancy Zoller was reinstated by the Ohio Supreme Court decision of January 26, 2018 in Cleveland Bar Association v. Zoller and Mamone, 2018-Ohio-302.

CONCEALMENT

TOPIC: Holding that concealment was not established affirmed.

TITLE: Murray v. Carano, 2017-Ohio-8235.

The appeals court affirmed the probate court's holding that executor had not established that decedent's daughter had concealed assets. The executor had filed a concealment complaint in 2015, three months after decedent had passed. Both a hearing and a bench trial established that the decedent was a physician who had married, had three children, Caren, Melissa, and Kelly, divorced, reconciled, separated, and reconciled again. The couple was living together when he passed.

Decedent had retired in 2010 and purchased a home for daughter Kelly and her husband, making the down payment and signing the loan agreements, but expecting them to make the mortgage payments. Kelly's husband became decedent's DPOA and soon depleted decedent's assets, ran up large sums of credit card debt, and placed decedent's condo in his own name while decedent paid the mortgage. He also stopped paying the mortgage on the home decedent had purchased for them.

Daughter Melissa lived in Florida, being retired from teaching due to disability. She was aware of her parents' financial nosedive and endeavored to help by urging them to do estate planning, and began to help pay their bills, cancel credit cards that they had not opened, and kept in communication with them regularly. A separate Chase bank account was established for them that was closely monitored by her to assure that her mother would not spend excessively or provide her son-in-law additional funds. The financial advisor retained was consulted regarding a large stock sale deposit of $98,789.00, deposited in that account around the time that decedent passed. $88,000.00 was transferred to her personal savings account about a month before her father passed, which she claims was done on his instructions. The executor sought to recover $91,500.00 from Melissa, who estimated that $65,000.00 was left after funeral expenses.

The trial court held that while Melissa held funds that were at one time part of the Chase account belonging to decedent, that those funds were not concealed or embezzled and that the evidence supported Melissa's claim that the funds were a gift from her father in light of the "family dynamics and the familial financial mischief."

The executor appealed on three assignments of error. First, that any gift was established on the improper use of self-serving hearsay. The appeals court noted that an exception to the

hearsay rule exists "for the benefit of a representative of a decedent to permit the decedent to "speak from the grave" to rebut the testimony of an adverse party. The way that the testimony was elicited at trial, allowed the statements to be made, and while arguably they may not be within the exception, the trial court's treatment was not disturbed.

The second assignment of error was that a power of attorney drafted for Melissa specifically prohibited gifts, and the third assignment sought recovery of the funds with a ten percent penalty. The appeals court found the issue to be whether Melissa Carano impermissibly concealed or wrongfully withheld the assets from the estate. The trial court found Executor did not establish by a preponderance of the evidence that Melissa Carano concealed or embezzled the assets. The trial court characterized the transfer of assets from Dr. Carano to Melissa Carano as an inter vivos gift. The Court of Appeals found the trial court's judgment was supported by competent and credible evidence. All three assignments were overruled and the judgment of the trial court was affirmed.

TOPIC: Ten percent penalty properly applied by trial court to culpable action taken by decedent's daughter while guardian.

TITLE: Hundley v. Sparkes, 2017-Ohio-8360.

Daughter served as mother's guardian from 2010 until ward passed in 2016, when her brother was appointed executor of her estate. He filed a complaint in probate court alleging his sister had concealed or embezzled their mother's assets, particularly, by changing the beneficiary designation on three life insurance policies to herself and utilizing the proceeds to maintain a tractor that the sister owned.

The probate court ruled she had embezzled $251 in estate assets to maintain the tractor and that she was guilty of concealing or embezzling the insurance policies/proceeds, awarding judgment for $29,880.32 and a ten percent penalty of $2,988.03 in addition, with payments split between the estate and her brother.

Daughter appealed, arguing that since the policies were not probate assets the probate court lacked jurisdiction to find her guilty of misusing them. The appeals court first reviewed both *R.C. 2109.50* and *2109.52* and determined the trial court clearly had jurisdiction to act as it did.

Daughter then argued that the penalty was inappropriate because she did not engage in the necessary culpable conduct. The appeals court turned to case law to determine that the record supported the finding of culpable conduct. Daughter "knowingly and wrongfully changed the beneficiary designation on all three life insurance policies" and "these are acts of self-dealing and acts of bad faith". The daughter could not support her claims that she was not culpable.

The trial court judgment was affirmed.

CREDITOR CLAIMS

TOPIC: Claim presented one day after the six months specified in R.C. 2117.06 is barred.

TITLE: New Riegel Local School Dist Bd. Of Edn. v. Buehrer Group Architecture & Eng. Inc.

The plaintiff, school board, was building a new classroom facilities building. One of the contractors was Huber Buehrer and the Buehrer architecture and engineering firm. The board entered into contracts with the above, and later claimed a breach of contract because the school had issues with the building, including condensation and moisture intrusion, allegedly due to defendants' faulty design and execution.

The board filed a complaint in the Seneca County General Division for breach of contract, etc., but also named the Estate of Huber Buehrer as one of the defendants. The plaintiff also claimed the Estate was liable because the decedent was the promoter of an "unincorporated entity." The Estate asserted that the claim was barred by R.C. § 2117.06 and moved for judgment on the pleadings. When the trial court granted the motion for judgment on the pleadings, plaintiff appealed.

The 3rd District Court of Appeals reviewed the matter, finding that pursuant to R.C. § 2117.06 (C), all claims must be presented against an estate within six months of decedent's date of death or are forever barred. Huber died August 10, 2014 and the board's claim was presented on February 11, 2018, *one day* past the 6-month period. As a result, while the case was remanded to the trial court with respect to the engineering firm, the appeal was overruled pertaining to the Estate. The case against the Estate was dismissed. Affirmed in part and reversed in part. This case has been appealed to the Ohio Supreme Court but not on the claim against the estate issue.

DISQUALIFICATION

TOPIC: Affiant failed to meet statutory filing deadline resulting in the dismissal of her affidavit**.**

TITLE: In re Disqualification of Rapp, 2017-Ohio-7429.

Rosanna Miller filed an affidavit with the clerk of the Ohio Supreme Court under R.C. 2701.03 seeking to disqualify Judge Rapp, a visiting Judge sitting by assignment, from presiding over any further proceedings in a case in the Logan County Probate Court.

Ms. Miller averred that the next hearing in the case was scheduled for the next business day. Under R.C. 2701.03(B) an affidavit of disqualification must be filed not less than seven calendar days before the day on which the next hearing is scheduled. The statutory deadline may be set aside only when compliance with the provision is impossible such as when the alleged bias

or prejudice occurs fewer than seven days before the hearing date or the case is scheduled or assigned to a judge within seven days of the next hearing.

Ms. Miller failed to establish that it was impossible for her to timely file an affidavit of disqualification. She claimed she received notice of the June 12 hearing on June 6, 2017 and that she filed her affidavit as soon as could be expected after receiving the notice. Ms. Miller's bias allegations however refer to judicial actions occurring between 2015 and a May 4, 2017 hearing. If she believed Judge Rapp was biased or prejudiced against her based on prior conduct, she should have filed the affidavit as soon as possible after those incidents rather than waiting until the last business day before the scheduled hearing, Because she did not set forth a sufficient reason for setting aside the statutory filing deadline, her affidavit was dismissed as untimely.

TOPIC: Dana test met, disqualifying attorney from representation of a client who was an attorney in the same firm who was now the plaintiff in a counterclaim against firm client.

TITLE: Wynveen v. Corsaro, 2017-Ohio-9170.

Appeals court affirmed probate court judgment disqualifying attorney from representing same firm attorney in accordance with the Dana test in which it was demonstrated that "(1) a past attorney-client relationship exists between Plaintiff and Corsaro & Associates, (2) a substantial relationship exists between the subject matter of past relationships and the current dispute and (3) Corsaro, through his representation of Plaintiff and Plaintiff's businesses, acquired confidential information from the Plaintiff.

Attorney Joseph G. Corsaro argued that the trial court abused its discretion in disqualifying Attorney Steven Beranek from representing him as Trustee of the Bradley A. Wynveen Irrevocable Trust, with regard to a counterclaim filed in the action set out below.

Attorney Corsaro had assisted Dr. Richard Wynveen with numerous matters and dealings for over twenty years prior to his passing, including setting up a Bradley A.Wynveen Irrevocable Trust. Bradley Wynveen was also provided estate planning and trust related matters. Bradley Wynveen was also a trustee of the Wynveen Family Foundation and expected to be paid funds from it in the future. Bradley Wynveen also was part owner of Gainwell Limited Partnership, which received legal services from Attorney Corsaro and his associates. Attorney Corsaro was named executor of Dr. Wynveen's estate and had been appointed by decedent as Trustee of Bradley Wynveen's trust, as well as two other family trusts.

Attorney Corsaro, as Executor, sought to pay estate taxes by collecting debts owed the estate by Bradley Wynveen either personally or through his interest in Gainwell. Bradley Wynveen filed a complaint in probate court denying responsibility for such estate debts and seeking the removal of Attorney Corsaro as Executor and Trustee, and for accountings and disgorgement of attorney fees his firm had charged, among other counts. Attorney Corsaro answered and counterclaimed for recovery of debts owed both to the estate and trust through firm attorney Beranek. Bradley Wynveen filed a motion to disqualify Attorney Beranek and the

probate court granted his request without a hearing after finding the firm's prior representation met the Dana test use for disqualification as set out above. (Dana Corp. v. Blue Cross & Blue Shield Mut., 900 F. 2d 882 (6th Cir. 1990).

The appeals court initially noted that disqualification of counsel in a civil case is a final appealable order that will only be reversed if it constitutes an abuse of discretion. Further, that "If the attorney-client relationship is a continuing one, adverse representation is prima facie improper" and "If, however, the attorney-client relationship is a former one, Ohio courts use the "Dana test" when considering the disqualification of counsel due to a conflict of interest." There was no question that Bradley Wynveen was at least a past client and evidence supports that as trustee and president of the foundation, remains a current client, satisfying the test's first prong.

The Court of Appeals also found that the second prong was met, as it was easy to conclude that Corsaro's involvement with Bradley's estate planning revealed a great deal of private information that would certainly be at issue in the current action. Further, that information was imputed to other members of Corsaro's law firm, including Attorney Beranek. Furthermore, Attorney Beranek was actually involved in the organization and representation of the Wynveen Family Foundation and Gainwell Limited Partnership, in which Bradley has a partnership interest. The makeup of Bradley's assets and rights will undoubtedly be scrutinized while adjudicating Corsaro's counterclaim because part of the debts allegedly owed involve monies now part of Bradley's assets.

Finally the Court of Appeals found the third prong was also met: It agreed that because Bradley was suing his former attorney, Corsaro was free to reveal confidential information to establish his counterclaim as reasonable and necessary. Nevertheless, it found that the exception in Rule 1.6 had no bearing on the Dana test, which only asks whether an attorney acquired confidential information. Here, the Court noted that it already found that the prior relationships between Corsaro and Bradley were substantially related, Corsaro's prior representations are imputed to Attoney Beranek, and therefore, a rebuttable presumption of acquired confidences applies. Attorney Baranek was disqualified. An appeal has been filed in the Ohio Supreme Court.

ESTATES

TOPIC: An order appointing a fiduciary to administer a decedent's estate is not a final appealable order.

TITLE: In re the Estate of Bond, 2017-Ohio-9076.

The appeals court dismissed an appeal by one opposing the appointment of another to administer decedent's estate for lack of a final appealable order.

The Court of Appeals noted that it had previously determined that an order appointing an administrator of an estate is not a final and appealable order." (In re Estate of Thomas, 9th Dist. Summit No. 227177, 2014-Ohio-3481). Since the appeal involved such an order, the appeals court lacked jurisdiction to hear it. A Notice of Appeal was filed in the Ohio Supreme Court.

TOPIC: Probate Court order denying motion of attorney/ex-husband's application to administer ex-wife's estate affirmed.

TITLE: In re Estate of Bringman, 2017-Ohio-7083.

Attorney and ex-husband of decedent appealed an order of the probate court in Knox County holding that it had jurisdiction of the matter. Another attorney had filed his application there for authority to administer the decedent's estate, citing that although decedent had been "temporarily" living in Franklin County at the time of passing, she had been a Knox County resident until then and did not leave a will.

A hearing on the application was set for October 26, 2016 but the attorney and ex-husband of decedent appeared and filed an objection including a copy of letters from the Franklin County Probate Court dated October 24, 2016 naming him executor of the estate there and establishing that there was a will.

A new hearing was then set and the matter heard in the Knox County Probate Court, with a judgment entry issued that the administration would proceed in Knox County, that Franklin County be requested to forward to Knox County a will filed in the Franklin County Probate Court, to be treated as a foreign document, and that further hearing be held regarding the fiduciary to administer the estate.

The sole issue on appeal from this ruling was whether the Knox County Probate Court erred in determining it had jurisdiction to proceed. Appellant cited *R.C. 2107.11 (A)(1)*, which sets out that administration be had in the county where the decedent was domiciled at time of death. The appeals court determined that "the trial court's said judgment entry was in the nature of a denial of a motion to dismiss for lack of jurisdiction." "As a general rule, a judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." The court took judicial notice of an earlier court ruling finding the couple's divorce was final and cited *R.C. 2107.33(D)*, noting that any nomination of the ex-husband as fiduciary would be revoked by the divorce unless expressly provided otherwise. This left the ex-husband without a "viable fiduciary interest" in the estate even assuming it was a final and appealable order. Appellant therefore lacked the ability to establish any prejudicial error that would warrant reversal of the probate court's ruling. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: Court of Appeals affirmed probate court holding that R.C. 2105.32 precluded the estate of mother from inheriting under daughter's will because she did not survive her daughter by 120 hours as required by statute.

TITLE: In the Matter of the Estate of Crystal E. Wall, Deceased, 2017-Ohio-5713

Willie May and her daughter Crystal resided together in Youngstown. In of 2014 Willie Mae discovered Crystal's deceased body in her home wherein Willie Mae suffered a stress-induced event and also died. It was undisputed that Willie Mae passed away less than 120 hours after the death of Crystal. On March 11, 2015 Crystal's will was admitted and an estate was opened for Willie Mae, who died intestate. Crystal's brother filed objections to the inventory of the estate of Crystal. He was not a named beneficiary under Crystal's will but was an heir to any estate of Willie Mae. He contended that Crystal's estate should pass to Willie Mae's estate pursuant to Crystal's will prior to distribution of Willie Mae's estate. The Executor of Crystal's estate contended that R.C. 2105.32, also known as Ohio's Presumption of Death Statute, requires a beneficiary to survive a decedent by 120 hours, otherwise the beneficiary is deemed to have predeceased the decedent. His position was that the estate should devise to the alternative beneficiaries. The trial court issued a judgment entry holding that R.C. 2105.32 precluded the estate of Willie Mae from inheriting under Crystal's will because Wilie Mae did not survive Crystal by 120 hours as required by statute. A timely appeal was filed by Crystal's brother.

The Court of Appeals for Mahoning County noted that R.C. 2105.36(A) provides for an exception to the 120 hour rule in the presumption of death statute if there is language in the will dealing explicitly with (1) simultaneous deaths, or (2) deaths in a common disaster. It notes that R.C. 2105.32 is a definitional section enacted to define the terms survivor and predecease. Defining what constitutes survivorship and determining under what circumstances a devisee has been deemed to predecease the decedent are exactly the issues in this case. The Court also distinguished this case form an Idaho Supreme Court case, In the Matter of the Estate of Kerlee. The presumption of death statute provides that answer when it states that any individual who passes away within 120 hours of a decedent is considered to have predeceased that decedent. It noted that Appellant would have the exceptions subsume the language but in Ohio by, one exception is that the language of the will must explicitly deal with and address the issue of simultaneous death or death in a common disaster when discussing the devisee. Virtually every will names a devisee and an alternate in case the named devisee predeceased the testator. Simply providing the alternate though doesn't explicitly deal with the presumption of death contained in the statute. To hold otherwise would render the operation of the presumption superfluous. In order to meet exception (A) to R.C. 2105.36, the language of an Ohio testator contained in his or her will must clearly state that the testator's intention is to override the Ohio presumption. The language utilized in the instant will serves only as broad, general language designating beneficiaries, and not as the explicit acknowledgment that Ohio has a definitive presumption defining survivorship. This acknowledgement must use the wording to actively defeat the presumption. Only then does the testator trigger the statute allowing an exception to the presumption. Since no such language was contained in Crystal's will, Appellant's assignment of error was found to be without merit and the judgment of the trial court was affirmed.

TOPIC: Ante-nuptial agreement set aside for lack of asset disclosure.

TITLE: In re Parrett v. Wright, 2017-Ohio-9057.

Richard and Ellen both signed an ante-nuptial agreement in 2005, which indicated Richard owned personal property and that Ellen owned real estate and personal property, all

without specificity or any attached documentation. Both agreed unless they owned property jointly, that the property of each would descend to the heirs of each spouse.

Ellen left her entire estate to her children or their issue per stirpes in her will, also executed in 2005. She passed, and her son, as Executor, simply denied the allegations in Richard's complaint to set aside the ante-nuptial agreement in 2015 without raising any defenses. The trial court, after a bench trial, dismissed the complaint on the basis that Richard had not met his burden to prove he had not been sufficiently informed of Ellen's assets when the agreement was made. Richard appealed and the appeals court reversed the trial court in Parrett v. Wright, 2017-Ohio-764, finding the trial court had improperly placed the burden of proof on Richard, and further noting that even if it had not done so, that the record suggests Richard was not sufficiently aware of Ellen's assets when the parties entered into the agreement.

Upon remand, the trial court heard that Richard had become aware through discovery that his earlier belief that Ellen simply had her house, some furniture, a motor vehicle, and her social security income, was mistaken. Ellen owned three bank accounts, totaling around $17,000.00, had an interest in two other real estate properties along with her son, and received payments from a business co-owned with her late husband from a prior marriage. The trial court also learned that Richard had received a pension buy out in 1997, with $105,000.00 being placed with New York Life Insurance, and that a 2005 joint tax return signed by both spouses reflected income from those three bank accounts, although balances were not listed.

The probate court then determined that the ante-nuptial agreement was invalid, that the only issue was disclosure and that neither Richard nor Ellen disclosed to each other the nature and value of their assets prior to signing the agreement, and provided Richard thirty-five days to exercise any spousal rights with regard to the estate.

The appeals court took the Executor's "issues" on appeal as assignments of error and dismissed them in affirming the trial court. First, the Ohio Supreme Court sets the following standard for evaluating ante-nuptial agreements and that they can be valid and enforceable: (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce. (Gross v. Gross, 11 Ohio St. 3d 99 (1984)). No disclosure was evidenced in this matter so the ante-nuptial agreement was properly found invalid.

The appeals court then determined that it was not provided an appropriate record to review claims as to whether Richard had been improperly provided extra time to make his election by the trial court, as the action to set aside the ante-nuptial agreement may not have been consolidated with any related case, but did note that the Executor has not argued that the trial court lacked jurisdiction to enter such an order and may have waived any such error in any event. The probate court judgment was affirmed.

GUARDIANSHIP

TOPIC: Guardianship case remanded for a hearing on application and any other necessary matters with proper notice to the requisite parties or persons and final judgment entry in regard to three guardianship applications.

TITLE: In re: Guardianship of Morello, 2017-Ohio-5787

On October 11, 2016 Attorney Ginella, with the assistance of counsel, filed an application for the appointment of a guardian of Phillip Morello, a 93-year old man. Attorney Ginella asked to be named guardian of appellant's person and estate. The court set it for hearing. The court also issued an order compelling an expert evaluation of appellant. Appellant with the assistance of counsel filed a motion to dismiss or in the alternative to have his brother Frank Morello, age 87, appointed as his guardian. His motion to dismiss alleged that less restrictive alternatives were available in the form of health care power of attorney and a durable power of attorney executed in 2014 in favor of Frank Morello. The motion to dismiss also stated that Attorney Ginella was a stranger to him.

The probate court set the matter for hearing and in the meantime Frank Morello filed an application pro se to be appointed guardian of his brother. That application was also set for hearing at the same time as Attorney Ginella's application. An evidentiary hearing was held and the matter was taken under advisement. The probate court subsequently ordered the case referred to a mediation which was unsuccessful except as to the issue of guardianship of the person. . Thereafter no decision was rendered explicitly as to the remainder of the competing guardianship applications. However, in January of 2017 Attorney Brian Zimmerman filed an application to be named as the guardian of the estate of appellant. In the Judgment entry issued on the same day, the probate court found appellant to be incompetent by reason of mental and physical disabilities. The court proceeded to name attorney Zimmerman as guardian of the estate of Phillip Morello. In addition, Alicia Price of Coleman Professional Services filed an application to be named guardian of the person and the court appointed her the same day.

Appellant filed a notice of appeal of the judgement entry naming Attorney Zimmerman as guardian of the estate. Appellant raised four assignments of error. The Court of Appeals for Stark County found the fourth assignment of error to be dispositive. In this assignment, appellant contended that the probate court lacked jurisdiction to proceed on Attorney Zimmerman's application to be named as guardian of the estate and the appeals court agreed.

The court of appeals focused on R.C.2111.04 (A) which states that except for an interim or emergency guardian appointed under division (B)(2) or (3) of section 2111.02 no guardian of the person, estate, or both shall be appointed until at least seven days after the probate court has caused written notice , setting forth the time and place of the hearing to be served . R.C. 2111.02 (2) sets forth the details of the notice. The court of appeals reviewed cases from a number of

jurisdictions and concluded that the matter should be remanded for a hearing on Attorney Zimmerman's application and any other necessary matters with proper notice to the requisite parties or persons and for a final judgment entry in regard to the three guardianship applications.

In his first assignment of error appellant challenged the probate court's determination that a guardianship was necessary in this matter. In the second assignment of error appellant maintained the trial court erred in implicitly declining to appoint Frank Morello as guardian of the estate. In his third assignment of error he argued the probate court erred in appointing Attorney Zimmerman, a non-family member and stranger to appellant as guardian of his estate. Based on the court's conclusion on the forth assignment of error it found those assigned errors to be presently premature. The judgment of the Stark County Probate Court was therefore reversed and remanded.

TOPIC: Probate Court holding affirmed that daughter be appointed guardian of her mother's person and estate, in her best interests, despite provision nominating husband to serve.

TITLE: In re Myers, 2017-Ohio-603

A couple had executed estate planning documents in 2003 including living wills and DPOA's for both business and health care. In her general DPOA for business, Ms. Myers nominated Mr. Myers as guardian of her person, with her daughter Bridgett nominated as first alternate attorney-in-fact. She also had a son from her first marriage, and Mr. Myers also had a son from his first marriage.

Ms. Myers was diagnosed with Leukemia in 2006, which was treated, but left her with a severe memory impairment requiring constant supervision. She discontinued working when her health further deteriorated in 2012, necessitating hiring of a caregiver and eventually placement outside the home on weekends, as Mr. Myers often travelled for a highly successful family business. Both her children worked for the family business and Mr. Myers eventually relocated to Florida in 2014, to a residence owned by Ms. Myers' aunt, who was his traveling companion.

Bridgett applied for guardianship of her mother's person and estate in 2015 after Mr. Myers announced a plan to move her mother into a nursing home full time. Mr. Myers filed his own application the day before the hearing, citing his nomination as guardian of her person. Counsel was secured for Ms. Myers and two days of evidentiary hearings were held, resulting in a twenty page *Magistrate's Decision* finding that Bridgett should be appointed, that good cause existed to appoint her despite the husband's nomination, and that interim orders be made for the ward's protection. The probate court overruled objections filed by Mr. Myers and he appealed its *Judgment Entry,* raising two assignments of error. First, that the trial court abused its discretion in not appointing him, and second, that it abused its discretion in appointing Bridgett.

The appeals court determined that Ohio does not have a statutory preference for the appointment of guardians. Further, a probate court may appoint a stranger as guardian if it is in the best interest of the ward. It examined the nomination statute, R.C. 2111.121(B), and found

that the language in it did not bind the court to appoint a nominated person in the presence of good cause or disqualification.

Good cause was found in this case in that Mr. Myers now lived in Florida with a new romantic interest, intended to discharge his marital duties solely by delegation and pocketbook, that he has not participated in his wife's medical care, that the amounts contributed to his wife's care pale in comparison to his assets derived from marital assets, that his constant travel responsibilities prevent proper monitoring of his wife's care, and that his actions in his treatment of marital assets and their disposition via use of his DPOA may conflict with his wife's needs.

Meanwhile, Bridgett has established that she has devoted herself to being her mother's caregiver, evidenced by taking her into her home and keeping her active, and that to the extent able, her mother has expressed her desire to continue to live with her. "The trial court found, in view of Appellee's extraordinary commitment to her mother, essentially putting her own life on hold to care for her mother, that Appellee's motivation is not financial but is based on genuine care and concern for what is best for her mother. Moreover, the fact that Appellant no longer resides in Ohio and spends the majority of his time traveling is a concern of the Court. Even before the rift with his step-children, Appellant only had a very limited relationship with his wife, seeing her only infrequently." No abuse of discretion was found evident on the part of the probate court and its judgment was affirmed.

TOPIC: Record reflects trial court did not abuse its discretion in finding ward required guardianship.

TITLE: In Re Guardianship of Hoffman, 2017-Ohio-8023.

Ward appealed appointment of a guardian for her estate and person, arguing that the appointment was based on her prior condition and not her present condition. The appellate court disagreed, affirming the appointment for the reasons that follow. The ward fell in her home and could not get up sometime in the summer of 2016. She was found days later, was hospitalized, treated, and admitted to a rehab facility a few weeks later, on August 9, 2016. In November of 2016 an attorney for the rehab facility, Kindred Nursing Home and Rehabilitation Community, filed for emergency guardianship of the ward's person and estate and the Court appointed M. Elizabeth Martindell as emergency guardian the next day. The matter was set for further hearing two days later.

The Court, after hearing from the rehab facility administrator and the ward, extended the emergency guardianship for thirty days based on their testimony, noting that the ward had lived without running water in her home for months before her fall and that she believed that the shakes served her at the facility were poison. The ward would not disclose where she would go on her own due to perceived harassment by facility staff. She also had interrupted the facility administrator inappropriately during her testimony, and she could not identify her attorney as her own attorney, surmising that he represented a doctor.

The Court set another hearing after extending guardianship another thirty days to January of 2017, at which Ms. Martindell was appointed as the ward's permanent guardian. Again, the facility administrator and the ward testified, and again the ward interrupted her testimony, this time calling her a liar, and then again refusing to disclose her plans should she be left on her own. She also requested that the Court not harass her anymore. She did admit to having brain damage as the result of an accident. The Court relied on two expert evaluations in concluding that continued guardianship was necessary.

The appeals court reviewed the incompetency statute and determined that both expert evaluations were relevant, one establishing a mental impairment, and the second confirming testimony that the ward was unaware of her condition and her needs. Both evaluations established that the ward could not provide for her health and safety. In addition, the ward's actions at both hearings suggested the need for the guardianship, as she alleged both the facility and the court were complicit in "kidnapping" her. Finally, testimony reflected that the ward had fallen multiple times at the facility since her admission and that the facility could no longer transport her places as a result of these falls. The trial court's judgment was not rendered against the manifest weight of the evidence.

TOPIC: Although a proposed ward in a guardianship has the right to appear for hearing, if he chooses not to appear and is represented by counsel at hearing, there is no procedural due process violation.

TITLE: In re M.R., 2017-Ohio-8027.

In 2016, M.R. was released from prison to live with his sister, P.R.. P.R. noticed M.R. was actively psychotic, delusional, increasingly violent, and attending to internal stimuli. P.R. filed for guardianship in the Harrison County Probate Court and was appointed guardian over the person. During the process, M.R. was served notice of hearing by personal service under RC § 2111.04 (A)(2)(a), and the notice indicated the proposed ward had the right to be present for hearings. M.R. was opposed to the guardianship, wanted counsel and wanted to be present for the hearing. However, his court-appointed attorney never mentioned that to the court. P.R. was appointed as guardian, and M.R. appealed.

The 7th District Court of Appeals reviewed the case. It found that there was no procedural due process rights violation, because appellant was served notice, discussed it with the court investigator, discussed it with counsel and still chose not to appear. He waived his right to appear. Additionally, the Court found when documents from the rehabilitation facility were faxed to the trial court (and file-stamped) and the attorney for the guardianship but not to M.R.'s lawyer, there again was no injustice, because the probate court had ordered an additional psychological exam (MMSE) and M.R.'s attorney reviewed the documents and never objected. As a result, the guardianship was proper. The decision of the trial court was therefore affirmed.

TOPIC: Guardianship appointment affirmed on appeal.

TITLE: In re Guardianship of Schwarzbach, 2017-Ohio-7299.

Maria Starr (daughter) and Lois Starr-Schram (mother-in-law) filed an application in the Franklin County Probate Court for guardianship of the person and estate of Franz Schwarzbach, due to their concerns over his alleged mental deterioration that accelerated with the passing of his wife in 2011. Through counsel, Franz opposed the guardianship, asserting that he was fully competent and capable of managing his own business and personal affairs. Starr-Schram eventually stepped aside and the court chose to appoint attorney Thomas Taneff as guardian in its final judgment.

At hearing before a magistrate, the evidence established that Franz was born in 1942 and came to the United States from Germany at the age of 18. His proficiency in English was a point of contention in the magistrate hearings. Franz was initially employed as a welder but soon entered a long and prosperous career operating central Ohio adult nightclubs. At the time of the hearings he was in partnership with Hetzel, although the formal business arrangement was unclear. Some business properties had recently been conveyed to third parties on terms that were described as difficult to clarify. Franz was living in a home which he lately shared with a 25-year- old companion who was formerly a dancer at one of his clubs. His son Thomas lived across the street in another house owned by Schwarzbach. They have a contentious relationship partly due to the appearance of this companion in Franz's life.

Proceedings commenced before the magistrate on September 3 and October 20, 2015. An agreed entry reflected a limited agreement between the parties to maintain Franz's finances basically at status quo and limited expenditures from his assets, except for living and operating expenses paid from his personal PNC bank account, with a stated balance of $60,000. The parties executed a further agreed entry authorizing an additional payment from other accounts in the amount of $17,112.07 for his taxes.

On February 20, 2016, Franz's current counsel on appeal began representation and filed a request stating that Franz required the services of an interpreter for further proceedings and on March 31, 2016 requested a transfer of funds from the protected accounts into the PNC account for additional living expenses, including attorney fees and costs for the guardianship proceedings, litigation costs for a Northern District of Illinois case, in which the same counsel represented a corporation partially owned by Franz, and a $40,000 lease buyout for Franz's Porsche SUV. The funds transfer request also cited the need to pay for interpreter services and real estate taxes. After a status conference, the magistrate denied some aspects of the request, specifically with respect to attorney fees, noting that fees could only be approved and paid per local rule after establishment of a guardianship. The magistrate noted that counsel had not itemized and substantiated fees or even produced a fee agreement for either the guardianship proceedings or the federal litigation. The magistrate did approve translation services for future courtroom proceedings and deferred consideration of translation costs for out –of-court services on the same terms as for attorney fees. The magistrate authorized payment of taxes but denied authorization to purchase the Porsche at lease term.

Franz filed a motion to set aside the magistrate's order. The court upheld the order with some modifications with respect to attorney fees, and noting that fees in the guardianship

proceedings would be subject to approval under local rule. Franz attempted to appeal that order but it was dismissed for lack of a final appealable order. He then moved for reconsideration in the trial court on the fee issue.

A three day substantive hearing on the merits of the case took place on October 20, 2015, May 5, 2016 and May 13, 2016. Per entry filed May 27, 2016 the magistrate issued her report finding him incompetent and in need of a guardian of the person and estate. Taneff was appointed as an independent. Franz filed objections supported by transcripts from the October and May 13 dates but omitting the May 5th transcript. All objections were overruled by a visiting judge, the decision was adopted in full, and the appointment of Taneff as guardian of the person and estate was confirmed.

Franz appealed and filed a motion to correct the record with the appeals court, seeking to supplement the record to establish that his live-in housekeeper, Valenzuela, had been removed from the home. The Court of Appeals noted that the filing properly belonged before the trial court in support of further post-judgment proceedings, and would not be considered as part of the record on appeal. He brought the following four assignments of error: 1) The trial court erred in adopting the factual findings of the magistrate. 2) The trial court erred in appointing the guardian. 3) The trial court erred in presuming (Schwarzbach) to be incompetent, and accordingly refusing to permit him to pay his attorney fees and expenses incurred in opposing the guardianship. And 4) The trial court erred in restricting (Schwarzbach's) ability to engage and pay for the costs of a foreign language interpreter.

The Franklin County Court of Appeals reviewed the matter, noting that the standard for overturning an appointment of a guardian on appeal is abuse of discretion. The Court overruled the first objection, noting that the Judge reviewed those parts of the transcript submitted and had an obligation to inquire as to whether additional transcripts would be filed, or to extend the time for filing when no request was made. It also overruled the second assignment of error, reviewing the evidence and testimony weighed by the magistrate and the court, and found no abuse of discretion in the probate court's judgment. It noted that there was clear and convincing evidence. The Court found that based on his "*diminished capacity and the risk of abuse at the hands of third parties and with the extreme risk from inability to reliably administer medication, the guardianship was appropriate*." As to the third assignment of error, the court found no deprivation of representation by counsel of Franz's choice nor ability to pay for it, only that court approval of the fees would be needed. It also overruled the denial of the fourth assignment of error as to his ability to engage and pay an interpreter. The order of the probate court was therefore affirmed.

TOPIC: Trial court appointment of non-family guardianship affirmed under circumstances.

TITLE: In re Guardianship of Thomas, 2017-Ohio-8331

Appeals court had affirmed probate court removal of ward's sister as her guardian a year ago for making inappropriate decisions regarding the ward. An uncle applied to be guardian after

ward's aunt's application was dismissed, due to pending criminal charges, and a failed background check. The uncle withdrew his application, moved to another county, refiled there, and was denied guardianship in the new county. The removed sister also tried to be reinstated but was denied for separate reasons.

The probate court appointed the Franklin County Guardianship Service Board as interim guardian during all this, and then made it permanent guardian. The appeals court affirmed, noting that ward's sister seemed to be practicing law without a license in her various filings for her other family members, and had not established anything had changed since her removal that would make her a suitable candidate.

TOPIC: Ward failed to produce any "satisfactory proof" to warrant her request to terminate her guardianship in place since 2000.

TITLE: In re: Guardianship of Shear, 2017-Ohio-8169.

Ward filed a motion pro se for a review of her guardianship on the basis that she was no longer incompetent. A magistrate recommended continuation of the guardianship in effect since 2000, held by her brother, after hearing from both of them, and reviewing the record. Two recent expert evaluations from two different doctors both indicated a need for ongoing guardianship. One included a lengthy narrative stating that she suffers from "severe thought disorder, aggressive behavior, and grandiose and paranoid delusions" requiring ongoing medication. The brother urged the court to continue the guardianship because his sister might soon need long term care placement due to her lack of care for herself. The ward believed that the guardianship process was a fraud and that she had been a victim of identity theft, continually pointing to her spreadsheet exhibit reflecting her monthly bills.

The trial court overruled her objections and adopted the magistrate's decision, denying the motion because the ward failed to produce satisfactory proof that the necessity for the guardianship no longer exists pursuant to *R.C. 2111.47.*

The appeals court affirmed, finding the sole issue to be whether the ward presented enough evidence to establish that the need for the guardianship no longer exists, and that the record reflects that the ward was unable to produce "any" satisfactory proof that the guardianship should be terminated.

TOPIC: Guardianship case remanded to determine whether visitation was in the best interest of the ward.

TITLE: In re Guardianship of Bakhtiar, 2017-Ohio-8617.

Ex-husband from fifty-five year marriage filed a motion to visit his ex-wife, and ward, after long and contentious family proceedings that resulted in the eventual appointment of an attorney as permanent guardian of the ward's person and estate. The couple divorced in 2014,

both in their eighties, and when the ward was placed in a nursing home in 2016 the ex-husband visited her with other family members. He filed a motion for further visitation and the attorney/guardian opposed it. The court scheduled a hearing but denied the motion ten days before it was to be heard, without explanation.

The ex-husband appealed. The appeals court first determined that the denial was a final appealable order because it affected a fundamental right in a special proceeding. Both the Constitution and case law recognize the fundamental right of one consenting adult to associate with another.

The appeals court then addressed the issue of visitation with regard to guardianships, noting that *R.C. 2111.50(C)* provides that all decisions made by the guardian, or the court as superior guardian, must be in the ward's best interests. Since the probate court gave no explanation for its action summarily dismissing the visitation motion, a remand was found necessary, noting both that the ward may express her own wishes and desires and that an evidentiary hearing need be held only if the movant meets his burden to show that prior indications that she no longer wished to associate with him had changed.

JURISDICTION

TOPIC: Priority doctrine gives Domestic Relations Court jurisdiction over spousal support claim.

TITLE: Stegall v. Nott, et al., 2017-Ohio-8683

Decedent owed "spousal support" to ex-spouse pursuant to a 1998 divorce decree. Decedent had filed a Motion to Modify or Terminate Spousal Support prior to passing. The surviving spouse filed her claim for over two million dollars remaining due against his estate and the decedents' adult daughters administering his estate rejected her claim. Parties disputed the balance to which a ten percent interest rate was applicable. Surviving ex-spouse timely filed a Common Pleas general division action to establish her remaining claim. That Court found that it had jurisdiction in an entry granting surviving ex-spouse's summary judgment motion suggesting that general division court had exclusive jurisdiction, and that both parties had agreed it had exclusive jurisdiction with regard to such rejected claims. It denied appellants' summary judgment motion arguing that jurisdiction lay with the Domestic Relations division by virtue of their father's filing of his motion prior to his passing.

The appeals court reversed, holding that the priority doctrine applies that "in Ohio, as between courts of concurrent jurisdiction, the tribunal whose power is first invoked acquires jurisdiction to adjudicate upon the whole issue and to settle the rights of the parties to the exclusion of all other tribunals." (Reams v. Reams, 6th Dist. Lucas, 2005-Ohio-5264). It found that the claims of the parties are identical in both courts. It also determined that Ohio's abatement by death statute does not apply for the reason that "since the parties divorce decree was fixed as to Stegall's liability to the Appellee, though subject to variation as to the amount,

the cause (Stegall's motion) survives his death." (Citing Diemer v. Diemer, 99 Ohio App.3d 54, 60.)

"Therefore, under the jurisdictional priority rule, the Domestic Relations Court should have exclusive jurisdiction to resolve the parties' dispute arising from the language in controversy contained in the Divorce Decree. Furthermore, while the Civil Division Court determined that the parties agree that it had exclusive jurisdiction to hear R.C. 2117.12 claims, subject matter jurisdiction cannot be waived." The Civil Division Court's orders were vacated and rendered void and the matter was remanded to the Domestic Relations Division.

TOPIC: Entry approving magistrate's decision on exceptions to inventory dismissed as not a final appealable order.

TITLE: In re Estate of Robison, 2017-Ohio-8980.

Decedent's son had filed an inventory as executor for his late father's estate. Surviving spouse filed exceptions and at a hearing before a magistrate presented thirty-eight certificates of title and two sets of BMV search records identifying vehicles owned by decedent not listed on the inventory and/or listed with incorrect VIN numbers. In addition, deeds and certificates of transfer and/or title records for real property were submitted regarding three properties either mischaracterized on the inventory or left off of it.

The magistrate recommended that the missing vehicles be added to the inventory, that the VIN numbers be corrected on those vehicles misidentified, that decedents' two-thirds ownership in one of the three properties be added, and that one property be excluded per the records provided.

The probate court approved the decision and the magistrate then ordered the son removed for failing to file a true inventory and extended time for the surviving spouse to make her elections until the changes were made.

Six assignments of error were filed on appeal by the executor. "The judgment entry identified in the notice of appeal must be a final appealable order." To be final and appealable, an order must affect a substantial right in an action "that in effect determines the action and prevents a judgment" or it "affects a substantial right made in a special proceeding or upon a summary application in an action after judgment."

Two of the assignments of error concerned orders made after the probate court's judgment entry and involve magistrate's orders or decisions that are interlocutory and not final appealable orders.

The other four assignments of error involve the probate court judgment entry but are not final and appealable because the entry "clearly contemplates further action in the probate court before approval or settlement of the final account, as "an order denying exceptions to an

inventory is only a final, appealable order if it also approves the inventory". Therefore, the appeal was dismissed for lack of jurisdiction.

The Court of Appeals indicated that "This court has previously noted that appellate districts are split on the issue of whether probate estate administration proceedings are 'special proceedings' under R.C. 2505.02(A)(2). It therefore court determined that the judgment in this matter clearly contemplates further action in the probate court before approval or settlement of the final account and does not constitute a final appealable order.

MANDAMUS

TOPIC: Petition for writ of mandamus seeking order to rule on several motions in pending cases granted where relator alleges that respondent failed to timely rule on relator's motions and respondent did not respond following issuance of alternative writ.

TITLE: Leavell v. Conway, 2017-Ohio-8346

Douglas Leavell filed a petition for a writ of mandamus against respondent, Judge James Conway. In the petition he requested that the court issue a writ of mandamus ordering Judge Conway to rule on several motions pending in his case.

The Sixth District Court of Appeals indicated that it had previously issued an alternative writ directing respondent to either do the act requested by relator in the petition or to show cause why he is not required to do the act by filing an answer to relator's petition pursuant to Civ.R.8(B) or a motion to dismiss relator's petition pursuant to Civ.R.12. Respondent failed to do so within the fourteen days of the date he was served as ordered by the court.

In light of the respondent's failure to respond to the alternative writ, the court issued a peremptory writ of mandamus pursuant to R.C. 2731.10 and ordered that respondent rule on all pending motions. The writ was granted.

MISCELLANEOUS

TOPIC: Under RC § 163.21 (A) (2), when the State abandons its "original legislative taking of citizens' real estate by "appropriation by fee simple," they are entitled to fees, costs of litigation and for paying witness expenses.

TITLE: City of Lorain v. McKiel, 2017-Ohio-7919

The City of Lorain developed a plan for road improvements in 2013, which included taking some of the McKiels' land by filing a petition/civil action for "appropriation by fee simple taking" that was filed in the Lorain County Probate Court. The petition was later amended to allow the McKiels the right of ingress and egress to a residual property. After a jury trial that

found in favor of the McKiels and gave them compensation and damages for the property as well as compensation for temporary easements, the McKiels filed a motion for attorney fees and expert/litigation costs, which the probate court denied. They appealed.

The 9th District Court of Appeals reviewed the matter. It found that, in their motion for fees, the McKiels were citing RC § 163.21 (A), asserting that Lorain had abandoned its "original legislative taking", and under (A)(2), they were entitled to fees, costs of litigation and for paying expert witnesses.

The Court found that the City of Lorain did not abandon its original legislative taking, but amended its petition to allow an easement of ingress and egress for the McKiels' benefit. Additionally, the Court found that just because the City of Lorain made a low offer of compensation to the McKiels, it was not a bad faith effort. Rather, under the statute, the probate court found that Lorain had made a good faith effort to compensate the McKiels for their inconvenience. The trial court decision was affirmed. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: For a writ of prohibition to issue there are 3 elements: first, an actual or imminent exercise of judicial power; second, the lack of authority for that power; and third; lack of an adequate remedy in the ordinary course of law. However, if the lack of jurisdiction is "patent and unambiguous", the third element need not be established.

TITLE: State ex rel. McGirr v. Winkler, 2017-Ohio-8046.

Attorney Stanley Chesley and 3 other attorneys stole millions of dollars in settlement funds while representing creditors, who filed a lawsuit against them in 2004. In 2014, Kentucky courts affirmed that Chesley was jointly and severally liable for $42 million. In 2013, he was permanently disbarred by the Kentucky Supreme Court. He was the sole shareholder of a corporation and was ordered to transfer his shares to the creditors, which he never did. He did create a "winding up" agreement though and a receiver was appointed.

However, the receiver created and registered as an Ohio for-profit corporation a new company and transferred Chesley's former corporate holding into it. The corporation filed the "Assignment for the Benefit of Creditors" in the Hamilton County Probate Court, beginning this ABC action. The creditors filed a motion to dismiss, which Judge Winkler denied. The creditors filed for a writ of prohibition with the Ohio Supreme Court against Judge Winkler and for an emergency stay of the ABC action.

Judge Winkler filed a motion to dismiss the writ of prohibition. The Ohio Supreme Court did grant an emergency stay of the ABC action. Under S.Ct.Prac R. 4.01(B), the Supreme Court dismissed the creditors' motion to strike a brief in support of Judge Winkler's motion to dismiss. The seminal issue is whether Judge Winkler has jurisdiction to preside over the ABC action.

For a writ of prohibition to issue there are 3 elements: first, an actual or imminent exercise of judicial power, second, the lack of authority for that power, and third, lack of an adequate remedy in the ordinary course of law. However, if the lack of jurisdiction is "patent and unambiguous", the third element need not be established.

The Supreme Court found the first prong easily met because Judge Winkler was going to exercise judicial power. It also found that under RC § 1313.01, Ohio law gives the probate court jurisdiction over ABC actions and may appoint/remove trustees, remove assignees, appoint appraisers, and order the private sale of property. The probate court thus has exclusive subject matter jurisdiction over ABC. The Supreme Court found that Judge Winkler does not patently and obviously lack jurisdiction over the ABC action. Creditors have an ordinary remedy at law by way of appeal.

However, the majority opinion granted the writ of prohibition, preventing further activity in the ABC action because it found that Chesley and his friends had continued to defy Kentucky court orders with a "sham winding-up agreement," and that the ABC action in Ohio was to further thwart creditors.

The ABC action was also an "end-run" around fraudulent transfer litigation already pending before the Federal District Court in Toledo, Ohio. Judge Carr wrote in the federal case that the "*sham finding casts a bright light on the tenacity with which Chesley has sought, and continues unrelentingly to seek, to retain money that he and his confederates stole from their former client victims.…unwittingly, I have helped a bandit to escape*." Motions to dismiss and for judgment on the pleadings were denied. Writ of prohibition was granted.

TOPIC: Divorce decree rendered void as defendant-appellant was not properly served in Egypt.

TITLE: Tadross v. Tadross, 2017-Ohio-930.

The Court granted plaintiff-appellee George Tadross's complaint for a divorce against defendant-appellant Maryan Tadross. The impetus for George's complaint was that Maryan and the parties' two minor children went to Egypt to visit relatives, but Maryan refused to return to the U.S., (she was still there during the trial). The Court divided the marital assets, named George as the residential parent and legal custodian, and ordered Maryan to pay George's legal fees. In addition to appealing from these rulings, Maryan complained that the Court lacked personal jurisdiction over her because she was not properly served in Egypt. The Court of Appeals for Cuyahoga County agreed that Maryan was not properly served with the complaint, so the action failed to commence, rendering the divorce decree void.

The Appeals Court reviewed service of process pursuant to Civ.R. 4.5 as it was process made in a foreign country and specifically addressed the fact that Egypt is a signatory under the Hague Convention. The Court of Appeals noted that that Civ.R. 4.1 makes no reference to the nationality of the defendant but instead refers to service in a foreign country. If service is allowed by Civ.R. 4.3, and it indicated there was no question it was, the complaint must be made

as provided by Civ.R. 4.5(A) and the Hague Convention. The Court of Appeals further found the alternative holding of the trial court to be an error as Civ.R. 4.1(A)(1)(b) permits service by commercial carrier, but that rule is not applicable in this case because Egypt requires service of process to be made only through a central authority. Any method of service not made through the Egyptian central authority is a nullity. Finally, and not withstanding improper service of summons, the court found that Maryan waived any defects in service of process by participating in the action and even acknowledging receipt of summons.

The Court of Appeals however noted that a defense of insufficiency of service of process is waived unless the defendant raises it in a responsive pleading, which Maryan did not do because she raised the defense in her answer to the complaint. In addition, she filed a motion to dismiss the complaint based on the court lacking personal jurisdiction over her and her active participation in litigating the case had no effect on the affirmative defense. The Court of Appeals concluded that the trial court erred by refusing to dismiss the action. The Judgment was vacated.

TOPIC: In dispute between decedent's wife and son about entitlement to funds in decedent's IRA account, trial court did not err in enforcing arbitration provision in IRA client agreement, where mother did not sign agreement, but was a third-party beneficiary to agreement because she voluntarily received IRA funds and continued to retain the account funds.

TITLE: Javorsky v. Javorsky, 2017-Ohio-285.

In October 2014 Andrew Javorsky opened an IRA account with TD Ameritrade. His son, his spouse's stepson, Thomas Javorsky was originally designated as the beneficiary of the account. Joan, as Andrew's spouse, signed the notice under the Agreement acknowledging that she was not named as the primary beneficiary of the Account. In 2007 Andrew changed his beneficiary designation naming Joan as the primary beneficiary then two years later changed it back to his son Thomas. Joan again acknowledged in writing she was not named as beneficiary. Andrew passed in March 2012 and Joan had her financial adviser request distribution of the funds of the account, resulting in $700,000 being transferred from the Account to Joan's Ameritrade account, which was subsequently liquidated.

In July 2014, Thomas filed suit against Joan, alleging undue influence with respect to the Account and other assets of his father; he also asserted a claim for intentional interference with expectancy of inheritance, fraud, and conversion. After recovering the 2009 change of beneficiary designation, Thomas amended his complaint to add TD Ameritrade as a defendant, seeking a declaratory judgment that he, and not Joan, was the proper beneficiary of the Account. He also asserted claims against TD Ameritrade for breach of contract, breach of fiduciary duty, and negligence.

Joan admitted that the funds were distributed to her but did not admit that Thomas was the proper beneficiary. She asserted cross-claims against TD Ameritrade for promissory estoppel, negligence, declaratory judgment, and indemnification. She also asserted counter and

third-party claims against Alpha Planning and Cirino for negligence, breach of fiduciary duty, breach of implied contract, unjust enrichment, promissory estoppel, and fraud.

TD Ameritrade filed motions to compel arbitration of both Thomas's and Joan's claims, contending that the IRA Client Agreement governing the Account provides that all claims relating to the Account must be arbitrated. The trial court agreed and granted both motions. Only Joan appealed that decision, contending in her sole assignment of error that the trial court erred by enforcing an arbitration provision in the agreement against a non-signatory to that Agreement.

The Court of Appeals for Cuyahoga County held that Joan knowingly accepted a direct benefit conferred by the Agreement as she expressly sought and voluntarily received the funds in the Account. In fact Joan continues to benefit by retaining the Account funds and claiming she is the proper Account beneficiary under the Agreement. As the claimed proper third-party beneficiary to the Account, she is also bound by the Agreement's burdens or obligations, including the arbitration provision. Based upon Joan's own actions and legal claims, she has subjected herself to the arbitration provision in the Agreement. Therefore, under either estoppel or third party beneficiary theory, the arbitration provision is enforceable against Joan's claims.

The Appeals Court further held that because Thomas's and Joan's contingent claims are intertwined and Joan's claims against TD Ameritrade are contingent on Thomas's claims, it would defeat strong public policy supporting arbitration and its purpose as an expeditious and economical means of resolving a dispute to find that Joan's claims are not subject to arbitration. The Court of Appeals concluded that the trial court did err in granting TD Ameritrade's motion to compel arbitration and stay proceedings pending arbitration. The Judgement was affirmed.

TOPIC: Court of Appeals affirms dismissal of case pursuant to settlement agreement**.**

TITLE: Teague v. Schmeltzer, 2018-Ohio-76.

Constance and Julius Schmeltzer passed away in 2012 and 2013 respectively, leaving behind as the beneficiaries of two living trusts three adult children: Kathleen Teague, Steven Schmeltzer, and Ernest Schmeltzer. This matter was initiated by the filing of a complaint by Kathleen Teague, Executrix of the Estate of Julius Schmeltzer, against Steven Schmeltzer, and demanding the return of certain assets of the estate. Subsequently Steven Schmeltzer filed a complaint for declaratory judgment against Kathleen Teague and Ernest Schmeltzer that was consolidated under 2015-CV-006 case number, along with other related probate cases. Upon the motion of Steven Teague partial summary judgment was granted finding a distribution agreement among the three adult children to be valid.

A mediation conference was conducted with the parties entering into a preliminary settlement agreement. It provided in part that the business entity of Old Portage Company was to pay Ernest Schmeltzer $30,000 within 14 days of entering into a final agreement. The agreement also provided that all litigation was to be dismissed with prejudice upon the execution of the final agreement. A final settlement agreement was subsequently prepared and signed by all parties. On January 13, 2017, Ernest Schmeltzer filed a motion for the enforcement of the settlement

agreement and for sanctions. In her response, Ms. Teague attached a copy of a notice of lien sent to Old Portage Company from the office of the Attorney General of Texas, Child Support Enforcement Division, detailing the attachment of a lien and all funds payable to Ernest Schmeltzer. On January 31, 2017 Ernest Schmeltzer filed a "motion and notice of withdrawal of signature to settlement agreement and motion for contempt" based upon the placement of the lien and alleging that the other parties had improperly contacted the Office of the Attorney General of Texas.

The Court denied Ernest Schmeltzer's motion for enforcement and sanctions and his motion and notice of withdrawal of signature to settlement agreement and motion for contempt, noting that his unrelated debts did not relate to his voluntary signature on the settlement agreement. The order further denied Ms. Teague's request for an oral hearing as moot. On April 7, 2017 Ms. Teague and Steven Schmeltzer filed a joint motion for an order of dismissal with prejudice, noting that Ernest had indicated he would not sign an agreed dismissal entry until he received his settlement funds, upon which the lien had been placed. On April 10, 2017 the trial court entered an order of dismissal indicating the parties had entered into a settlement agreement and that under the terms of the agreement all parties agreed to dismiss all claims against each other with prejudice.

On the same day Ernest filed a notice of interlocutory appeal of the trial court's order of March 10, 2017. Pursuant to his request, the Court of Appeals filed an entry amending his notice of appeal to include an appeal of the trial court's April 10, 2017 order, and dismissed his appeal from the trial court's order of March 10, 2017.

Ernest argued that the trial court erred in denying his motion for enforcement and sanctions and his motion for the withdrawal of his signature to the settlement agreement, and for contempt, without holding an evidentiary hearing. Ernest also argued that the trial court erred in issuing an order of dismissal without holding an evidentiary hearing on his claims against Ms. Teague and her counsel.

The Court of Appeals for Summit County disagreed. It concluded that it was not an abuse of discretion for the trial court to dismiss the case pursuant to the settlement agreement. Ernest had failed to demonstrate a legitimate factual dispute regarding the settlement term. It held that in the absence of such a factual dispute, a court is not required to conduct such an evidentiary hearing. Likewise, the trial court didn't err in denying Ernest's motion for enforcement and sanctions, and his motion for the withdrawal of his signature to the settlement agreement and for contempt, without holding an evidentiary hearing. His assignments of error were overruled and the judgment of the Summit County Probate Court was affirmed.

TOPIC: Former Attorney/ Trustee sentenced to 20 years in jail and ordered to pay $400,718 in restitution.

TITLE: State v. Searfoss, In the Court of Common Pleas, Wood County, Ohio, Case No. 2017CR0235.

This matter came before the court for a jury trial. The Defendant, a former attorney was accused of stealing $435,000 from a client and was found guilty on all counts. He was indicted on a total of 14 felony counts, including 4 counts of engaging in a pattern of corrupt activity, a first degree felony; 6 counts of felony theft, all either third-, fourth-, or fifth-degree felonies; and four counts of money laundering, a third-degree felony.

Searfoss was accused of taking $435,000 from a trust belonging to Eric Walker, who made Searfoss trustee after he served as his lawyer during a divorce proceeding. The state argued that Searfoss took the funds without the consent of Walker and used them to purchase a house, to pay down a home equity line of credit on a home; to pay back taxes and child support; and to purchase 2 vehicles. The defense argued that Walker, at Searfoss' suggestion, loaned the money to Searfoss in an effort to shield the money from outside parties, and acted with Walker's consent. Searfoss argued that he made payments on the loan each time it was due. Searfoss surrendered his license as part of a disciplinary proceeding unrelated to this case.

Searfoss was the only defense witness. He testified that he suggested that Walker loan him the money as a means of investment. He said that Walker had a copy of the beneficiary consent form that would have outlined what Searfoss could do with the trust months before he signed it. He said the document allowed for loans to be made to Searfoss, and that he could use the money as he saw fit. Searfoss acknowledged that he had been difficult to get ahold of, saying that he has ADHD. He also said that Walker should tell his wife if questioned, that they were business loans. He further indicated that he told Searfoss many times that he should consult his own attorney on matters regarding the trust and Searfoss acknowledged that he made some mistakes that were in violation of the rules for attorneys during his career. He also admitted that despite a separation of witness order, he called his wife before and after she testified. . He admitted to his financial instability and his need to seek assistance from ODJFS for Medicaid and food stamps.

The Prosecutor pointed out that the language in the trust drafted by Searfoss permitted him to violate the law. He argued that the case was simple as it came down to deception and consent.

The jury of 6 men and 6 women deliberated for approximately four hours before arriving at a verdict of guilty on all counts. They then deliberated approximately 2 more hours to determine verdicts on a series of forfeiture specifications in the indictment. The jury determined that Searfosss must forfeit his home in Bowling Green; a residence in Perrysburg now in the name of his in-laws; a total of $432,000; a Dodge Dart; and a position of trust over the trust. The jury determined not to require him to forfeit an additional $22,000 and a 2013 Chevrolet van named in the specifications.

TOPIC: When the decedent had advanced dementia, the court found she lacked the mental capacity to make a change in beneficiary designation, that she no longer could understand the nature and extent of her assets, and that she was susceptible to undue influence.

TITLE: In re Estate of Flowers, 2017-Ohio-1310.

Virginia Flowers was married and had children, living in South Carolina. She was widowed in 1993 and received a structured settlement. In 1996, Flowers met the plaintiff-appellee, Dean. They married in 1998. Flowers' daughters felt that some of their mother's irrational behavior was due to her new fiancé, who had filed a lawsuit against them for defamation as well as for a CPO. While the parties did apologize to one another and that litigation ended, the relationship between Flowers and her daughters practically ended and the daughters stayed away from Flowers and her new husband.

After they married, Dean quit his job and lived off Flowers; when she lost her job, they lived off partial withdrawals from her Edward Jones account. Flowers executed her Last Will and Testament on December 4, 2007, naming Dean as sole beneficiary and his nieces as alternate beneficiaries, excluding her daughters. The extended family observed that Dean was loud and verbally abusive to Flowers, who was afraid of him. From 1998 to 2010, one of the daughters tried to maintain some relationship with Flowers; that ended, however, in 2007 when the daughter confronted Dean about marijuana she found drying at the marital home. She had no further contact with her mother until 2010.

In 2008, Flowers stopped working and Dean sold her car; in 2009, he testified that she started to repeat herself and forget things. In 2010, she would forget to eat, bathe or change clothes without prompting. She no longer helped with household things and became confused or disoriented easily. Dean handled all finances, cooking, etc.

In 2010, Dean's mother found Flowers wandering in the yard. Flowers kept wanting to go to Ohio. Flowers moved to Toledo, Ohio in 2010 to be with her brother, defendant Joseph, who believed she began to decline until her 2012 death. He stated that every time she saw Dean (her husband) she would get worse. Dean tried to have local Ohio police let him see Flowers, but she did not want to see him. When she showed up with a lawyer, Dean returned to South Carolina and began his own proceedings in that state. Joseph got Flowers medical treatment in Ohio, and she indicated she wanted her daughters to have her Edward Jones assets, not Dean. Flowers tried to reconcile with her daughters.

Flowers met with a Toledo attorney in 2010 who prepared a POA designating Joseph as her attorney- in- fact. Joseph said she had trouble with eating, dressing, and bathing, including a danger with hot water. The attorney would later testify that, notwithstanding the above, Flowers knew her family and who she wanted in charge or to have her things. In like manner, the local Edward Jones representative testified that, while there was impairment, she knew who she was, that she wanted to change her beneficiary designations, and who she wanted to receive her funds. The attorney specializing in Social Security Disability law testified to a similar experience with Flowers: impairment, yet an ability to know who she was and why she wanted to do her proposed changes.

A Toledo divorce attorney met with Flowers to discuss a divorce and CPO. She believed Flowers had impairment but this was due to years of emotional and physical domestic abuse by Dean. Flowers' daughters also would testify how their mother had changed between 2007 and

2010. Dean filed a support and maintenance action in South Carolina, filed a guardianship there, and later would file her estate administration there, as he was named as executor in Flowers' Last Will and Testament. At a civil protection hearing, Flowers testified she was terrified of Dean who was verbally and physically abusive to her. A CPO was issued. Flowers lived on her dad's family farm until close to her death, where her brother Joseph would see her weekly, and her dad had to provide 24/7 care, as she would not feed, dress or bathe herself.

After Flowers' death in 2012, Dean as executor filed an action in the Lucas County Probate Court to have the July 2, 2010 beneficiary designations (from him to her daughters) overturned as the product of undue influence and Flowers' lack of capacity to make said designations due to her advanced dementia.

Three doctors testified, and at least one performed a post-mortem psychiatric evaluation, finding Flowers had such advanced dementia that she lacked the mental capacity to make the change in beneficiary designation, that she no longer could understand the nature and extent of her assets, and that she was susceptible to undue influence. Judge Puffenberger found in favor of Dean, ruling that he was entitled to the Edward Jones funds and that the change of beneficiaries was invalid. The daughters appealed.

The 6th District Court of Appeals reviewed the matter de novo. It found that the evidence at trial and the testimony of the doctors made it clear that Flowers lacked capacity to give an informed consent for the change of beneficiary forms. Further, even if not necessarily improper, there was undue influence by her brother Joseph and her daughters. Ultimately, the Court found that the probate court had acted properly:

"…conflicting evidence was presented as to Flowers' testamentary capacity and there was a difference of opinion as to the weight to be given lay and expert witness evidence. The probate court, as the trier of fact, resolved these conflicts. We cannot say that the court lost its way in resolving these conflicts and created such a manifest miscarriage of justice that its judgment should be reversed…" The Court of Appeals therefore affirmed the decision of the Lucas County Probate Court. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: Motion to dismiss granted by Supreme Court in case alleging rules violations by Probate Court.

TITLE: Zambon v. Allen County Probate Court, 2017-Ohio-9111.

Shelia Zambon and Lambert Studer filed an original action in the Ohio Supreme Court styled as a "Complaint for Violation of Rules Governing the Courts of Ohio." Relators' allegations apparently arose out of a will dispute that occurred in the Allen County Probate Court relating to decedent Thomas Studer. Relators alleged that the Allen County Probate Court failed to file appropriate notices in the local newspaper relating to Mr. Studer's will, and it accepted filings from Mr. Studer's sister, Carol Hilyard, which allegedly contained false statements. Relators further alleged that Allen County Probate Court did not follow the rules of the Ohio Supreme Court and failed to follow the procedures. No specific rules were identified. Relators

asked the court to take action against Allen County Probate Court, Carol Hilyard, and daughter that works in the court system, for clear violation of the court rules set down in the court. Relators asked the court to find Allen County Probate Court guilty of rules violation.

Relators' complaint attached the second page of an Application for Summary Release From Administration by Carol Hilyard in the Allen County Probate Court. The allegations appear to have arisen out of the Allen County Probate Court's handling of the summary release of Mr. Studer's estate.

The Allen County Probate Court filed a Motion to Dismiss for lack of jurisdiction to grant Relators' request for declaratory judgment in the form of a determination that the Allen County Probate Court violated rules, that the Allen County Probate Court was not a proper party because it is not an entity sui juris that is capable of being sued, that Relators' Complaint constituted an impermissible collateral attack on the decisions of the Allen County Probate Court, that Relators did not have a private cause of action against a probate court for alleged violations of court rules, and that to the extent that Relators' allegations are construed against the Court's only judge, Judge Derryberry is absolutely immune from suit.

The Supreme Court granted the Motion to Dismiss the case and denied relator's motion of objection to order.

TOPIC: Petition for Writ of Habeas Corpus denied by Court of Appeals.

TITLE: In re Thomas Frederick, 2017-Ohio-8122.

This matter was before the Court of Appeals for Sandusky Courty on a petition of Thomas Frederick for a writ of habeas corpus. In his petition he stated that he was imprisoned based upon a felony indictment. However the trial court had found him to be incompetent to stand trial and not subject to being restored within a one-year period. The trial court dismissed the indictment and ordered the jurisdiction over Frederick transferred to the Sandusky County Probate Court for further proceedings under. R.C. 5122 or 5123. However, Frederick sates that no civil commitment proceedings have been initiated. Therefore, he argued that he was wrongfully being held in custody, and demanded that a writ of habeas corpus issue immediately against his illegal imprisonment.

The Court of Appeals noted that the application was not verified, which means that a formal declaration in the presence of an authorized officer by which one swears to the truth of the statements was not made, so it must be dismissed. In addition to the lack of verification it further noted that the application did not expressly name the person by whom Frederick is confined and upon whom the writ should be served, although it does intimate that the person is the Sandusky County Sheriff. Similarly the application did not state where the petitioner is imprisoned.

The Court of Appeals therefore denied the writ of habeas corpus without prejudice and indicated that he could refile his petition to cure the deficiencies.

NAME CHANGE

TOPIC: In a contested minor name change action, the probate court had no authority to declare a juvenile court lacked jurisdiction and or its actions were void. However, the probate court had jurisdiction over name changes under R.C. 2717.01, not the juvenile court.

TITLE: In re Name Change of A.L.R., 2017-Ohio-7458

Minor child was born in 2008, and the parents were never married. However, they both signed an affirmation of paternity listing the child's name as A.L.R., and had it notarized. This was reflected on the child's birth certificate.

In 2009, father filed a complaint in the Franklin County Juvenile Court for parental rights, etc., which was contested. A magistrate heard the matter and objections were eventually overruled, the final JE being filed in 2010. Mother was named sole custodian of the child, but no finding of paternity was made, as an affirmation had been done in 2008. Although the magistrate's decision indicated the parties agreed to modify the child's name to A.R.F.R, the court did not order the name change and did not file any specific orders for change of birth record.

In 2012, Father took a copy of the decision and entry to Vital Statistics and got a changed birth certificate, which he then took to Social Security and had a new card issued.

In 2016, mother filed an application for the minor's name change in the Licking County Probate Court, as mother and child resided in that county. Father filed a TRO (which was granted) in Franklin County Juvenile Court to prevent the name change and mother filed a Rule 60 (B) motion, arguing that Licking County Probate Court had jurisdiction. In January 2017 after a hearing, the Franklin County Juvenile Court vacated its restraining order, vacated its 2010 order and ordered the name changed to A.R.F.R..

Later in January 2017, the Licking County Probate Court ordered a name change from A.L.F.R. to A.L.R.. The reasoning was that the child (now 8 years old) had always gone by AL.R., her school and immunization records reflected A.L.R., she was known as A.L.R., and even her passport was issued as A.L.R. Father appealed, asserting the probate court lacked jurisdiction.

The 5th District Court of Appeals reviewed the matter. It first looked at R.C. § 3111.13 (C) that allows a juvenile court to determine a surname of a minor after the establishment of a parent child relationship, always in the best interests of the child. It noted that the probate court had found that no parentage matter was before the Franklin County Juvenile Court in 2017 (an affirmation was done in 2008), and that therefore it lacked jurisdiction to change a name.

The Court found that the probate court had no authority to declare another court to lack jurisdiction and that its actions were void. Second, the Court found that the Licking County Probate Court had jurisdiction over name changes under R.C. 2717.01, and found that under In re Wilhite, the name change was properly restored to A.L.R. The appeal was overruled.

TOPIC: Denial of Mother's application to change her son's name affirmed on appeal.

TITLE: In re Change of Name of D.G. S., 2017-Ohio-9110.

Mother and B.S. (Father), were divorced in 2015. Mother used the surname L. early in the marriage but ultimately used the surname S. She reverted to her maiden name following the divorce. While married, the parties adopted their minor son D.G.S. through a domestic adoption. Mother is Italian and father is German/Irish. D.G.S.'s biological mother is of Lebanese descent and his biological father's descent is unknown.

At the time of the adoption Mother and Father changed D.G.S.'s name from his birth name to D.L.S., the D, an Italian first name and the L. having been the first name given at birth. Although D.G.S.'s middle name was to have remained L., in deference to his biological mother, Mother and Father had it changed during their marriage to the masculine form of Mother's middle name. D.G.S.'s first and middle name are therefore reflective of Mother's Italian heritage and his surname reflective of father's heritage.

During the pendency of the divorce Mother was denied a name change but she either encouraged or allowed the child to be identified by the surname L.-S. over father's objection. When the divorce was final she filed another application to change the surname of the child to L.-S. Father objected and the probate court appointed a GAL. Following a hearing and an in camera interview with the child, the court denied Mother's application. Mother filed a timely appeal. Mother contended that the ruling was contrary to the weight of the evidence and argued that because the weight of the evidence weighs in favor of the name change, the trial court abused its discretion by "supplanting its own preference for paternalistic standards in place of the law."

The Court of Appeals disagreed with both arguments. It noted that the probate court considered the factors outlined by the Ohio Supreme Court in *Willhite.* It noted that the probate court had specifically found that a surname change would adversely affect the child's development and maintenance of a relationship with his father, however, absent a name change, D.G.S., is as and would continue to be firmly identified as a member of Mother's family. The court noted the "us versus him" negative undertow in the in camera interview with the child and considered the fact that Mother used the name L. or L.-S. for the child despite the denial of her previous application for name change and without consent of Father. The record further indicated that the child does not identify with Father's German/Irish heritage or his Lebanese heritage but rather his mother's Italian heritage and that the child had identified his surname as just L. to his teacher and that the child was being brought up in his mother's religion and that

Mother objected to Father taking the child to his church. The child is firmly identified with his mother's extended family and the denial of a name change would not affect it.

The probate found that the child's surname has been the same since the adoption and that the child lacked sufficient maturity to express a meaningful preference in his surname. It noted that although very bright he could be easily influenced because of his age and lack of understanding of the adult world. The child appeared prepped for the interview and appeared to have difficulty responding to questions other than those fashioned as "mom versus dad." Additionally the court found that Mother had not established with clear and convincing evidence any demonstrable level of embarrassment, discomfort, or inconvenience in maintaining the child's current surname. Additionally Father is current in his support, maintained contact with the child and that both parents are residential parents. Any disparity in parenting time appeared to the trial court to relate to work schedules.

The probate court had also considered the testimony of the GAL who opined that the child's first and middle names were already Italian; although the child identified with the name L. this may have been due to Mother using the surname for the child despite the denial of her prior application; the name change could diminish the child's identification with Father; and no information was provided to the GAL with regard to embarrassment, discomfort, or inconvenience due to the child's having a different surname from Mother and that any concerns of embarrassment are merely hypothetical.

Finally the Court of Appeals determined that Mother's claim that the court used an archaic paternalistic standard is without merit. It noted that in Bobo *and* **Willhite** The Ohio Supreme Court advised courts to refrain from defining the best interest of the child test as purporting to give a primary or greater weight to the Father's interest in having the child bear the paternal surname. However, in support of her argument, Mother does not point to any findings of the probate court. Instead Mother only points to Father's testimony that he did not want the child's surname changed and the testimony of the GAL that Father believed a child should have his father's surname and that Father carried anger from the divorce into the present matter. The court only considered the best interests of the child and did not consider the interests of either parent.

The Court of Appeals therefore concluded that the probate court considered the appropriate factors and did not abuse its discretion when it denied Mother's application to change the child's surname. The judgment of the Medina County Probate Court was therefore affirmed. Jurisdiction was declined by the Ohio Supreme Court.

POWER OF ATTORNEY

TOPIC: Caregiver's blatant and constant misuse of elderly couple's POAs, which were obtained due to undue influence, was because caregiver, with purpose to deprive them, knowingly obtained checks without their consent, and her criminal conviction for theft of $30K in checks, bribery, and tampering was not against the manifest weight of the evidence.

TITLE: State v. Marcum, 2017-Ohio-7517.

Marcum appealed from her felony convictions in the Montgomery County Common Pleas Court, General Division on various counts of theft from an elderly person, insurance fraud, etc. The Stambacks were in their 80s when they passed away. Their niece Ely was their original POA in 2004, and she ran errands for them as eventually they needed help, stopped driving and Mrs. Stamback grew ill. Ely paid for a home hospice plus service, "Right at Home" (RAH.), and Ely wrote checks for their bills, etc., signed "Ely, POA." She wrote checks from 2010 to 2013.

Marcum worked for RAH as a licensed nurse's aide and caregiver. Soon after she started helping the husband in 2013, he angrily revoked Ely's POA. From that point on she wrote no checks, etc. She was told by a Chase bank worker that Mr. Stamback and a woman had come in and withdrawn money. Ely no longer had authority to write checks or make health care decisions for husband and wife.

At trial, the owner of RAH stated he was concerned when the POA's were revoked, because RAH personnel are not permitted to handle clients' finances. Marcum came to him and announced she was the new POA for the Stambacks, who were going to put her in their wills as residuary beneficiary. After that, she was no longer employed by RAH.

Later in 2013, the Stambacks' probate lawyer was contacted by Mr. Stamback who indicated their new POA was in jail, they wanted their nephew to be their POA, and to revoke Marcum's POA's. New wills and revocations were drafted. However, Marcum created an "Addendum" to each will that was notarized. Further, a subsequent review of the Stambacks' checking account revealed Marcum bilked the elderly couple of almost $30K in a short period of time, including after the nephew became the POA. Marcum would identify to Visiting Angels and RNs herself as their "daughter" and hang out in a back bedroom with no medical care given. Later, Marcum would claim that electronics, furniture and clothing were "stolen" from the Stambacks' home; she even sold their car to Car Max.

On appeal after her convictions for fraud, bribery, and theft from an elderly person, as well as tampering, the 2nd District Court of Appeals found that Marcum's blatant and constant misuse of the POA's, which were obtained due to undue influence, was because Marcum "with purpose to deprive the Stambacks, knowingly obtained the checks without their consent, and that her conviction for theft of the checks is supported by sufficient evidence and not against the manifest weight of the evidence." The decision of the trial court was affirmed.

TOPIC: Trial Court directed to determine whether POA acted consistently with R.C. 337.34 in the withdrawal of TOD funds.

TITLE: In the Matter of the Estate of Judith A. Speakman, 2017-Ohio-7808.

The facts of this case are largely undisputed. Judith Speakman died intestate with a will designating appellant as the beneficiary of one-half of the estate property. The remaining half

was to be divided in equal shares between Speakman's two nephews. Speakman had a personal bank account with Huntington and a TOD account with Merrill Lynch that listed appellant as the beneficiary upon Speakman's death. The TOD account had certain limitations including that if the Account Owner becomes incompetent, a court appointed guardian or conservator, or an agent acting under a DPOA that is satisfactory to MLPF & S may give instructions on the TOD account to the extent of their authority. A court appointed guardian or conservator, or agent acting under a DPOA , shall not have the authority to enter into, alter, or revoke the Agreement and designation of Beneficiaries, except by obtaining an authorizing order from a court of competent jurisdiction and presenting a certified copy of that order to MLPF & S.

Speakman became ill in 2015 and was moved into a nursing home. On April 17, 2015, Speakman executed a DPOA naming Frederick and Nancy Pitzer as attorneys-in –fact. As of April 30, 2015, the TOD account contained $113,448.33. On May 21, 2015 Frederick withdrew $50,000 from the TOD account and deposited the sum into Speakman's Huntington Account. Frederick explained at trial that he withdrew those funds from the TOD account because Speakman's Huntington account contained only $13,000 and additional funds were needed for Speakman's health care costs and nursing home arrangements. Frederick had also placed Speakman's house on the market which sold on August 7, 2015 and the funds were deposited in her Huntington account. On August 20, 2018 he withdrew the remaining assets from the TOD account because he said the account was losing money. Those funds were also deposited in the Huntington Account.

Speakman passed away on November 20, 2015. Acting as Executors, Frederick and Nancy prepared an Inventory of the estate. Appellant wrote a letter addressing concerns with the former TOD funds. The letter was construed as an objection to the inventory. Appellant argued that the money withdrawn from the TOD account was improperly removed and comingled with probate property. Appellant maintained that the money withdrawn from the TOD account should not be considered probate property and should have remained TOD property and transferred to her as the beneficiary. The trial court held a hearing and following additional briefing found that the money withdrawn from the TOD account was probate property and therefore subject to distribution under terms of the will. Appellant appealed the decision of the trial court raising two arguments on appeal. First appellant argued that the TOD account contract contained a clause limiting the holder of a POA from altering or revoking the TOD account except by court order. Second appellant argued that the POA failed to preserve Speakman's reasonable estate plan contrary to the provisions of the Uniform Power of Attorney Act, specifically R.C. 1337.34(A)(4).

Based on the Court's review it found that the trial court's decision did not address whether appellees complied with R.C. 1337.34 with respect to Speakman's estate plan. Therefore it remanded the matter for further findings of fact. It recognized that appellant's argument largely centered on the contractual dispute detailed above, but the issue was disputed by the parties and evidence was adduced as to Speakman's estate plan. At trial there was evidence that Speakman set up the TOD arrangement prior to her final illness and that she wanted the funds from the TOD account to go to the appellant. There was also evidence that Frederick was aware of the TOD arrangement but withdrew funds from the TOD account and deposited the money into

Speakman's individual account. Ultimately the funds in the individual account became probate property subject to the terms of the will.

In remanding the case to the trial court it emphasized that there is no allegation that appellees acted out of self interest in the transfer of the funds from the TOD accounts to the Huntington account. The evidence at trial was that Speakman's individual account had fallen to $13,000 while she was still alive and in nursing care. The funds in the TOD account were still Speakman's property while she was alive and appellant did not have any right to control the funds in the TOD account. Although the POA provided Frederick and Nancy with authority to manage Speakman's assets they were obligated to act in accordance with the POA agreement and terms of R.C. 1337.34 requiring the POA to attempt to preserve the principal's estate plan to the extent actually known by the agent if preserving the plan is consistent with the principal's best interest.

Frederick testified that he removed $50,000 from the TOD account for anticipated future healthcare and nursing home expenses and placed the funds in the Huntington account. Following the initial withdrawal of money from the TOD account Speakman's house was sold and the proceeds deposited into the Huntington account. Thereafter Frederick testified that he withdrew the balance of the TOD account because the account was "losing money." Noting that the court of appeals is not a finder of fact it remanded the case, directed the trial court to determine whether Frederick acted consistently with R.C. 1337.34 in the withdrawal of the TOD funds, and to take any necessary action consistent with that determination. Accordingly it reversed the decision of the Fayette County Probate Court and remanded the matter for further proceedings.

TRUSTS

TOPIC: Under R.C. § 5807.06, removal of a trustee was justified for his unauthorized transfers of $205,000, his biased actions against certain family beneficiaries regarding distribution, and sanctions against the trustee levied by FINRA (Financial Industry Regulatory Authority).

TITLE: Delp v. Delp, 2017-Ohio-7774.

The Delp Heritage Trust was created in 1997 for the benefit of the grantor's wife, his daughter and her children, as well as the children of his two sons, who were named co-trustees. The grantor died in 1998. The co-trustees were not entitled to any distribution from trust proceeds unless they were the sole living descendants. The trustees were given discretion and wide latitude in dispensing funds to beneficiaries. When there were multiple withdrawals from trust funds to one trustee's personal account, the other beneficiaries and one of the two sons (who had resigned as trustee) asked for an accounting, required under R.C.§ 5808.13 (C) and the terms of the trust.

Eventually a civil complaint was filed in the Lucas County Probate Court, alleging breach of fiduciary duty and for removal of the trustee. Judge Puffenberger found the unauthorized

transfers of $205,000 and his actions against certain family members of note and was troubled by suspension/sanctions against the trustee levied by FINRA (Financial Industry Regulatory Authority). The court, after hearing, granted plaintiffs' motion to remove the trustee as in the best interests of the trust beneficiaries. He appealed.

The 6th District Court of Appeals reviewed the case. It first found that the hearing on the removal was not a "special proceeding," and thus R.C. § 2505.02 was inapplicable. Additionally, the removal of the trustee was a "provisional remedy" and did not run afoul of *Ohio Civil Rule* 54 (B). Next, the Court examined R.C. § 5807.06 which governs removal of a trustee. Appellant claimed on appeal that he had committed no serious breach of trust, that he administered the trust effectively, and was fit to continue. The Court found that the financial transfers, partiality, lack of accounting and testimony of witnesses justified the trustee's removal. The Court of Appeals for Lucas County therefore affirmed the decision.

TOPIC: Under R.C. § 5810.01 (B)(3), B(10), and 5810.04, the beneficiaries were entitled to court costs, expenses and reasonable attorney fees in litigation related to a trustee's breach of fiduciary duties. Also, when the settlor's intent and scope requires more than the deed itself, extrinsic evidence is allowed to determine intent and scope.

TITLE: Dueck v. Clifton Club Co., 2017-Ohio-7161; 2018-Ohio-723

Appellants are lot owners in Lakewood, Ohio, of property originally settled by a land company in the 1800s. In 1912, the land company created a trust making all lot owners beneficiaries. The Clifton Club is a social club that is members only, but opens to lot owners beneficiaries and "members" who are non-residential. The issue is whether "members" are entitled to beach access. As beaches are now crowded, the lot owners filed a declaratory judgment action in the Cuyahoga County Probate Court to find that since "members" are not lot owner beneficiaries, they are not trust beneficiaries and do not have the same legal rights as lot owners to access the beach,

The trust deed says the beach is to be held for common use of all lot owner beneficiaries, and to collect an annual assessment from them for maintenance, etc. The issue is not the trust or that the Clifton Club itself is a lot owner. Members and beneficiaries have enjoyed the beach. Since rapid overcrowding occurred since 2011, the trustees imposed beach rules that were restrictive against club members versus beneficiaries. The trial court found that it was illogical that rights of lot owner beneficiary members at the Clifton Club differed from nonresident members at the Clifton Club. Since the Club existed in 1902, it did not make sense to think that all members should not have equal access to the beach. When the trustees' motion for summary judgment was granted, the appellant lot owner beneficiaries appealed.

The 8th District Court of Appeals reviewed the matter. It first found that both sides agreed that members could use the beach by permission, with an annual fee and trustee oversight. The issue is whether nonresident club members are direct beneficiaries under the trust deed, which would entitle them to equal access and status as lot owner beneficiaries.

The Court first went through the definition of a trust and that there is a presumption under Ohio law that a deed of conveyance expresses the settlor's intent. Interpretation of trusts is subject to rules of contract and instrument interpretation and construction as a matter of law.

The Court therefore examined the original trust deed and first found that the Clifton Club was a lot owner beneficiary and that the settlor's intent was to convey the beach for the use and benefit of the lot owners. The Court found that members are not defined beneficiaries and therefore had no legal rights under the trust deed. Since Clifton Club is a lot owner beneficiary, it has rights. The issue becomes the scope of the settlor's intent as to the Clifton Club's use of the beach. The Court found that extrinsic evidence was needed and allowed to determine the scope.

The Court reviewed the historical record, finding that since before 1948, the Clifton Club paid the trustees for operation and maintenance of the beach. By 1970, it seems clear that there was an understanding between trustees and the Clifton Club that lot owners have full beach access by right and that access by members was permissive, with trustees allowed to impose regulations. This demonstrates that even lot owner beneficiaries did not have completely free access, since it was limited by regulation. The Court found that, as a matter of law, access by members is by permission and regulation of trustees, and club members have no legal right of access as beneficiaries.

The Court also found that the trustees had breached their duty of impartiality, and to inform and report to the beneficiaries as required by the deed and historical record of understanding. Under RC § 5810.01 (B)(3), B(10), and 5810.04, the beneficiaries were entitled to court costs, expenses and reasonable attorney fees in litigation related to a trust. Reversed and remanded.

Notices of Appeal filed by the Trustees of Clifton Park Trust and the Clifton Club Co. were not accepted by the Ohio Supreme Court.

TOPIC: *Civ R 60 (B)* motion was properly denied by trial court.

TITLE: Jacob v. Jacob, 2017-Ohio-8725

Decedent had created a revocable living trust naming her daughter successor trustee years ago. She amended the trust a few years later to name her son David as trustee instead of her daughter. A year after that change, she amended the trust again, this time directing that $216,927.76 be deducted from any share due her daughter after death, attributable to a prior loan. Daughter filed against brother after their mother passed, seeking an accounting and contesting the validity of the changes. The probate court granted the son summary judgment and daughter appealed. The case was already remanded once for a ruling on a *60(B)* motion pending from the daughter, which was denied and added to her appeal.

The first assignment questioned the summary judgment, suggesting genuine issues of fact existed necessitating trial. "The key factor is not the format chosen but whether the report

provides the beneficiaries with the information necessary to protect their interests." The appeals court overruled this assignment of error upon review of the record reflecting the provision of trust reports with no specific facts supplied by the daughter that would have placed into question the completeness of those reports.

The second assignment of error addressed the *60(B)* denial and was overruled on the basis that the daughter presented no meritorious claim for consideration should the motion have been granted. The court noted that her request for an updated accounting was submitted after her action had been decided. Further, "the question before the court was not why Juanieta decided to reduce Lisa's share of the trust, it was only whether she had the capacity to do so." The daughter has not challenged the trial court's determination that decedent was competent when making the changes. The trial court judgment was affirmed.

TOPIC: Under R.C.§ 5810.04, the probate court can award costs, expenses and reasonable attorney fees in matters involving a trust, even from trust assets.

TITLE: Dibert v. Carpenter, 2017-Ohio-689

Gerald and Cynthia are siblings. In 1975, their grandfather conveyed 570 acres to their parents, while retaining a life estate in the property. He later sold his life estate for a note on the property, secured by a mortgage of about $270,000.

Grandfather created a trust and assigned the note and mortgage to the trust. The income from the trust was to go to grandfather's 2nd wife at his death. When his wife and kids passed away, the trust corpus was to go equally to Gerald and Cynthia.

When their mother died in 1989, their father remarried and put his interest in grandfather's trust into a new trust. No monies had yet been paid out. He was to be the income beneficiary during his time, his new wife during her life, and then there would be an equal distribution to Gerald and Cynthia.

Grandfather's 2nd wife died in 1997 and Cynthia was named successor trustee. She and Gerald conveyed 2 parcels of land to the grandfather's trust to satisfy the note and mortgage. In 2007, Gerald filed a suit in the Champaign County Probate Court against his sister individually and as successor trustee of the grandfather's trust, alleging breach of fiduciary duty, conversion, unjust enrichment, and that she should be removed as trustee. In 2008, Cynthia filed a number of counterclaims, one being a breach of fiduciary duty and self-dealing under R.C. § 2109.44.

The presiding judge recused herself after making some procedural rulings, and the Ohio Supreme Court appointed a retired judge to preside over the trial. Gerald filed a motion "to avoid orders by recused judge." The trial court denied Gerald's motion and proceeded. In 2015, Gerald appealed the loss of the civil action, his lack of obtaining jury trial, as well as the granting of Cynthia's attorney fees from the trust.

The 2nd District Court of Appeals reviewed the matter. It first found that Gerald's appeal of a lack of jury trial was insupportable, because he did not conform to Ohio Civil Rule 38 (B) regarding his failure to ask for a jury trial on Cynthia's numerous counterclaims. Additionally, since the civil action was heard in the probate division, under R.C. § 2101.31, it shall be heard by the probate judge, unless the judge, at his or her discretion, refers the matter to a jury. Second, Gerald did not raise proper defenses to Cynthia's counterclaims, which she had properly amended under Civil Rule 15 (A). Third, Gerald never filed an affidavit of disqualification with the Ohio Supreme Court regarding the original judge who recused herself, but not before ruling in a limited fashion over routine, procedural entries. The Court found no abuse of discretion, either by the original judge or her appointed replacement. Finally, the Court found that under R.C. § 5810.04, the probate court can award, costs, expenses and reasonable attorney fees in matters involving a trust, even from trust assets. Cynthia timely sought fees, which the lower court did not grant in full. Fees were found reasonable. Affirmed. Jurisdiction was declined by the Ohio Supreme Court; Reconsideration was denied.

TOPIC: Trial court judgment finding surviving spouse assumed rights as trust beneficiary reversed.

TITLE: Collins v. Hearty Invest. Trust, 2017-Ohio-1270.

The Summit County Court of Common Pleas granted judgment to the executor of the Hugh Hearty estate and decedent's surviving spouse. The appeals court reversed in part, vacated in part, and remanded the matter for further proceedings consistent with their opinion.

Five Hearty siblings in 1996 pooled assets and created the Hearty Investment Trust as grantors and beneficiaries. One of the issues in this matter concerned trust language including a power of appointment provision in addition to one setting out a default provision that a grantor's trust share would pass to the Trust in the absence of a will or trust provision providing for a limited power of appointment elsewhere. One of the Hearty siblings had signed an unwitnessed codicil transferring any interest he had in the Trust upon his death to his wife should she exercise the limited power of appointment.

The executor of that sibling's estate and his surviving spouse filed a declaratory judgment action against the Trust and the surviving siblings, seeking affirmation of the appointment as well as payment of estate debt pursuant to a second relevant provision of the Trust that provided the Trustee pay estate debts "to the extent the Trustee determines that non-trust assets are not available." On this latter issue, the appeals court determined that "The appropriate remedy under these circumstances would have been for the trial court to order the trustee to evaluate the estate's claim." The Trustee had expressly denied doing so and the trial court's award of money damages of $164,513.51 was vacated and remanded for further proceedings so that the Trustee could do so.

The appeals court found that the trial court had erred as a matter of law by finding that the power of appointment provision was ambiguous. "A trial court, however, cannot disregard the statutory attestation requirement and validate a codicil based upon the testator's intent." "Because the purported codicil failed to comply with the statutory attestation requirement, it was

not valid as a will and accordingly, was an invalid exercise of the power of appointment under the Trust." The trial court was reversed on this issue. Jurisdiction was denied by the Ohio Supreme Court.

TOPIC: Probate court properly fashioned remedy regarding distribution of trust assets upon termination of a trust which was evidenced simply by an abstract of trust providing no direction regarding the distribution intended by the settlors.

TITLE: Brown v. Brown, 2017-Ohio-8938.

Trial court faced a conundrum of determining distribution of trust assets upon death of both settlors without the trust document and without any clear and convincing evidence of intent regarding distribution either in an existing abstract of trust or by extrinsic evidence.

Both settlor spouses had three children of their own prior to marriage. They executed reciprocal wills in 1985 leaving their estates to each other and naming the six children as equal beneficiaries of the surviving spouse's estate. In 2000, 129.54 acres, that had been Russ Brown's, was placed in a Brown Family Trust. Some funds generated by the farming of some of that land was set aside in a separate the Brown family account. Rose Brown died in June 2013. In September 2013, Russ Brown modified his will to provide that only his lineal descendants take his estate upon his death, in equal shares, per stirpes, while acknowledging the existence of Rose's three children.

Russ later passed, and one of Russ's children, as Executor of his estate, filed a complaint as "presumed Successor Trustee" of the Brown Family Trust against all six children individually seeking a number of determinations regarding the trust, which no one could find. An "Abstract of Trust Agreement" was later located which listed the son and a daughter of Rose as successor co-trustees, listed Russ and Rose as beneficiaries, and provided no guidance on trust distribution upon termination.

The trial court heard the son's claims as well as those of the children of Rose asserted in counter and cross claims for fifty percent of the trust assets, for appointment of Rose's daughter as Co-Trustee pursuant to the abstract of trust, and for liquidating the trust upon equal distribution to all six surviving children. After a bench trial with several witnesses and exhibits, the probate court findings included: that a revocable trust for Russ and Rose's benefit was established; that the titling of the property put in trust removed personal ownership and indicated an intention it pass outside their estates; that no power of appointment exercisable by will was ever made by either Russ or Rose; that the property and some funds set aside related to the trust property must be distributed as there was no longer any purpose for the trust; and that without an adequate legal remedy the court had to use its equitable powers to allow distribution directly to Russ's children since Rose predeceased, any right she had to any asset passed to Russ by her will, and both Rose and Russ's estates were closed.

The appeals court overruled five assignments of error on appeal in affirming the probate court. It found that the trial court properly interpreted both *R.C. 5808. 17(D)* (applicable to trust

termination distributions) and 5804.09(C) (applicable to non-charitable trusts without ascertainable beneficiaries) in concluding that any trust asset be distributed to Russ's children. "The trial court recognized the parties' need for resolution in this case without an adequate remedy at law under these specific circumstances where there is a missing trust agreement and insufficient evidence in the record to ascertain the purpose of the trust after the death of the primary beneficiaries with no successor beneficiaries specifically named." It noted that any exclusion of a statement Rose may have made with regard to distribution as hearsay was harmless error.

WILLS/WILL CONTEST

TOPIC: In declaratory judgment action to construe will, containing restriction on alienation of real estate without limiting fee transferred, restriction void and found repugnant to Ohio public policy.

TITLE: Bragdon v. Carter, 2017-Ohio-8257

Decedent included the following provision in his will: "ITEM IV: I give, bequeath and devise my real estate equally to my children and friend, BELINDA DILES, BRENDA BRAGDON, BURL BRAGDON II, and BETH A. NIXON, per stirpes, provided that said real estate not be sold until twenty-one (21) years after the death of my granddaughter, MORGAN MCKENZIE DILES, born April 14, 1996. It is the purpose of this bequest that my children and their heirs shall always have a place to live."

Decedent passed in 1998 and Belinda was his executor and transferred the real estate by certificate of transfer to the four parties named with language consistent with the above. The estate closed in 2001 and in 2004 Belinda transferred her quarter interest to Brenda and Burl did the same in 2009. Brenda and Beth transferred their interests to Corey and Heather Bragdon in 2014, who thereby became sole owners of the property.

Corey and Heather filed a complaint in the general division in 2016 seeking declaratory judgment that their ownership was not subject to the restrictive provision. After a status conference, the trial court found the restriction valid, and that to rule otherwise would divest unjustly the granddaughter of her future interest in the property.

The appeals court reviewed the matter, de novo, and determined that the issue was strictly the construction and validity of the will provision purporting to restrict the alienability of devised real property, which is disfavored under Ohio public policy. *R.C. 2107.51* "requires that every devise of land in a will convey all interest unless it is clearly shown a lesser estate was intended". Therefore, the restriction cannot constitute a life estate. "In sum, the real property at issue was transferred in fee simple absolute, and the portion of the devise attempting to restrict the alienability of the property is void and of no effect as being repugnant to the devise and the public policy of this State", The trial court determination was reversed.

TOPIC: Court of Appeals found no error in jury's finding of validity of will and beneficiary changes by decedent.

TITLE: Kiefer v. Kiefer, 2017-Ohio-6997

John and Kimberly Kiefer started dating in 2001 and she moved in with him in 2008. John's mother died in 2008 leaving the family farm to John. In May 2009 John executed a will that left all of his real estate, including the family farm to Kim. To Jason, John left $20,000 in cash as well as $30,000 in non-probate government bonds. Kim and John married in 2010, John for the fourth time. The week after they married John made Kim the beneficiary of his bank accounts, annuity, IRA and other investments. On March 31, 2010 John executed his final will which was identical to his 2009 will, save a change in Kim's last name from her maiden name to her married name, "Kiefer." John also executed a living will naming her as the contact person.

John died approximately three years later in June 2013 and the following November Jason filed a will-contest claiming his father was not competent when he executed the final will and that Kim exercised undue influence over him. Jason also sought to set aside the beneficiary changes that his father made after he married Kim. After a jury trial, John's final will and beneficiary changes were all found to be valid. On May 2, 2016 the probate court entered judgment on the jury's verdicts. Jason moved for a new trial, which the court overruled. Jason appealed. The assignments of error were that the court erred in refusing to give a confidential and fiduciary relationship jury instruction and in denying a new trial when there was jury misconduct.

The probate court declined to give the instruction because it concluded that, under Ohio law, a marital relationship alone is not enough to show a confidential relationship. The Court of Appeals noted that ultimately it doesn't matter why John decided to leave the farm to Kim. He did not need to explain himself and the court saw nothing particularly suspicious about any of John's donative decisions and nothing that suggests that John's decision to leave the bulk of his assets to his wife was anything other than his free and independent decision. On this record, the trial court did not abuse its discretion by not giving the presumption-of–undue influence instruction that Jason requested.

The second assignment of error alleged that the probate court erred in denying a new trial when there was jury misconduct. Jason moved for a new trial based on jury misconduct, a valid reason for a new trial under Civ.R.59(A)(2). He argued that there was misconduct during deliberations, that one juror dominated the others by not allowing them to express their views and intimidating those who disagreed with him.

On the second day of the jury's deliberations, one of the jurors left the jury room and said that she did not intend to return because of the behavior of the dominating juror. The trial court discussed the matter with the attorneys, and all agreed that the judge should talk to the juror on record outside of the presence of the other jurors and attorneys. After interviewing the juror the court gave counsel a detailed account of the interview. Both attorneys and the court then agreed that the court would give a modified Allen charge to the jury. Jason's counsel repeatedly stated that he desired to avoid a mistrial. And counsel never objected to the manner in which the court

handled the matter. When invited to note any objections for the record, Jason's counsel was silent.

The Court of Appeals held however, that Jason did not move for a mistrial or a new trial based on the trial court's handling of the matter or lodge any objections. Consequently he forfeited his right to a new trial on grounds of juror misconduct. Both assignments of error were overruled and the probate court's judgment was affirmed. The Ohio Supreme Court declined jurisdiction.

TOPIC: Summary Judgment in will contest affirmed on appeal.

TITLE: Johnson v. Johnson, 2017-Ohio-4153

Decedent executed his Last Will and Testament, and prepared by Attorney Caplea at Decedent's request, on June 3, 2010. Pursuant to the terms of the Will Decedent appointed Appellee as Executor and bequeathed any and all of his real property and the residual of the estate to Appellee. Decedent passed away July 6, 2015 at age 88. Appellee applied to probate the Will, which the court granted on September 17, 2015. Appellants filed a will contest alleging undue influence. Appellee filed an answer and counterclaim. In the counterclaim Appellee asserted Appellant's complaint was frivolous. Appellee filed a motion for summary judgment which was granted.

The evidence presented during the summary judgment proceeding established Appellants didn't like Appellee. Appellee and Decedent met in the early 1980's and were married in June 2002. Decedent was 35 years older than Appellee. They were happily married and cared for each other during periods of health problems throughout their marriage.

Appellants believed Appellee excluded them from decisions regarding Decedent's medical treatments, and failed to notify them when Decedent was hospitalized. Appellants also thought Appellee controlled Decedent's decisions regarding his property and finances. Appellants further contended Appellee purchased two rental properties with monies withdrawn from Decedent's 401(k) plan and titled the properties in only her name. In his Affidavit Appellant Calvin Johnson, Decedent's grandson, averred Decedent was unaware of the purchases until he received a tax bill in the mail. Appellant stated that he witnessed Decedent "become upset even irate at purchases made by Appellee without his knowledge and consent and added that he observed Appellee improperly and unduly influenced Decedent to act in ways Decedent would not have acted otherwise.

Appellants Reginald Johnson and Decedent's son had owned the home in which Decedent and Appellee were residing. Appellant Reginald Johnson indicated Appellee was not happy the residence was not in her and Decedent's names and insisted Appellee Reginald Johnson transfer the house to them. Reginald Johnson recalled a telephone call with Decedent during which he heard Appellee yelling in the background, "Get the house. Get the house." In their memorandum in opposition to the summary judgment, Appellants concluded that this situation demonstrated Appellee influenced Decedent to ensure the house was transferred and, if

Decedent truly wanted the house transferred "it would have been unnecessary for Appellee to be in the background yelling."

Appellant also presented the Affidavit of Judge Frank Forchione in which he stated he prepared a last will and testament for Decedent on or around 2009 while he was still in private practice, but did not retain a copy. Judge Forchione noted the will included bequests to his children. He stated that if Decedent had requested that he prepare estate planning documents which disinherited his children he would have declined due to Decedent's expressed feelings toward his children. Appellants also attached a copy of Decedent's 1974 will in which he devised and bequeathed his entire Estate to his children in equal shares.

In her motion for summary judgment, Appellee stated that Decedent wanted to ensure she was taken care of after his death and knew she would be unable to live on her disability check. To ensure his wishes, Decedent executed the Will on June 3, 2010. Attorney Caplea prepared the Will at Decedent's request. The Will appointed Appellee as Executor and bequeathed any and all of his real property as well as the residual of the estate to Appellee. Attorney Caplea and Decedent had been friends for approximately five years when Decedent requested Caplea to prepare the Will, and remained friends until his death. Caplea noted that Decedent had the capacity to sign the Will and that Decedent was not under duress when doing so.

On September 12, 2016 the Court granted judgment in favor of Appellee. The trial court found that Appellants failed to provide evidence of undue influence of Decedent. The trial court explained the fact that the parties did not get along and Decedent bequeathed the majority of his Estate to Appellee, with whom he had been involved for over 30 years, thirteen of which they were married, was insufficient to establish undue influence . The trial court noted the evidence showed Decedent was competent and made choices during his lifetime which benefitted his wife. The trial court added Appellants' anecdotes and speculation regarding Decedent and Appellee's relationship did not create a genuine issue of material fact. Thereafter, Appellee dismissed her counterclaim pursuant to Civ.R. 41. Appellant filed a timely appeal raising one assignment of error that the court erred in granting summary judgment when genuine issues of material fact existed as to whether Defendant-Appellee exerted undue influence upon Fred Johnson, so as to invalidate the Last Will and Testament of Fred Johnson as being the product of Defendant-Appellee's undue influence.

The Court of Appeals noted that Appellants contended that Decedent was a susceptible testator because he was 83 years old when he executed his Will and was in poor health around that time. Appellants' mention of Decedent's poor health around that time refers to his hospitalization due to his congestive heart failure which occurred a year after he executed the Will and from which he made a full recovery after hospitalization and rehabilitation. In his Affidavit Attorney Caplea averred that Decedent was competent to sign the Will and he did not observe anything which would indicate that Appellee was exerting undue influence over him. Additionally Appellant Reginald Johnson acknowledged that Decedent was mentally sharp in 2010. It found that there was no evidence to support Appellants' assertions Decedent was a susceptible testator. Furthermore it found that the alleged incidents of undue influence cited by Appellants do not establish Appellee so overpowered and subjugated the mind of (Decedent) as to destroy his free agency and make him express the will of another rather than his own.

The Court therefore found that the trial court did not err in granting summary judgment in favor of Appellee. The Judgment of the Stark County Probate Court was affirmed.

TOPIC: Judgment of trial court denying enforcement of settlement agreement affirmed where all beneficiaries were not included.

TITLE: Estate of Shoemaker, 2017-Ohio-8699

Nephew-in-law filed will contest challenging validity of a will admitted to probate, naming as defendants those beneficiaries listed in the will, including two churches, decedent's brother, and the estate Executor. The nephew- in- law was also a beneficiary of one-half of the residue of decedent's estate under her will. The Executor and nephew requested the court to approve a settlement they had worked out that roughly approached the intent of the testator, briefed the matter per instruction from the Court, and worked with a receiver appointed to manage the estate through the proceedings. The trial court denied approval of their settlement, prompting nephew to appeal, assigning as error the failure of the court to ratify their settlement.

First, the appeals court treated the matter as a denial of a joint oral motion to enforce settlement by nephew and Executor. "This case presents a legal issue of whether the trial court erred by refusing to enforce the settlement agreement based on the trial court's philosophy that the testator's intent should prevail over the parties' presumably valid agreement." "In this case, while recognizing the long-standing public policy in favor of settlements, the trial court here engaged in an in-depth discussion of the competing interests: (1) the public policy which encourages settlement of litigation, and (2) the superiority of the testator's intent with regard to disposition of property. Thereafter, the trial court denied enforcement of the settlement agreement giving preference to the testator's intent in a will admitted to probate and assumed to be valid on its face. The trial court's decision made no finding that the oral settlement agreement of Appellant and Appellee failed as to the basic principles of contract law, violated public policy or that it was otherwise unconscionable in some regard."

Reviewing the matter de novo, no evidence was presented that the other parties to the will contest were given the opportunity to be heard on the settlement. "Just because the settlement agreement included them does not mean they were consulted in any way when the negotiations occurred, given the absence of evidence on this point. Just because the submitted agreement provided the same disposition for the other beneficiaries as in the will does not mean those beneficiaries should not have had an opportunity to be heard on the matter involving them, prior to dismissal of the will contest action." The judgment of the probate court was affirmed. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: Jury found no exertion of undue influence on father on will altering his estate plan executed just three weeks prior to his passing.

TITLE: Zimpfer v. Roach, 2017-Ohio-8437

Decedent passed on September 6, 2014, testate, leaving two surviving daughters. His son had predeceased him, and his two children, Blake and Courtney, brought the will contest, as the revised will admitted to probate was drafted three weeks prior to his passing. This will altered his estate plan from his three children, per stirpes, to his two daughters equally, after $5,000.00 specific gifts to his six grandchildren.

After a series of discovery and procedural motions and a substitution of attorneys for Blake and Courtney well into the case, the trial court ruled on the estate's summary judgment motion that the will admitted complied with statutory requirement, that no evidence was presented to rebut the presumption that it was valid, and that no evidence was presented that Jake lacked testamentary capacity when he executed his last will. The probate court did, however find that a genuine issue of material fact existed as to whether decedent's daughters exerted undue influence over their father when he executed his last will. This issue went to a jury in January of 2017 and the jury on January 12, 2017 found the last will was not the product of undue influence.

The first assignment of error on appeal dealt with the plethora of discovery and procedural motions and was overruled as follows; "In sum, the record reflects that after entering the case new counsel attempted to file a series of pleadings and motions that would have effectively "reset" the clock on the litigation, pleadings, and the discovery process. However, the retention of new counsel alone does not generally reset the litigation schedule for dispositive motions in a civil matter. Accordingly, we cannot conclude that the trial court's handling of the discovery matters in this case amounted to an abuse of discretion that prejudicially affected the substantial rights of Appellants. For all these reasons, the first assignment of error is overruled."

The second assignment of error dealt with the testamentary capacity issue and was overruled as follows: the decedent's longtime doctor of thirteen years submitted an affidavit suggesting that on her visit with him about the time he executed his will that she was able to speak with him about twenty minutes, he recognized not only her but her husband, and freely discussed farming, the weather, and the like. Nothing was presented that would have created a genuine issue of fact on this issue, even considering submissions by appellants submitted without leave of court but nevertheless on file. The probate court judgment was affirmed. Jurisdiction was declined by the Ohio Supreme Court.

TOPIC: Complaint to set aside and declare null and void a Last Will and Testament and recover damages for the tortious misconduct of the defendant dismissed by the Probate Court for lack of subject matter jurisdiction.

TITLE: Beadle v. O'Konski-Lewis et al, In the Court of Common Pleas of Lucas County, Probate Division, Case No. 2014 ADV 2613; 2016-Ohio-4749; and 2016-Ohio-1194

Plaintiff Donald Beadle filed this complaint alleging the defendant O'Konski-Lewis unduly influenced her spouse Laurence Lewis in the execution of his Will and Trust. The plaintiff alleged that her actions intentionally and improperly interfered with his expectation of inheritance, as the plaintiff was the sole beneficiary of Mr. Lewis's previous Will.

The plaintiff prayed that the court declare the Will and Trust executed on August 24, 2010 invalid, void and unenforceable because the testator was not competent and the instruments were a result of undue influence of the Defendant O'Konski-Lewis. The plaintiff requested also that the court award damages in excess of $25,000.00.

The plaintiff also named as defendants Fifth Third Bank as the successor trustee under the Trust and Pamela Lewis and Toledo Community Foundation as beneficiaries under the Trust.

In response, the defendants filed a Motion to Dismiss and Motion for Judgment on the Pleadings. The defendants argued that pursuant to Civ. Rule 12(B)(1) of the Ohio Rules of Civil Procedure the court had no subject matter jurisdiction over the claims and also that the claims fail under the ripeness doctrine.

The following facts were not in dispute: the testator/settlor, Mr. Lewis is alive; he was declared incompetent by the probate court on October 12, 2012 and his spouse was appointed his guardian; he executed a Will on March 23, 2000 naming the plaintiff sole beneficiary; he executed another Will and Trust on August 24, 2010 giving his estate to Fifth Third Bank as Successor Trustee under the Trust Agreement he also executed on that date; his Will has not been admitted to probate.

The defendants' argued that the exclusive method of challenging a will is by will contest pursuant to R.C. 2107.19 and this can only occur after a will is admitted to probate. In Corron v. Corron (1988), 40 Ohio St. 3d 75 the Ohio Supreme Court held an action for declaratory judgment does not lie to challenge the validity of a will. Further the Court held: "A will is ambulatory in nature, and until the death of the testator, and until the law admits such instrument in probate, it gives no accrued rights to the potential takers of the benefit." Id at 78

Defendant Fifth Third Bank argued the same principle applies to the Trust and cites in support the case Lewis v. State Bank, N.A. Butler County (1993), 90 Ohio App. 3d 709. Essentially the court held an inter vivos trust is ambulatory in nature and while the donor was alive, she retained all rights including changing beneficiaries.

The plaintiff argued that when the Lucas County Probate Court declared Mr. Lewis incompetent, the Will and the Trust ceased to be ambulatory and the court had jurisdiction to determine and declare the rights under the trust pursuant to R.C. 2101.24(B)(1)(b) and R.C. 5802.01(C). Plaintiff also cited First National Bank of Cincinnati v. Oppenheimer, 190 N.E.2d 70 in support of his claim that once incompetent a trust settlor loses the capacity to change a revocable instrument. To that end, the plaintiff argued that the court could determine the rights under the inter vivos trust. However, in Oppenheimer, the testator was dead and a will had been admitted to probate. The issue was whether the incompetent testator's agent could exercise the agency during the incompetence of the principal to revoke an inter vivos trust. The court found the agency is revoked or suspended during the loss of capacity. The plaintiff also argued that the court had jurisdiction to determine the tort claim of intentional interference with expectancy of inheritance because an action of will contest will not provide an adequate remedy as the assets

the plaintiff expected to inherit have been transferred to the inter vivos trust. This claim was completely intertwined with the plaintiff's claims regarding the validity of the Will and Trust.

The Lucas County Probate Court, Judge Dartt sitting by assignment, noted that the law cited by the defendants is clear and convincing. The Probate Court lacks jurisdiction to declare a Will invalid and void when the testator is alive and the will has not been admitted to probate. The Plaintiff has cited no law that stands for the proposition that once a testator/settlor has been declared incompetent the Will and Trust cease to be ambulatory and this court has jurisdiction over the claims. In fact, the law is that until the death of the testator/settlor potential beneficiaries have no accrued rights.

The Court therefore ordered that the defendants Motion to Dismiss and Motion for Judgment on the Pleadings were found well taken and the plaintiff's complaint was ordered dismissed for lack of subject matter jurisdiction. The Sixth District Court of Appeals affirmed the decision of the Lucas county Probate Court in case number 2016-Ohio-4749. The Ohio Supreme Court declined to accept jurisdiction of the appeal of this case pursuant to S.Ct.Prac.R. 7.08(B)(4).

TOPIC: Denial of wife's application to admit to probate the purported will of her husband was not error where purported will, part of a love letter, did not satisfy the formalities for a will, R.C. 2107.03, and a factual inquiry into decedent's intent in writing the letter reflected that he did not intend it to constitute his will since, inter alia, he had an unsigned will prepared for his signature, R.C. 2107.24.

TITLE: Estate of Hand, 2016-Ohio-7437.

Appellant/surviving spouse Natalie Hand sought to admit a "Love Letter Will" to probate as a lost, spoilated, or destroyed will. The first two paragraphs of the "Love Letter Will" professed Decedent's love for her and the last paragraph read as follows:

> As my last will and testament, I appoint you the primary beneficiary of all I have and all I have worked for. With the complete trust that you will look after my children, my business interests and all the other things that I have put together over the years and not let anyone try to deprive you of those things.
>
> I love you eternally,
> ERIC ANTHONY HAND
> s/ Eric Anthony Hand

Decedent also left a draft titled "The Last Will and Testament of Eric Hand," which Decedent had prepared through Legal Zoom.com, which was unsigned. It left 52% of Decedent's estate to surviving spouse and 48% to Decedent's children.

The Butler County Probate Court denied appellant's application to admit the "Love Letter Will" to probate. The probate court found that the purported will could not be admitted to

probate under R.C. 2107.03 or 2107.181 because it was not signed by Boon and Lester. The probate court further found that the purported will could not be admitted to probate under R.C. 2107.24 because while there was clear and convincing evidence Decedent prepared the "Love Letter Will" and signed it in the presence of Boon and Lester, there was no clear and convincing evidence Decedent "intended the three page hand-printed document to constitute his will.

The Twelfth District Court of Appeals indicated that in this case, there is no question that the "Love Letter Will" did not satisfy the formalities for a will required under R.C. 2107.03. Therefore, R.C. 2107.254 provides for a factual inquiry into threshold requirements for admission to probate which are entirely different from those specified by R.C. 2107.03. Among other factors, R.C. 2107.24 requires the probate court to determine if the decedent intended the document to constitute his will. Such an inquiry does not involve an interpretation of what the provisions of the document mean. And while the provisions of the document are relevant in determining whether the decedent intended the document to constitute his will, the inquiry, as in this case, is much broader.

It therefore declined to apply a de novo standard of review to the probate court's denial of appellant's application to admit the "Love Letter Will" to probate under R.C. 2107.24, and instead reviewed the probate court's denial under a manifest weight of the evidence standard.

The court concluded that given Decedent's familiarity with the formalities of a will, the similarity of the "Love Letter Will" to the other love letters Decedent wrote to appellant, and the fact that after he wrote and signed the "Love Letter Will", Decedent told appellant and Lester he was going to legally create a will at a later date, it found that credible, competent evidence supported the probate court's finding that there was no clear and convincing evidence Decedent intended the "Love Letter Will" to be his will. The probate court, therefore, properly denied appellant's application to admit the "Love Letter Will" to probate and the appellant's assignment of error was overruled.

A cross-assignment of error was also filed in this case but because the court affirmed the probate court's decision it was not considered.

The judgment of the probate court was affirmed.

TOPIC: In an action for will construction, extrinsic evidence may be considered for the testator's intent only when the language of the will creates doubt as to its meaning. Where the language is clear and unambiguous, however, the testator's intent is presumed to be the express language of the will.

TITLE: Bogar v. Baker, 2017-Ohio-7766.

Tom died testate, and his last will left his real estate with all its contents to his brother Bogar, the plaintiff-appellant. It was admitted to probate and a full administration filed in the Mahoning County Probate Court. The residuary clause left anything else to other relatives

(nieces, nephews, etc.). The real estate included 31 acres, a house, and outbuildings. There were also farm vehicles, tools, garden equipment, and the like.

Baker was the executor, who argued that the equipment, personal property, etc., are not what the testator intended when he left the real estate "together with all contents of said real estate" to Bogar. All personal property should be distributed via the residuary clause.

After hearing, the probate court agreed that the farm equipment and vehicles should go to the residuary beneficiaries, not Bogar, finding there was no extrinsic evidence that Tom intended to include the vehicles and farm equipment as "contents" of the real estate to Bogar. He appealed.

The 7th District Court of Appeals reviewed the matter. It found that extrinsic evidence may be considered for the testator's intent only when the language of the will creates doubt as to its meaning. Where the language is clear and unambiguous, however, the testator's intent is presumed to be the express language of the will: "*A court, however, cannot rewrite a will*."

The Court found that the probate court asserted that the specific bequest was ambiguous, even though the personalty were tools and farm equipment such as tractors, and that the real estate had always been used as a farm. It found the probate court erred in excluding farm equipment, etc., as part of Bogar's specific bequest. The matter was remanded and permission given to the lower court to consider extrinsic evidence to determine whether automobiles on the real estate were "contents", based on their purpose and use on the family farm. Reversed and remanded.

TOPIC: Probate Court admits copy of reciprocal will pursuant to R.C. 2107.26.

TITLE: In the Matter of the Estate of Floreda J. Holland, Case No. 20170015, In the Court of Common Pleas, Probate Division, Clark County.

This matter came before the Clark County Probate Court, Judge Carey on an Application to Admit Lost Will of Floreda Holland filed by two of Floreda's five children. The Court was presented a copy of the purported will which the Court found appeared to have the signature of the testatrix, Floreda Holland, followed by two witnesses. On the form of the Will was the name of Attorney Carl Juergens, now retired and being out of state. One witness is now deceased and the other could not be located. Juergens has no independent recollection of the execution of the Will.

The Court received the testimony of the oldest daughter of the decedent who lived next door and recalled her parents discussing their visit to Attorney Juergens to execute their wills, and that at that time in October 1984 were legally competent and of sound mind and memory. She testified that her father died in 2004 and his Will was admitted to probate on February 14, 2005. An exact copy of the original document was presented to the Court and admitted as an exhibit. All efforts to locate the original Last Will of Floreda proved to be fruitless.

Both the son and daughter testified that they recognized the signatures of their parents on the Wills and the Court found them to be reciprocal wills executed on the same day. The Court noted that there were no unusual bequests, rather each left the entire estate to the surviving spouse if living and if not divided it equally between the five children. Testimony further indicated there was never any suggestion that either James or Floreda intended to revoke their wills, rescind any part or to create new wills or codicils. From the date of James Holland's death through Floreda's demise, she lacked capacity to create a subsequent Will and would have needed the help of Brenda to do so.

Judge Carey found that a review of the copy of the reciprocal will containing the signature of Floreda Holland and two witnesses; that it was executed with the formalities required in the State of Ohio on October 16, 1984; the original Will appeared to be lost and that there was no evidence suggesting Floreda revoked the original will. Testimony indicated that James and Floreda Holland, who were married at the time and had testamentary capacity, spoke about executing their wills at Attorney Juergens Office in 1984. An original of James Holland's Will was admitted to probate in 2005 upon his death.

The Court therefore ruled that even though the witnesses were unavailable to testify, a copy of a Last Will and Testament may be admitted to probate where the evidence is clear and convincing that a testamentary document, otherwise properly executed, is a reciprocal Will, and that the original of the twin has already been duly admitted. To that end, the Court made the requisite findings necessary to admit the purported will as the precise copy of the Last Will and Testament of Floreda Holland.

TOPIC: Probate Court did not find clear and convincing evidence to admit Will into Probate.

TITLE: In the Matter of the Estate of Joan E. Shaw, Deceased, Case No. 20170021, In the Court of Common Pleas, Probate Division, Clark County, Ohio.

This matter came before the Court on an Application to Probate a Copy of a Lost Will. Presented to the Court was what appeared to be a copy of the Last Will and Testament of Joan Shaw and appeared to be testamentary in nature. However, it was readily apparent that there was no signature of the testratrix or any witness to the Will.

The Affidavit of the attorney, Shawn Taylor, who was not the scrivener but is currently a partner in the same firm, indicated that it was the practice of the firm to either keep the original Will or give the original to the client and keep a copy in the client's file. In 1997, it was the protocol of the firm to make the copy before it was signed and upon execution the initials of the witnesses the date the document was signed would be affixed to the top right corner of the first page. The Court found the writing on the top of the document in question: signed 2-18-1997 witness-"D.A.H" and "K.M."

After reviewing R.C. 2107.26 and 2107.03 the Court found that the contents of the Will were clearly within the copy of the document produced by counsel and that there was no evidence suggesting the intention of the testator to revoke or otherwise destroy the Will.

The Court found though that the question at bar was whether there was clear and convincing evidence that the Will was executed with the formalities required in Ohio in February 1997. R.C. 2107.03 requires that the Will be written, signed, at the end by the testator, and witnessed by two competent witnesses in the conscious presence of the testator. It was not signed by either the testatrix or witnesses and the Court only had the representations of legal counsel that the testator had signed in the presence of the two witnesses. In essence the Court found that it was left with a double hearsay representation, that is a hearsay statement apparently written by Attorney Henson, now deceased, as interpreted and represented by Attorney Shawn Taylor.

Judge Carey found that unfortunately this representation did not rise to the threshold of clear and convincing evidence necessary to warrant the submission of the document into Probate. The Application to Probate a copy of the lost Will was denied. As there was not testimony received by the Court from witnesses to the execution of the Will the record taken was not reduced to writing pursuant to R.C. 2107.27(B).

TOPIC: The fact that real estate was acquired after the execution of a Will does not alter the operation of the Will or the testamentary directive concerning the after acquired property.

TITLE: In the Matter of the Estate of Marilyn Sue Humason, Case No. 20160501, In the Court of Common Pleas, Probate Division, Clark County, Ohio.

This matter came before the Clark County Probate Court on an Application for an in-kind distribution filed by Marci Maynard on behalf of her four minor children. Maynard sought a Court order that Executor refrain from selling certain real estate and instead retain custody of it for the benefit of the minors. Executor objected.

Decedent Marilyn Humason died in August 2016 leaving two adult daughters, Marci and Joli, along with six grandchildren. Her Will was admitted on September 6, 2016. It had been executed by Decedent on June 5, 2015. The Will provided in pertinent part the following:

> ITEM II: "As soon as it is administratively feasible, I request my Executor to sell all of my personal tangible and real property, and to distribute the net proceeds pursuant to this my Last Will and Testament."
>
> ITEM IV: "I give, devise, and bequeath all of the rest and residue and remainder of my property of whatsoever nature, real and personal, and whether legal, equitable or mixed, and wheresoever situated, which I may own, or to which I may be legally or equitably entitled, or over which I may have a power of appointment, in equal shares, among my grandchildren who both (i) were born prior to my death and (ii) survive me by sixty (60) days.

> My grandchildren who are living at the time executed this my Last Will and Testament and who would be eligible to receive a residue of my estate, if they survive me by sixty (60) days, are TREVOR GRANT MAYNARD, KATE LAUREN MAYNARD, COLIN COLE MAYNARD, HAILEY MAYNARD, MILA MADISON JONES, and LEXI MAKAYLA JONES. I request each of my grandchildren use the funds which they receive under this my Last Will and Testament to pursue their education, to the extent they have not already completed their education.
>
> In the event any individual who is then entitled to receive assets pursuant to this Will has not yet attained the age of twenty-one (21), then I direct that such assets be held by SECURITY NATIONAL BANK AND TRUST COMPANY, Division of the Park National Bank, and its corporate successor, for the benefit of such minor as Custodian pursuant to the Ohio Transfers to Minor's Act."

Daughter Marci Maynard was married to the four children's biological father, Charles Maynard, until their divorce on March 11, 2015. Part and parcel of the divorce decree was a shared parenting plan agreed to by Marci and Charles and approved by the magistrate on March 11, 2015. The parenting plan included an agreement which designated both parents as residential parents for school placement as long as they remain in the same school district which is currently Olentangy. If one parent moved out of the district the other parent would become residential parent for school purposes. The agreement specified the schools the children would attend unless the parents agreed otherwise in writing.

Marci could not afford a home in the district so her mother, Decedent, purchased a home valued at $341,000.00 for the benefit of Marci and her children, which was the subject of the application. Marilyn Humason did not however amend ITEM II of her Will which directed the Executor to sell all of her real estate. Maynard requested that the Court set aside ITEM II with respect to the home. She argued that decedent would not have intended that the house be sold, which she purchased for her grandchildren, so they could be educated in the Olentangy School system. She argued that Security National Bank must consider her children's educational needs and conclude it would be in their best interests to permit them to remain in their home and school district.

The Court noted that Marci Maynard blurred several things as a distribution in kind is generally reserved for personal property not real estate and a Will construction is generally used to interpret a clause in a Will. She also blurred the separate responsibilities of Security National Bank as Executor and as Trustee for minor residency beneficiaries. The Court however proceeded to resolve the matter so the administration of the estate could proceed.

Although Marci Maynard requested a full evidentiary hearing the Court found there was no ambiguity in the terms of the Will and that the language clearly requested that the Executor sell all of the real property. The fact that the property was acquired after the execution of a Will does not alter the operation of the Will or the force of the testamentary directive concerning the after acquired property. The Court therefore declined the invitation to consider additional

evidence. The Court denied the application of Marci Maynard to distribute the Powell property to Security National Bank in kind.

TOPIC: Summary judgment on will contest undue influence claim reversed and remanded in light of evidence presented.

TITLE: Young v. Kaufman, 2017-Ohio-9015.

Assignments seven and eight of the ten assignments in error on appeal deal with whether the probate court erred in granting defendants' summary judgment and then denying a following motion for reconsideration on a will contest claim, finding a lack of material issues regarding the exertion of undue influence over decedent with regard to her estate plan.

Decedent passed in 2013, leaving five children as her next of kin. Decedent's pour-over will executed in 2010 excluded two of those children. Decedent had utilized a number of advisors in developing her plan and had executed no further changes prior to her death. She did meet with the family members earlier in 2013 after a stage four lung cancer diagnosis and the initiation of estate plan changes and indicated to them that she would like all five to promise to share equally in her assets. She passed before finalizing any changes and the two excluded children, who had years ago cashed in their shares of a very successful family business, sued the other three, in a will contest claim and sought the removal of them as co-executors and co-trustees for breach of fiduciary duties. They cited the undue influence believed to be exerted by two of them, Josh Kaufman and Kim Kaufman.

The probate court entered summary judgment in favor of defendants after bi-furcating the contest and removal issues. On appeal, the reviewing court first noted: "To establish undue influence, the challenging party must prove by clear and convincing evidence: (1) the testator was susceptible to undue influence, (2) another person had an opportunity to exert influence over the susceptible testator, (3) improper influence was exerted or attempted and (4) a result showing the effect of such influence. The same standard applies in establishing undue influence with respect to a trust."

The appeals court determined the probate court correctly dismissed any claim that Kim Kaufman, though fiduciary to her late mother as her durable power of attorney, was involved in or directing any decisions related to her 2010 estate plans. However, reasonable minds could disagree whether Josh Kaufman, by clearly becoming an intermediary and spokes-person for his mother with regard to her 2010 estate plans, had a confidential relationship with his mother creating a presumption of undue influence by him. "Accordingly, the probate court erred by not affording appellants the opportunity to litigate the presumption of undue influence in granting summary judgment on the contest claim." It was noted that the attorney handling much of the communication regarding the estate plans resorted to claims of "protocol" to cover the total absence of any record or recollection of direct interaction with decedent prior to execution of the 2010 estate documents. The probate court's judgment was reversed and remanded. A Notice of Appeal was filed with the Ohio Supreme Court.

WRONGFUL DEATH

TOPIC: Equitable wrongful death distribution reflecting "extenuating circumstances" affirmed.

TITLE: In re Estate of John C., 2017-Ohio-8648.

Appeals court affirmed a probate court adoption of a magistrate's decision on the distribution of wrongful death proceeds, overruling objections from "other next of kin".

Decedent was a tow truck driver who was struck and killed by another vehicle while helping with a disabled vehicle. The driver at fault's insurance company offered $25000.00 and the decedent's towing company insurance company offered to settle for $450,000.00.

Decedent's daughter, Montana, administered her father's estate as sole surviving next of kin and brought the wrongful death action on behalf of herself, decedent's mother, eight siblings and decedent's grandson, who was conceived prior to decedent's death but was born following his death. She proposed the sum of $303,522.15 be split with $203,522.15 to go to her and $100,000.00 to his mother, with nothing for any other next of kin.

The magistrate, after hearing, recommended distribution as follows: $178,522.15 to Montana, $70,000.00 to the mother, $15,000.00 to one brother, $10,000.00 each to another brother and three sisters, and none to the rest. After a number of objections and filings, the trial court overruled the objections and adopted the magistrate's decision.

Three assignment of error were addressed on appeal. First, the other next of kin argued the trial court placed too much emphasis on the rebuttable presumption in *R.C. 2125.02(A)(1).*They suggested that evidence that the daughter had no relationship with her father from age seven until his death, due to efforts on the part of the family to protect her from abuse her father had done to other family members, was enough to even rebut the presumption.

The trial court found most significant that the daughter "is the only surviving child of a father who failed to parent her since the age of 7 for reasons due to no fault of her own. The parent-child relationship did not exist not as the result of some failure on Montana's part as the objectors suggest, but due solely to the incomprehensible acts of the decedent. Given the facts and circumstances of this case, this court believes that it is only fair to provide Montana compensation upon the death of her father in order to compensate for what her father failed to provide her, both financially and emotionally, when he was alive." The trial court did not err in referring to the presumption and clearly applied equitable principles in its decision, consistent with *R.C. 2125.03*.

The second assignment of error raised the propriety of the daughter and mother receiving any distribution at all due their lack of relationship with decedent. Mother witnessed the sexual abuse of a younger daughter by her son, and let another child know decedent was stealing funds from his business. The record reflected a continued relationship and mental anguish on the loss of her son to support her inclusion. The record also reflected that due to his improper actions, decedent was a stranger not only to his daughter but to his entire family. Montana also felt loss upon his passing and was the person who took up the responsibility of proceeding with the wrongful death action.

In their third assignment of error appellants contended that the evidence did not support the award to Donna, Arthur, and Nicole. Specifically, appellants contended that the trial court failed to base its distribution on the amount of time the beneficiaries spent with decedent. As discussed in the resolution of appellants' second assignment of error, the court of appeals held that the trial court possessed the discretion to consider the surrounding facts and circumstances when making its equitable determination pursuant to R.C. 2125.03. Upon review of the record the court concluded that the trial court did not abuse its discretion in its distribution to Donna, Arthur, and Nicole.

The trial court judgment was affirmed.

CASELAW DIGEST ADDENDUM

ADOPTIONS

TOPIC: A probate court's authority to grant an adoption is blocked when an issue of Paternity is pending in another court but the court is not impeded if a "parenting matter," such as a parenting time dispute, is pending. Even though it can proceed with the adoption it must consider the effect of the "parenting matter" when determining whether a parent's consent for the adoption is required.

TITLE: In re Adoption of M.G.B.-E, 2018-Ohio-1787

D.H and V.B.-E divorced in 2004 and at the time had two children. Mother (V.B.-E.) was granted custody and father (D.H.) was given standard parenting time. Mother began to prevent parenting time, accusing father of sexually abusing his son. Father filed several contempt actions against his ex-wife in the Montgomery County Domestic Relations Court where they were divorced.

After the divorce Mother moved to Hillsboro, Ohio and Highland County Children's Services began investigating her claims against father. The father sought custody of the children in Montgomery County and the mother through Highland County Probate Court was able to change the last names of the children without D.H. being notified.

A hearing was held in Montgomery County court in early 2007 and in September a magistrate found the sexual abuse allegations unsubstantiated. Mother was ordered to comply with the visitation schedule and family counseling was ordered to help the children phase back into regular visits with the father. Father was required to hire and pay the counselors but as of an April 2008 status hearing he indicated that he had not been able to hire any of the agreed-upon counselors. By September 2008 he still had not hired a counselor and his case was dismissed. He did not regain visitation with his children.

Mother moved to Cincinnati in 2010 and moved again in 2011 and 2013, eventually landing in Wilmington in Clinton County. Both mother and father remarried and father had children with his new wife. In 2014 a babysitter told father she believed she had spotted his son, R.B.-E. at a football game in Wilmington and his wife began searching the Wilmington area and located his ex-wife. D.H. attended a track meet where his son was running, and mother called the police. Mother's new husband allegedly attempted to keep the son from directly speaking with D.H.

In 2015 father filed a motion in Montgomery County to re-establish parenting time with his children. Four days later the step-father of the two children filed a petition to adopt in Clinton County Probate Court alleging that he had failed to maintain more than minimal contact with the child for more than a year. The probate court found that father attended a few sporting events where his son participated, but he didn't speak with child and never tried to communicate with his daughter since losing his visitation. After a two –day hearing that included several

family members from both sides, the probate court ruled father's consent was not needed and granted the adoption. D.H. appealed arguing that once proceedings in the domestic relations court started on the parenting-time request, the probate court must refrain from considering the adoption until the domestic court action was resolved. The Twelfth District affirmed the probate court's ruling and father appealed to the Ohio Supreme Court, which agreed to hear the case.

The Ohio Supreme Court noted that in recent cases, citing *In re Adoption of Pushcar*, the Court has stated that in 2006 it was referencing matters of "parentage" not "parenting." "Parentage" is a narrower term than "parenting" and refers to issues such as paternity. Parenting more broadly considers issues such as custody, visitation, and parenting time, according to the Court. "We read *Pushcar* as requiring the probate court to refrain from acting until the juvenile court had determined the child's paternity, because until that occurred, the probate court could not determine whether the father's consent is required," the court stated. It noted that the Clinton County Probate Court does not face that impediment. It added that there is no finding that needs to be relayed by the domestic relations court for the probate court to determine if the father attempted to make contact with his children in the year prior to the adoption filing.

The Court noted that while a pending matter cannot stop the probate court from proceeding, the stepfather must prove by clear and convincing evidence that the father did not have more than minimal contact with the children. The opinion stated that even if a parent has completely failed to communicate with the children, the consent could still be required if there was justifiable cause for not having contact. The court noted that in some cases justifiable cause was found where the custodial parent significantly interferes with or discourages communication. The Court ruled that the probate court must take into account the father's attempt to reestablish his parental rights through the domestic relations court action and the mother's attempts to block him from interacting with the children.

Writing for the majority Justice French stated that the father who opposed the adoption could not rely on his attempt to reestablish parenting time to stop the adoption but the probate court should consider the father's efforts when determining whether the adoption may proceed without the father's consent. The opinion was joined by Chief Justice O'Connor and Justices Kennedy and Fischer. Judge Mark Pietrykowski, sitting for former Justice O'Neill also joined the opinion. Justice O'Donnell in a dissenting opinion joined by Justice DeWine wrote that the state law does not require the probate court to consider the existence of pending matters in other courts, and that interpretation is a new burden on probate courts that was not imposed by the state legislature.

TOPIC: In petition for adoption by stepfather, trial court did not err in denying biological father's motion for appointment of counsel at state expense where biological father was incarcerated. This case was initiated by the stepparent and not by the State seeking to terminate parental rights, and indigent parent in an adoption proceeding is not entitled to appointed counsel.

TITLE: In re Adoption of R.M.T., 2018-Ohio-1691

P.M.W. appealed a decision of the Warren County Probate Court granting the petition for adoption of appellant's son, R.M.T., J.T. Appellant also appealed the probate court's denial of his motion for the appointment of counsel, his motion to have a transcript prepared at the state's expense, and his motion to stay the final decree of adoption pending appeal. Appellant is the biological father and is currently incarcerated in an Ohio prison. The court bifurcated the determinations of consent and best interest. The court order finding consent not needed was appealed and affirmed by the Court of Appeals for Warren County.

Thereafter the court held a best interest hearing and concluded it was in the child's best interest, granted appellee's petition and filed a final decree of adoption. Appellant filed a motion for the appointment of counsel, requesting that the probate court appoint him counsel to represent him on appeal, a motion to have the hearing transcript prepared at the state's expense and a motion to stay the final decree of adoption pending appeal. The probate court denied all of appellant's motions. Appellant filed a timely appeal raising five assignments of error.

The Court of Appeals overruled his assignment of error as to denial of appointment of counsel, denial of a transcript prepared at state expense, denial of a stay of the adoption decree, and that the court failed to hold a best interest hearing. The court, however, found reversible error in that the court did not provide at least 20- days' advance notice of the consent hearing to the appellant. The Court of Appeals therefore affirmed in part, reversed in part, and remanded for further proceedings according to law and consistent with the opinion.

TOPIC: Child's adoption vacated after the Ohio Supreme Court finds custody still disputed in West Virginia.

TITLE: State ex rel. Garrett v. Costine, 2018-Ohio-1613

G.G. was born in June 2011 and in December 2011 Amanda Garrett granted her sister Elizabeth guardianship of the child. The Hancock County West Virginia family court designated Elizabeth as the legal guardian and awarded weekly and holiday visitation to Tamalie Garrett, mother of Amanda and Elizabeth. In 2012 Elizabeth and G.G. moved to Ohio and four years later Tamalie asked the West Virginia Court to modify the 2011 visitation order, and subsequently asked the court to hold Elizabeth in contempt for violating the visitation order. The mother and daughter reached an agreement through mediation in 2016 regarding parenting and visitation issues.

Two days before the settlement in West Virginia, and without informing her mother, Elizabeth filed a petition in Belmont County Probate Court to adopt G.G. Amanda, the biological mother, permanently surrendered G.G. to Elizabeth. The probate court did not notify Tamalie or the West Virginia family court of the filing of the petition and in December granted the adoption and sent a copy of the decree to the West Virginia Court, which then mailed a copy to Tamalie. The West Virginia Court notified Tamalie that unless she successfully had the adoption set aside or modified the family court would dismiss her pending case.

In April 2017, the West Virginia court dismissed Tamalie's request for a contempt order against Elizabeth without prejudice. Tamalie requested the Ohio court vacate the adoption.

The Ohio court did not change its order but stayed the case pending the resolution of the West Virginia litigation between Tamalie and Elizabeth.

Tamalie then filed a request with the Ohio Supreme Court to stop the adoption. The Supreme Court agreed to hear Tamalie's request for a Writ of Prohibition.

The opinion noted that in its 2003 *State ex rel. Morenz v. Kerr* decision, the Ohio Supreme Court stated that an Ohio Court lacks jurisdiction to proceed in a child-custody when a case is pending in the court of another state, and the other state court is acting consistently with the federal Parental Kidnapping Prevention Act (PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA). The court noted Ohio, West Virginia, and most states have replaced the UCCJA at issue in *Morenz* with the federal Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The Court ruled that the visitation order originally granted to Tamalie by West Virginia means the PKPA applies to custody and visitation orders regarding G.G. The court found that Tamalie had to prove two requirements were met for her to claim that the West Virginia court still had jurisdiction. The Supreme Court held that since Tamalie resided in West Virginia at the time of the adoption, she met the requirement under the PKPA that grants exclusive continuing jurisdiction over a prior custody order or visitation order if at the time of the adoption the child or any contestant in a child custody matter still resided in West Virginia.

To meet the second requirement Tamalie had to show West Virginia was acting consistently with the UCCJEA. The UCCJEA indicated that West Virginia would retain jurisdiction unless either the Ohio probate court or the West Virginia family court determined whether the child, the child's parents, or any person acting as a parent no longer lived in West Virginia. The Supreme Court ruled neither court made the requisite determination. The Supreme Court stated that the probate court had evidence that the biological mother still lived in West Virginia, and concluded the probate court did not make the required findings to take jurisdiction. Tamalie had established that West Virginia still had jurisdiction over the initial visitation determination and had the requisite continuing jurisdiction to modify that order. The Court found that the probate court decree was a modification of the West Virginia visitation order and noted that the purpose of the federal PKPA is to avoid jurisdictional competition and conflict between state courts and that the law requires the contestants in custody disputes to receive reasonable notice and the opportunity to be heard. Here no attempt to comply with PKPA was made, further defeating the goals implicit in the act.

The Supreme Court granted the writ and ordered the probate court to vacate the adoption and cease the proceedings. The six justices voting unanimously joined the opinion Justice DeGenero did not participate.

TOPIC: Probate Court has exclusive original jurisdiction to consider petition to adopt. Judgments reversed and remanded.

TITLE: In re Adoption of H.W., 2018-Ohio-460

This case stems from a petition to adopt H.W. filed by the Waltons on July 11, 2017 in the Probate Court. The facts are intertwined with an abuse, neglect, and dependency case involving H.W. in the Sandusky County Juvenile Court. H.W. tested positive for drugs when he was born, was placed in foster care of the Waltons after temporary custody was granted to Sandusky County Department of Job and Family Services. The child was removed from the Waltons, due to safety concerns. The same day the Waltons filed a petition to adopt and the biological parents consented. The Waltons previously adopted H.W.'s half-sister. Two days later a permanent custody hearing was held in Juvenile Court. SCDJFS objected to the adoption petition. Various motions and objections were filed involving the standing of SCDJFS to participate in the adoption. On September 19, 2017 SCDJFS moved to dismiss the Waltons' petition because the Juvenile Court granted permanent custody to SCDJFS. On September 20, 2017 the Probate Court issued an entry concluding it lacked jurisdiction to consider the Walton's petition. The Waltons filed a Motion to Reconsider and Stay Judgment Entry of September 20, 2017 and Memorandum in Opposition to Motion to Dismiss, but the Judge denied their motions. The Waltons appealed raising one assignment of error that the Wyandot County Probate Court erred in finding that it lacked jurisdiction over the adoption.

The Court of Appeals reversed and remanded finding that the Probate Court has exclusive original jurisdiction to consider the petition for adoption. The Court provided an analysis of the jurisdictional issues between Juvenile and Probate cases concerning a child that is part of an abuse, neglect, dependency case and a private adoption case citing *State ex rel. Allen Cty. Children Servs. Bd., 2016-Ohio-7382.*

GUARDIANSHIP

TOPIC: In action by guardian to sell trust real estate, R.C. 2127.05, to pay expenses for co-Trustor who was a ward of the court, trial court did not err in granting summary Judgment to plaintiff, even though the trust agreement provided other options to generate funds from the property, guardian was not required to accept more time-consuming options, and guardian averred that time was of the essence in order to pay ward's creditors.

TITLE: Mathers v. Gibson, 2018-Ohio-1697

In August 2000, Robert and Maxine Mathers executed the Mathers Family Trust as co-trustors for their benefit as co-trustees. It was funded by the transfer of real estate, approximately 123 acres consisting of a farm and a house. Maxine passed away and Robert became sole co-trustor/co-trustee. Appellants Gibson and T. Marlatt, Robert's adult grandchildren, were named as co-successor trustees of the trust and co-executors to Robert's will, and were named as alternate attorneys –in –fact and agents for Robert's estate documents. Appellants R. Marlatt and Hatmaker are remainder beneficiaries of the trust.

Appellee Terri Mather filed an application in March 2017 to become guardian of the person and estate of Robert and was appointed in April 2017. The trust allowed for the invasion of the trust for the benefit of the ward by the guardian if the co-trustor became a ward and if the

income from the trust was insufficient to provide for the proper health, support, and maintenance of the ward.

Appellee filed a complaint to invade the trust and sell the trust real estate pursuant to R.C. 2127.05 because Robert's monthly expenses exceed his income from the trust. He named appellants and others not part of the appeal. A guardian ad litem was appointed at the guardian's request. Appellee filed a motion for judgment on the pleadings and summary judgment claiming the sale of the trust real estate was necessary because Robert was out of funds to pay his bills, and no one had challenged her authority to sell the real estate or contest its submitted valuation or attempt to remove her as guardian in the guardianship case. Appellants (excluding T. Marlatt) filed a memorandum in opposition, asserting that under the terms of the trust, the co-successor trustees had the sole ability to sell the trust real estate. Appellants requested discovery to determine Robert's care and finances so the co-successor trustees could take appropriate actions under the trust. The probate court granted summary judgment to appellee and authorized the sale of the entire trust real estate.

Appellants claim the probate court erred in granting summary judgment to appellee and permitting the sale of the trust real estate without discovery and an opportunity to present evidence. Appellants claimed other, less restrictive alternatives were available. The Court of Appeals for Guernsey County found that the probate court did consider the ward's income and monthly expenses relative to the inventory of the ward's assets. It also noted that Appellants did not file any requests for discovery nor follow through with the appropriate rules so they could not argue they were denied the opportunity for discovery. It further found the guardian did not need to use more cumbersome alternatives to sale such as to mortgage, partition, subdivide, option, lease or sell off gas, oil, mineral royalties as her affidavit established time was of the essence in order to pay the ward's creditors. It was clear from the Trust Agreement that the intention of Robert and Maxine as co-trustors and co-trustees was that they would benefit from the trust real estate during their lifetimes for their own care and maintenance.

TRUSTS

TOPIC: General Division trial court did not err when it determined that the probate division had jurisdiction over Sosnoswsky's claims.

TITLE: Sosnoswsky v. Koscianski, 2018 –Ohio-1409

Sami Sosnoswsky was gifted money to be placed into a trust until she turned 18, with her mother Judith Lieber as custodian of the account. Between 1973-1980 the following amounts were to be placed in the trust: $19,000 from her grandmother, $6,057.40 from her grandfather, and $50,000 from her father. Sosnoswsky alleged that the trust was currently worth about $2,000,000. In February 2016 John Koscianski was appointed guardian of the estate and person of Judith Lieber. On December 12, 2016 Sosnoswsky filed a complaint in the Cuyahoga County Probate Court, then filed a complaint in the general division on December 29, 2016. They were virtually identical except for the code section cited, named the same defendants, and alleged that due to Lieber's fraudulent conveyance of the funds, Sosnoswsky never received any

of her trust money.

Koscianski filed a motion to dismiss the complaint in the general division pursuant to Civ.R. 12(B)(1). The court stayed the case pending decision on the complaint filed in probate court. On April 28, 2017, Sosnoswsky voluntarily dismissed her complaint without prejudice in the probate court and moved to reinstate her general division case to the active docket.

Koscianski moved to renew the original motion to dismiss in the general division and the court granted his motion holding that pursuant to R.C. 2101.24 the probate court has exclusive jurisdiction over matters set forth in R.C. 2101.24 and as to all matters pertaining directly to the administration of estates, unless otherwise provided by law. Since this matter involved a ward under guardianship in Cuyahoga County Probate Court the court found the claims were controlled by R.C. 2109.50- 2109.56 and the Probate Court had exclusive jurisdiction. The motion to dismiss was therefore granted pursuant to Civ.R.12(B)(6).

Sosnoswsky appealed raising as error that defendant's Motion To Dismiss was granted on the grounds that the Cuyahoga County Common Pleas Court lacked subject matter jurisdiction in accordance with Civ.R.12(B)(1).

The Court of Appeals determined that the matter was properly before the probate court and that the jurisdictional priority rule applied. The jurisdictional priority rule prevents the prosecution of two actions involving two courts of concurrent jurisdiction at the same time and that the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of all of the parties. The court of appeals found that the two cases concerned the same whole issue as the cases were pending in two different courts of concurrent jurisdiction involving substantially the same parties, and that the ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where suit was originally commenced. Even though Sosnoswsky had dismissed her complaint in probate court pursuant to Civ.R.41(a), per the operation of the savings statute she could refile her claims in probate court.

Finding that the general division trial court did not err when it determined that the probate division had jurisdiction over Sosnoswsky's claims, the trial court decision was affirmed. A dissent was written by Judge Stewart stating that the Ohio Supreme Court has stated that the probate division has no jurisdiction over claims for money damages arising out of fraud and that even though plaintiff sought an order to rescind the transfer of assets of the trust if granted it may affect the administration of the estate, her primary aim was still the recovery of monetary damages from the alleged fraud and the issues raised were solely within the jurisdiction of the general division. Since the claims relate to the actions of the ward not the guardian Judge Stewart wrote that the general division had jurisdiction and it erred in dismissing the case. She would have reversed the case and remanded the case to the general division.

TOPIC: In plaintiff's complaint seeking fiduciary accounting of two irrevocable gift trusts for his children, summary judgment for defendant was not error where plaintiff transferred control of trusts to defendant when plaintiff resigned as trustee, provisions in trust do not give plaintiff the right to a full financial accounting and, as to plaintiff's claim for financial accounting, under federal tax law, instant court does not have jurisdiction.

TITLE: Millstein v. Millstein, 2018-Ohio-1204

Norman established two irrevocable gift trusts for the benefit of his children and their successors: the AJT in 1987 and the KMT in 1988, with him being the grantor and trustee of both trusts. In 1997 he transferred control of both to Kevan when he resigned as Trustee of the KMT and AJT and made Kevan the sole trustee of both trusts.

Norman alleged that Kevan's administration of the KMT was inconsistent with Norman's intentions that he made clear in a 1988 memo. Norman had authored the memo when he was grantor and trustee of the KMT. He claimed that Kevan had a fiduciary duty to consider Norman's intentions that were set forth in the memo, including the prospect of offsetting income attributable to Norman when making trust administration decisions. It was noted in the decision that Norman asserted also that he had no recollection of writing or reading the 1988 memo and alleged that Kevan was using it against him.

Norman further alleged in the complaint that both trusts pass income to him making it financially onerous to him. Norman asserted that he was entitled to a fiduciary accounting because he had been saddled with millions of dollars of income tax liability due to the administration and activities of the KMT, and claimed that under the KMT he was entitled to at least annually a full financial report.

In December 2014 Kevan moved for summary judgment on Norman's complaint, arguing that he was not entitled to a financial accounting of the trusts and that if he ever was entitled to an annual full financial report per the trusts, he had released that right when he entered into an agreement with Kevan in 2005. Count 2 had been previously decided and was not part of the appeal. Norman's attorney was subsequently disqualified due to a conflict and he obtained new counsel who filed an opposition to Kevan's remaining arguments in his summary judgment motion related to his Counts 1 and 3 of Norman's complaint. In August 2017 the probate court granted summary judgment to Kevan and Norman appealed. In his sole assignment of error he raised three issues regarding his argument that the court erred in granting summary judgment.

In his first issue Norman argued that he was entitled to a full financial report of the

trust assets at least annually and Kevan argued that the trust provisions do no such thing. The Court of Appeals opined that one of the fundamental tenets for the construction of a will or trust is to ascertain within the bounds of law, the intent of the testator, grantor or settlor. If the language of the trust is unambiguous the grantor's intent can be determined from the express terms of the trust itself, and no judicial construction or interpretation is required unless the purpose of the trust is illegal or against public policy. Based on the language in the trust, the beneficiaries are entitled to the full books of account, but Norman is entitled to a full financial report of the trust assets, which is not the same. Further, the court noted that under R.C. 5808.13(c) the trustee owes a fiduciary duty to the beneficiaries of a trust not to the grantor. It further notes that the official comment to R.C. 5808.13 employs the term report rather than accounting to negate any inference that the report must be prepared in any particular format, or with a high degree of formality. Kevan maintained that this comment makes a clear distinction between the terms report and accounting and demonstrates that the requirement that a trustee provide a report is a lesser and dissimilar standard than is required of a trustee who is obligated to provide an accounting, and the court agreed. Under the trust it held that Norman was entitled to "a full financial report of the trust assets" not a "fiduciary accounting" of the trusts, which would include not only trust assets but also details of the trust administration and liabilities as well.

Due to Norman having signed an agreement in 2005 the court also found, that pursuant to that agreement as well as additional agreements, Norman is prohibited from bringing any action against Kevan. Although Norman argued that even under the 2005 agreement, he is entitled to a full financial accounting, as he contends that because Kevan breached the 2005 Agreement by not providing him with the accounting, he is not prevented from bringing this lawsuit. The Court of Appeals disagreed. Since the 2005 Agreement provided that as they are prepared, the accountings will be delivered to Norman, all current monthly and annual operating and financial statements for all companies, trusts and other entities in which he was involved in as of the date of the Agreement and Release, but notably as of the date of the release. Norman had not been involved in the trusts at issue in the case since 1997 when he transferred all control of the trusts to Kevan. The court found that Norman's first issue had no merit.

In his second issue Norman argued that he was entitled to a financial accounting under federal tax law, claiming that he needed the information to file his personal income taxes. He cited to Treasury Regulation Section 1.671-4 in support of his argument that he is entitled to an accounting of the trusts. Kevan contended that he complied with the relevant tax regulations and provided Norman with an annual grantor tax letter with the required information each year. Although Norman did not dispute that fact, he still argued that he needed the full accounting to verify the accuracy of the annual tax information Kevan had provided to him. The Court of Appeals held that this provision does not give Norman the right to a full financial accounting of the trusts, and held that the court did not have jurisdiction over the federal tax claims. It stated that if Norman truly believed that Kevan had not furnished him with the proper tax information Norman should contact the IRS.

Finally Norman contended that under the principles of equity, Kevan should provide him with a financial accounting because he is the one responsible for paying the taxes. The Court of Appeals, however, held that since this issue was not raised below it could not be raised for the

first time on appeal. The third issue was therefore found to have no merit.

The Court of Appeals for Cuyahoga County therefore concluded that the trial court did not err when it granted the summary judgment to Kevan because there was no genuine issue of material fact in the case.

TOPIC: In action by guardian to sell trust real estate, R.C. 2127.05, to pay expenses for co-Trustor who was a ward of the court, trial court did not err in granting summary Judgment to plaintiff, even though the trust agreement provided other options to generate funds from the property, guardian was not required to accept more time-consuming options, and guardian averred that time was of the essence in order to pay ward's creditors.

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Appellee Terri Mather filed an application in March 2017 to become guardian of the person and estate of Robert and was appointed in April 2017. The trust allowed for the invasion of the trust for the benefit of the ward by the guardian if the co-trustor became a ward and if the income from the trust was insufficient to provide for the proper health, support, and maintenance of the ward.

Appellee filed a complaint to invade the trust and sell the trust real estate pursuant to R.C. 2127.05 because Robert's monthly expenses exceed his income from the trust. He named appellants and others not part of the appeal. A guardian ad litem was appointed at the guardian's request. Appellee filed a motion for judgment on the pleadings and summary judgment claiming the sale of the trust real estate was necessary because Robert was out of funds to pay his bills, and no one had challenged her authority to sell the real estate or contest its submitted valuation or attempt to remove her as guardian in the guardianship case. Appellants (excluding T. Marlatt) filed a memorandum in opposition, asserting that under the terms of the trust, the co-successor trustees had the sole ability to sell the trust real estate. Appellants requested discovery to determine Robert's care and finances so the co-successor trustees could take appropriate actions under the trust. The probate court granted summary judgment to appellee and authorized the sale of the entire trust real estate.

Appellants claim the probate court erred in granting summary judgment to appellee and permitting the sale of the trust real estate without discovery and an opportunity to present evidence. Appellants claimed other, less restrictive alternatives were available. The Court of Appeals for Guernsey County found that the probate court did consider the ward's income and

monthly expenses relative to the inventory of the ward's assets. It also noted that Appellants did not file any requests for discovery nor follow through with the appropriate rules so they could not argue they were denied the opportunity for discovery. It further found the guardian did not need to use more cumbersome alternative to sale such as to mortgage, partition, subdivide, option, lease or sell off gas, oil, mineral royalties as her affidavit established time was of the essence in order to pay the ward's creditors. It was clear from the Trust Agreement that the intention of Robert and Maxine as co-trustors and co-trustees was that they would benefit from the trust real estate during their lifetimes for their own care and maintenance.

(131st General Assembly)
(Amended Substitute House Bill Number 432)

AN ACT

To amend sections 1337.60, 2101.026, 2105.02, 2105.14, 2105.31, 2105.32, 2105.33, 2105.34, 2105.35, 2105.36, 2105.37, 2105.39, 2106.13, 2106.18, 2107.07, 2107.10, 2109.62, 2111.131, 2113.86, 4505.10, 5801.10, 5803.02, 5804.02, 5808.16, 5812.32, 5812.46, 5812.51, 5814.01, 5814.02, 5814.03, 5814.04, 5814.05, 5814.06, 5814.07, 5814.08, 5814.09, and 5815.23; to amend, for the purpose of adopting new section numbers as indicated in parentheses, sections 2105.39 (2105.38) and 5814.09 (5814.10); to enact new sections 2105.39 and 5814.09 and sections 1337.571, 2105.40, 2127.012, 2137.01, 2137.02, 2137.03, 2137.04, 2137.05, 2137.06, 2137.07, 2137.08, 2137.09, 2137.10, 2137.11, 2137.12, 2137.13, 2137.14, 2137.15, 2137.16, 2137.17, 2137.18, and 5802.04; and to repeal section 2105.38 of the Revised Code to revise the law governing decedent's estates by making changes in the Ohio Trust Code, the Probate Law, the Uniform Principal and Income Act, the Transfers to Minors Act, and the Uniform Simultaneous Death Act; to authorize the director or any designee of the Franklin County Guardianship Service Board to act on behalf of the Board on guardianship matters, and to permit the Board to charge a reasonable fee for services to wards; and to adopt the Revised Uniform Fiduciary Access to Digital Assets Act.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 1337.60, 2101.026, 2105.02, 2105.14, 2105.31, 2105.32, 2105.33, 2105.34, 2105.35, 2105.36, 2105.37, 2105.39, 2106.13, 2106.18, 2107.07, 2107.10, 2109.62, 2111.131, 2113.86, 4505.10, 5801.10, 5803.02, 5804.02, 5808.16, 5812.32, 5812.46, 5812.51, 5814.01, 5814.02, 5814.03, 5814.04, 5814.05, 5814.06, 5814.07, 5814.08, 5814.09, and 5815.23 be amended; sections 2105.39 (2105.38) and 5814.09 (5814.10) be amended for the purpose of adopting new section numbers as shown in parentheses; and new sections 2105.39 and 5814.09 and sections 1337.571, 2105.40, 2127.012, 2137.01, 2137.02, 2137.03, 2137.04, 2137.05, 2137.06, 2137.07, 2137.08, 2137.09, 2137.10, 2137.11, 2137.12, 2137.13, 2137.14, 2137.15, 2137.16, 2137.17, 2137.18, and 5802.04 of the Revised Code be enacted to read as follows:

Sec. 1337.571. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to digital assets causes the agent to be an authorized user for the purpose of applicable computer fraud and unauthorized computer access laws and authorizes the agent to do all of the following:

(A) Have access to any catalogue of electronic communications sent or received by the

principal;

(B) Have access to any other digital asset in which the principal has a right or interest;

(C) Have the right to access any of the principal's tangible personal property capable of receiving, storing, processing, or sending a digital asset;

(D) Take any action concerning the asset to the extent of the account holder's authority;

(E) Have access to the content of electronic communications sent or received by the principal.

Sec. 1337.60. A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by sections 1337.21 to 1337.64 of the Revised Code.

[INSERT NAME OF JURISDICTION]

STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act (sections 1337.21 to 1337.64 of the Revised Code).

This power of attorney does not authorize the agent to make health-care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

ACTIONS REQUIRING EXPRESS AUTHORITY

Unless expressly authorized and initialed by me in the Special Instructions, this power of attorney does not grant authority to my agent to do any of the following:

(1) Create a trust;

(2) Amend, revoke, or terminate an inter vivos trust, even if specific authority to do so is granted to the agent in the trust agreement;

(3) Make a gift;

(4) Create or change rights of survivorship;

(5) Create or change a beneficiary designation;

(6) Delegate authority granted under the power of attorney;

(7) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a

survivor benefit under a retirement plan;

(8) Exercise fiduciary powers that the principal has authority to delegate.

CAUTION: Granting any of the above eight powers will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I, ... (Name of Principal) name the following person as my agent:

Name of Agent:

.....

Agent's Address:

.....

Agent's Telephone Number:

.....

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent:

.....

Successor Agent's Address:

.....

Successor Agent's Telephone Number:

.....

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent:

.....

Second Successor Agent's Address:

.....

Second Successor Agent's Telephone Number:

.....

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act (sections 1337.21 to 1337.64 of the Revised Code):

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

(...) Real Property
(...) Tangible Personal Property
(...) Stocks and Bonds
(...) Commodities and Options
(...) Banks and Other Financial Institutions
(...) Operation of Entity or Business
(...) Insurance and Annuities
(...) Estates, Trusts, and Other Beneficial Interests
(...) Claims and Litigation
(...) Personal and Family Maintenance
(...) Benefits from Governmental Programs or Civil or Military Service
(...) Retirement Plans
(...) Taxes
(...) Digital Assets
(...) All Preceding Subjects
(...) My agent shall have access to the content of electronic communications sent or received by me.

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

.....

.....

.....

.....

.....

.....

.....

.....

.....

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a guardian of my estate or my person, I nominate the following person(s) for appointment:
Name of Nominee for guardian of my estate:

.....

Nominee's Address:

.....

Nominee's Telephone Number:

.....

Name of Nominee for guardian of my person:

.....

Nominee's Address:

.....

Nominee's Telephone Number:

.....

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

....

Your Signature Date

.....

Your Name Printed

.....

Your Address

.....

Your Telephone Number

State of Ohio
County of .....

This document was acknowledged before me on ..... (Date), by ..... (Name of Principal).

.....

Signature of Notary

My commission expires:

.....

This document prepared by:

.....

.....

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;

(2) Act in good faith;

(3) Do nothing beyond the authority granted in this power of attorney;

(4) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest;

(5) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

(1) Act loyally for the principal's benefit;

(2) Avoid conflicts that would impair your ability to act in the principal's best interest;

(3) Act with care, competence, and diligence;

(4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) Cooperate with any person that has authority to make health-care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) The death of the principal;

(2) The principal's revocation of the power of attorney or your authority;

(3) The occurrence of a termination event stated in the power of attorney;

(4) The purpose of the power of attorney is fully accomplished;

(5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act (sections 1337.21 to 1337.64 of the Revised Code). If you violate the Uniform Power of Attorney Act or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

Sec. 2101.026. (A) The probate court of Franklin county may accept funds or other program assistance from, or charge fees for services described in division (B) of this section rendered to, individuals, corporations, agencies, or organizations, including, but not limited to, the board of alcohol, drug addiction, and mental health services of Franklin county or the Franklin county board of developmental disabilities. Any funds or fees received by the probate court of Franklin county under this division shall be paid into the treasury of Franklin county and credited to a fund to be known as the Franklin county probate court mental health fund.

(B) The moneys in the Franklin county probate court mental health fund shall be used for services to help ensure the treatment of any person who is under the care of the board of alcohol, drug addiction, and mental health services of Franklin county, the Franklin county board of developmental disabilities, or any other guardianships. These services include, but are not limited to, involuntary commitment proceedings and the establishment and management of adult guardianships, including all associated expenses, for wards who are under the care of the board of alcohol, drug addiction, and mental health services of Franklin county, the Franklin county board of developmental disabilities, or any other guardianships.

(C) If the judge of the probate court of Franklin county determines that some of the moneys in the Franklin county probate court mental health fund are needed for the efficient operation of that court, the moneys may be used for the acquisition of equipment, the hiring and training of staff, community services programs, volunteer guardianship training services, the employment of magistrates, and other related services.

(D) The moneys in the Franklin county probate court mental health fund that may be used in part for the establishment and management of adult guardianships under division (B) of this section may be utilized to establish a Franklin county guardianship service.

(E)(1) A Franklin county guardianship service under division (D) of this section is established by creating a Franklin county guardianship service board comprised of three members. The judge of the probate court of Franklin county shall appoint one member. The board of directors of the Franklin county board of developmental disabilities shall appoint one member. The board of directors of the board of alcohol, drug addiction, and mental health services of Franklin county shall appoint one member. The term of appointment of each member is four years.

(2) The Franklin county guardianship service board may appoint a director of the board. The board shall determine the compensation of the director based on the availability of funds contained in the Franklin county probate court mental health fund.

(3) The ~~members and the director, if any, of the~~ Franklin county guardianship service board may receive appointments from the probate court of Franklin county to serve as guardians of both the person and estate of wards. ~~The~~ The director or any designee of the Franklin county guardianship service board may act on behalf of the board in relation to all guardianship matters.

(4) The director of the Franklin county guardianship service board may hire employees subject to available funds in the Franklin county probate court mental health fund.

~~(4) If a new director replaces a previously appointed director of the Franklin county guardianship service board, the new director shall replace the former director serving as a guardian~~

~~under division (E)(3) of this section without the need of a successor guardianship hearing conducted by the probate court of Franklin county so long as the wards are the same wards for both the former director and the new director.~~

(5) The Franklin county guardianship service board may charge a reasonable fee for services provided to wards. The probate judge shall approve any fees charged by the board under division (E)(5) of this section.

(6) The Franklin county guardianship service board that is created under division (E)(1) of this section shall promulgate all rules and regulations necessary for the efficient operation of the board and the Franklin county guardianship service.

Sec. 2105.02. When, in ~~Chapter 2105. of the Revised Code~~ this chapter, a person is described as living, it means that the person was living at the time of the death of the intestate from whom the estate came and that the person lived for at least one hundred twenty hours following the death of the intestate, and when a person is described as having died, it means that the person died before such intestate or that the person failed to live for at least one hundred twenty hours following the death of the intestate.

Sec. 2105.14. ~~Descendants of an intestate begotten before the intestate's death, but born after the intestate's death, in all cases will inherit as if born in the lifetime of the intestate and surviving the intestate; but in no other case can a person~~ No descendant of an intestate shall inherit under this chapter unless ~~living at the time of the death of~~ surviving the intestate for at least one hundred twenty hours, or unless born within three hundred days after the death of the intestate and living for at least one hundred twenty hours after birth.

Sec. 2105.31. As used in sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code:

(A) "Co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of ~~real or personal~~ property~~; insurance or other policies; or bank, savings bank, credit union,~~ or ~~other~~ accounts~~,~~ held under circumstances that entitle one or more ~~persons~~ individuals to the whole of the property or account on the death of the other ~~person~~ individual or ~~persons~~ individuals.

(B) "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with a transfer-on-death designation or the abbreviation TOD, account with a payable-on-death designation or the abbreviation POD, transfer-on-death designation affidavit, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(C) "Payor" means a trustee, insurer, business entity, employer, government, governmental agency, political subdivision or instrumentality, or any other person authorized or obligated by law or a governing instrument to make payments or transfers.

~~(D) "Event" includes the death of another person.~~

Sec. 2105.32. (A) Except as provided in section 2105.36 of the Revised Code, ~~a person~~ if title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead, or allowance for support depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived ~~another specified person~~ the other individual by one hundred twenty hours is deemed to have predeceased the other ~~person for the following purposes:~~ individual.

~~(1) When the title to real or personal property or the devolution of real or personal property depends upon a person's survivorship of the death of another person;~~

~~(2) When the right to elect an interest in or exempt a surviving spouse's share of an intestate estate under section 2105.06 of the Revised Code depends upon a person's survivorship of the death of another person;~~

~~(3) When the right to elect an interest in or exempt an interest of the decedent in the mansion house pursuant to section 2106.10 of the Revised Code depends upon a person's survivorship of the death of another person;~~

~~(4) When the right to elect an interest in or exempt an allowance for support pursuant to section 2106.13 of the Revised Code depends upon a person's survivorship of the death of another person.~~

(B) This section does not apply if its application would result in a taking of an intestate estate by the state.

Sec. 2105.33. Except as provided in section 2105.36 of the Revised Code, ~~a person~~ an individual who is not established by clear and convincing evidence to have survived ~~a specified~~ an event by one hundred twenty hours is deemed to have predeceased the event for purposes of a provision of a governing instrument that relates to the ~~person~~ individual surviving an event, including the death of another individual.

Sec. 2105.34. Except as provided in section 2105.36 of the Revised Code, the following shall apply:

(A) If it is not established by clear and convincing evidence that one of two co-owners with right of survivorship ~~in specified real or personal property~~ survived the other co-owner by one hundred twenty hours, ~~that~~ one-half of the property ~~shall pass~~ or account passes as if ~~each person~~ one co-owner had survived the other ~~person~~ co-owner by one hundred twenty hours, and one-half of the property or account passes as if the other co-owner had survived the one co-owner by one hundred twenty hours.

(B) If there are more than two co-owners with right of survivorship ~~in specified real or personal property~~ and it is not established by clear and convincing evidence that at least one of the co-owners survived the others by one hundred twenty hours, ~~that~~ the property ~~shall pass~~ or account passes in the proportion that ~~each person owns~~ one co-owner's ownership bears to the ownership of the whole number of co-owners.

Sec. 2105.35. In addition to any provisions of the Rules of Evidence, the following provisions relating to the determination of death and status apply:

(A)(1) ~~A person is dead if the person has been determined to be dead pursuant to standards established under section 2108.40 of the Revised Code~~ An individual is dead if the individual has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the brain, including the brain stem, as determined in accordance with accepted medical standards. If the respiratory and circulatory functions of an individual are being artificially sustained, under accepted medical standards a determination that death has occurred is made by a physician by observing and conducting a test to determine that the irreversible cessation of all functions of the brain has occurred.

(2) A physician who makes a determination of death in accordance with division (A) of this

section ~~2108.40 of the Revised Code and any person who acts in good faith in reliance on a determination of death made by a physician in accordance with that section is entitled to the immunity conveyed by that section~~ and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for the physician's acts or the acts of others based on that determination.

(3) Any person who acts in good faith and relies on a determination of death made by a physician in accordance with division (A) of this section and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for the person's actions.

(B) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death of ~~a person~~ an individual purportedly occurred is prima-facie evidence of the fact, place, date, and time of the ~~person's~~ individual's death and the identity of the decedent.

(C) A certified or authenticated copy of any record or report of a domestic or foreign governmental agency that ~~a person~~ an individual is missing, detained, dead, or alive is prima-facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(D) In the absence of prima-facie evidence of death under division (B) or (C) of this section, the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(E) Except as provided in division (F) of this section, a presumption of the death of ~~a person~~ an individual arises when either of the following applies:

(1) ~~When the person~~ The individual has disappeared and has been continuously absent from the ~~person's~~ individual's place of last domicile for a five-year period without being heard from during the period;

(2) ~~When the person~~ The individual has disappeared and has been continuously absent from the ~~person's~~ individual's place of last domicile without being heard from and was at the beginning of the ~~person's~~ individual's absence exposed to a specific peril of death, even though the absence has continued for less than a five-year period.

(F) When ~~a person~~ an individual who is on active duty in the armed services of the United States has been officially determined to be absent in a status of "missing" or "missing in action," a presumption of death arises when the head of the federal department concerned has made a finding of death pursuant to the "Federal Missing Persons Act," 80 Stat. 625 (1966), 37 U.S.C.A. 551, as amended.

(G) In the absence of evidence disputing the time of death stipulated on a document described in division (B) or (C) of this section, a document described in either of those divisions that stipulates a time of death of an individual one hundred twenty hours or more after the time of death of another ~~person~~ individual, however the time of death of the other ~~person~~ individual is determined, establishes by clear and convincing evidence that the ~~person~~ individual survived the other ~~person~~ individual by one hundred twenty hours.

~~(H) The provisions of divisions (A) to (G) of this section are in addition to any other provisions of the Revised Code, the Rules of Criminal Procedure, or the Rules of Evidence that pertain to the determination of death and status of a person.~~

Sec. 2105.36. ~~A person who is not established by clear and convincing evidence to have survived another specified person by one hundred twenty hours shall not be deemed to have predeceased the other person~~ Survival by one hundred twenty hours is not required if any of the following ~~apply~~ applies:

(A) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster, and that language is ~~operative~~ operable under the ~~situation in question~~ facts of the case.

(B) The governing instrument expressly indicates that ~~a person~~ an individual is not required to survive an event, including the death of another individual, by any specified period ~~in order for any right or interest governed by the instrument to properly vest or transfer~~, or expressly requires the individual to survive the event for a specified period, but the survival of the event for the specified period shall be established by clear and convincing evidence.

(C) ~~The governing instrument expressly requires the person to survive the event for a specified period in order for any right or interest governed by the instrument to properly vest or transfer, and the survival of the event by the person or survival of the event by the person for the specified period is established by clear and convincing evidence.~~

~~(D)~~ The imposition of a one-hundred-twenty-hour requirement of ~~the person's~~ survival ~~of the other specified person causes~~ would cause a nonvested property interest or a power of appointment to be invalid under section 2131.08 of the Revised Code, ~~and~~ but the ~~person's~~ survival ~~of the other specified person is~~ shall be established by clear and convincing evidence.

~~(E)~~ (D) The application of a one-hundred-twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition, ~~and~~ but the ~~person's~~ survival ~~of the other specified person is~~ shall be established by clear and convincing evidence.

Sec. 2105.37. (A) A payor or other third party is not liable for any of the following:

(1) ~~Making~~ Having made a payment~~, transferring~~ or transferred an item of ~~real or personal~~ property~~,~~ or ~~otherwise transferring~~ any other benefit to a person designated in a governing instrument who, under sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code, is not entitled to the payment or item of property or other benefit, if the payment or transfer was made before the payor or other third party received written notice of a claimed lack of entitlement ~~pursuant to~~ under those sections ~~2105.31 to 2105.39 of the Revised Code~~;

(2) ~~Taking~~ Having taken any other action ~~not specified in division (A)(1) of this section~~ in good faith reliance on the person's apparent entitlement under the terms of the governing instrument before the payor or other third party received written notice of a claimed lack of entitlement ~~pursuant to~~ under sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code.

(B) A payor or other third party is liable for a payment, transfer, or other action taken after the payor or other third party receives written notice of a claimed lack of entitlement ~~pursuant to~~ under sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code.

(C) Written notice of a claimed lack of entitlement under ~~divisions~~ division (A) or (B) of this section ~~must~~ shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of

entitlement ~~pursuant to~~ under sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code, a payor or other third party may pay any amount owed or transfer or deposit any item of ~~real or personal~~ property held by it to or with the probate court that has jurisdiction over the decedent's estate. If no probate proceedings have been commenced, upon receipt of written notice of a claimed lack of entitlement ~~pursuant to~~ under sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code, a payor or other third party may pay any amount owed or transfer or deposit any item of ~~real or personal~~ property held by it to or with the probate court located in the county of the decedent's residence. The court shall hold the funds or ~~real or personal~~ items of property ~~until it is determined pursuant to~~ , and upon its determination under sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code to whom the funds or ~~real or personal~~ items of property should be disbursed, shall order disbursement in accordance with its determination. ~~The court then shall order disbursement of the funds or real or personal property in accordance with that determination.~~ Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(D) A person who purchases property for value or receives a payment or other item of property or benefit in partial or full satisfaction of a legally enforceable obligation, and without notice that the person selling or transferring the property or benefit or making a payment is not entitled to the property or benefit under sections 2105.31 to 2105.40 of the Revised Code, is neither obligated under those sections to return the payment or item of property or benefit nor liable under those sections for the amount of the payment or the value of the item of property or benefit.

(E) A person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under sections 2105.31 to 2105.40 of the Revised Code is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under sections 2105.31 to 2105.40 of the Revised Code.

(F) If sections 2105.31 to 2105.40 of the Revised Code or any provision of those sections are preempted by federal law with respect to a payment, an item of property, or any other benefit covered by those sections, a person who, not for value, receives the payment, item of property, or other benefit to which the person is not entitled under sections 2105.31 to 2105.40 of the Revised Code is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were sections 2105.31 to 2105.40 of the Revised Code or any provision of those sections not preempted.

Sec. ~~2105.39~~ 2105.38. (A) Sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code do not impair any act done in any proceeding, or any right that accrued, before ~~May 16, 2002~~ the effective date of the amendment of this section. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run, prior to ~~May 16, 2002~~ the effective date of the amendment of this section, under any provision of the Revised Code, the provision of the applicable section of the Revised Code applies with respect to that right.

(B) Any rule of construction ~~or presumption~~ regarding any provision of a governing instrument that is provided in sections 2105.31 to ~~2105.39~~ 2105.40 of the Revised Code applies to any governing instrument that is executed~~, or any multiple-party account that is opened,~~ prior to ~~May~~

~~16, 2002~~ the effective date of the amendment of this section, unless there is a clear indication of a contrary intent in the governing instrument ~~or multiple-party account~~.

~~(C) If any provision of sections 2105.31 to 2105.39 of the Revised Code or the application of those sections to any persons or circumstance is held invalid, the invalidity does not affect other provisions or applications of sections 2105.31 to 2105.39 of the Revised Code that can be given effect without the invalid provision or application.~~

Sec. 2105.39. Sections 2105.31 to 2105.40 of the Revised Code shall be applied and construed to effectuate their general purpose to make uniform the law with respect to the subject of those sections among the states enacting the law.

Sec. 2105.40. Sections 2105.31 to 2105.40 of the Revised Code may be cited as the uniform simultaneous death act.

Sec. 2106.13. (A) If a person dies leaving a surviving spouse and no minor children, leaving a surviving spouse and minor children, or leaving minor children and no surviving spouse, the surviving spouse, minor children, or both shall be entitled to receive, subject to division (B) of this section, in money or property the sum of forty thousand dollars as an allowance for support. If the surviving spouse selected ~~two~~ one or more automobiles under section 2106.18 of the Revised Code, the allowance for support prescribed by this section shall be reduced by the value of the automobile having the ~~lower~~ lowest value ~~of the two automobiles~~ if more than one automobile is so selected. The money or property set off as an allowance for support shall be considered estate assets.

(B) The probate court shall order the distribution of the allowance for support described in division (A) of this section as follows:

(1) If the person died leaving a surviving spouse and no minor children, one hundred per cent to the surviving spouse;

(2) If the person died leaving a surviving spouse and minor children, and if all of the minor children are the children of the surviving spouse, one hundred per cent to the surviving spouse;

(3) If the person died leaving a surviving spouse and minor children, and if not all of the minor children are children of the surviving spouse, in equitable shares, as fixed by the probate court in accordance with this division, to the surviving spouse and the minor children who are not the children of the surviving spouse. In determining equitable shares under this division, the probate court shall do all of the following:

(a) Consider the respective needs of the surviving spouse, the minor children who are children of the surviving spouse, and the minor children who are not children of the surviving spouse;

(b) Allocate to the surviving spouse, the share that is equitable in light of the needs of the surviving spouse and the minor children who are children of the surviving spouse;

(c) Allocate to the minor children who are not children of the surviving spouse, the share that is equitable in light of the needs of those minor children.

(4) If the person died leaving minor children and no surviving spouse, in equitable shares, as fixed by the probate court in accordance with this division, to the minor children. In determining equitable shares under this division, the probate court shall consider the respective needs of the minor children and allocate to each minor child the share that is equitable in light of the child's needs.

(C) If the surviving spouse selected ~~two~~ one or more automobiles under section 2106.18 of

the Revised Code, the probate court, in considering the respective needs of the surviving spouse and the minor children when allocating an allowance for support under division (B)(3) of this section, shall consider the benefit derived by the surviving spouse from the transfer of the automobile having the ~~lower~~ lowest value ~~of the two automobiles~~ if more than one automobile is so selected.

(D) If, pursuant to this section, the probate court must allocate the allowance for support, the administrator or executor, within five months of the initial appointment of an administrator or executor, shall file with the probate court an application to allocate the allowance for support.

(E) The administrator or executor shall pay the allowance for support unless a competent adult or a guardian with the consent of the court having jurisdiction over the guardianship waives the allowance for support to which the adult or the ward represented by the guardian is entitled.

(F) For the purposes of this section, the value of an automobile that a surviving spouse selects pursuant to section 2106.18 of the Revised Code is the value that the surviving spouse specifies for the automobile in the affidavit executed pursuant to division (B) of section 4505.10 of the Revised Code.

Sec. 2106.18. (A) Upon the death of a married resident who owned at least one automobile at the time of death, the interest of the deceased spouse in ~~up to two~~ one or more automobiles that are not transferred to the surviving spouse due to joint ownership with right of survivorship established under section 2131.12 of the Revised Code, that are not transferred to a transfer-on-death beneficiary or beneficiaries designated under section 2131.13 of the Revised Code, and that are not otherwise specifically disposed of by testamentary disposition may be selected by the surviving spouse. This interest shall immediately pass to the surviving spouse upon transfer of the title or titles in accordance with section 4505.10 of the Revised Code. The sum total of the values of the automobiles selected by a surviving spouse under this division, as specified in the affidavit that the surviving spouse executes pursuant to division (B) of section 4505.10 of the Revised Code, shall not exceed ~~forty~~ sixty-five thousand dollars. Each automobile that passes to a surviving spouse under this division shall not be considered an estate asset and shall not be included in the estate inventory.

(B) The executor or administrator, with the approval of the probate court, may transfer title to an automobile owned by the decedent to any of the following:

(1) The surviving spouse, when the automobile is purchased by the surviving spouse pursuant to section 2106.16 of the Revised Code;

(2) A distributee;

(3) A purchaser.

(C) The executor or administrator may transfer title to an automobile owned by the decedent without the approval of the probate court to any of the following:

(1) A legatee entitled to the automobile under the terms of the will;

(2) A distributee if the distribution of the automobile is made without court order pursuant to section 2113.55 of the Revised Code;

(3) A purchaser if the sale of the automobile is made pursuant to section 2113.39 of the Revised Code.

(D) As used in division (A) of this section, "automobile" includes a motorcycle and includes a truck if the truck was used as a method of conveyance by the deceased spouse or the deceased spouse's family when the deceased spouse was alive.

Sec. 2107.07. A will may be deposited by the testator, or by some person for the testator, in the office of the judge of the probate court in the county in which the testator lives, before or after the death of the testator, and if deposited after the death of the testator, with or without applying for its probate. Upon the payment of the fee of twenty-five dollars to the court, the judge shall receive, keep, and give a certificate of deposit for the will. That will shall be safely kept until delivered or disposed of as provided by section 2107.08 of the Revised Code. If the will is not delivered or disposed of as provided in that section within one hundred years after the date the will was deposited, the judge may dispose of the will in any manner the judge considers feasible. The judge~~, on being paid the fee of five dollars, shall receive, keep, and give a certificate of deposit for~~ shall retain an electronic copy of the will prior to its disposal after one hundred years under this section.

Every will that is so deposited shall be enclosed in a sealed envelope that shall be indorsed with the name of the testator. The judge shall indorse on the envelope the date of delivery and the person by whom the will was delivered. The envelope may be indorsed with the name of a person to whom it is to be delivered after the death of the testator. The will shall not be opened or read until delivered to a person entitled to receive it, until the testator files a complaint in the probate court for a declaratory judgment of the validity of the will pursuant to section 2107.081 of the Revised Code, or until otherwise disposed of as provided in section 2107.08 of the Revised Code. Subject to section 2107.08 of the Revised Code, the deposited will shall not be a public record until the time that an application is filed to probate it.

Sec. 2107.10. (A) No property or right, testate or intestate, shall pass to a beneficiary named in a will who knows of the existence of the will for one year after the death of the testator and has the power to control it and, without reasonable cause, intentionally conceals or withholds it or neglects or refuses within that one year to cause it to be offered for or admitted to probate. The property devised or bequeathed to that beneficiary shall ~~descend to the heirs of the testator, not including any heir who has concealed or withheld the will~~ pass as if the beneficiary had predeceased the testator.

(B) No property or right, testate or intestate, passes to a beneficiary named in a will when the will was declared valid and filed with a probate judge pursuant to section 2107.084 of the Revised Code, the declaration and filing took place in a county different from the county in which the will of the testator would be probated under section 2107.11 of the Revised Code, and the named beneficiary knew of the declaration and filing and of the death of the testator and did not notify the probate judge with whom the will was filed. This division does not preclude a named beneficiary from acquiring property or rights from the estate of the testator for failing to notify a probate judge if the named beneficiary reasonably believes that the judge has previously been notified of the testator's death.

Sec. 2109.62. (A)(1) Upon the filing of a motion by a trustee with the court that has jurisdiction over the trust, upon the provision of reasonable notice to all beneficiaries who are known and in being and who have vested or contingent interests in the trust, and after holding a hearing, the court may terminate the trust, in whole or in part, if it determines that all of the following apply:

(a) It is no longer economically feasible to continue the trust.

(b) The termination of the trust is for the benefit of the beneficiaries.

(c) The termination of the trust is equitable and practical.

(d) The current value of the trust is less than one hundred thousand dollars.

(2) The existence of a spendthrift or similar provision in a trust instrument or will does not

preclude the termination of a trust pursuant to this section.

(B) If property is to be distributed from an estate being probated to a trust and the termination of the trust pursuant to this section does not clearly defeat the intent of the testator, the probate court has jurisdiction to order the outright distribution of the property or to make the property custodial property under sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code. A probate court may so order whether the motion for the order is made by an inter vivos trustee named in the will of the decedent or by a testamentary trustee.

(C) Upon the termination of a trust pursuant to this section, the probate court shall order the distribution of the trust estate in accordance with any provision specified in the trust instrument for the premature termination of the trust. If there is no provision of that nature in the trust instrument, the probate court shall order the distribution of the trust estate among the beneficiaries of the trust in accordance with their respective beneficial interests and in a manner that the court determines to be equitable. For purposes of ordering the distribution of the trust estate among the beneficiaries of the trust under this division, the court shall consider all of the following:

(1) The existence of any agreement among the beneficiaries with respect to their beneficial interests;

(2) The actuarial values of the separate beneficial interests of the beneficiaries;

(3) Any expression of preference of the beneficiaries that is contained in the trust instrument.

Sec. 2111.131. (A) The probate court may enter an order that authorizes a person under a duty to pay or deliver money or personal property to a minor who does not have a guardian of the person and estate or a guardian of the estate, to perform that duty in amounts not exceeding five thousand dollars annually, by paying or delivering the money or property to any of the following:

(1) The guardian of the person only of the minor;

(2) The minor's natural guardians, if any, as determined pursuant to section 2111.08 of the Revised Code;

(3) The minor;

(4) Any person who has the care and custody of the minor and with whom the minor resides, other than a guardian of the person only or a natural guardian;

(5) A financial institution incident to a deposit in a federally insured savings account in the sole name of the minor;

(6) A custodian designated by the court in its order, for the minor under sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code.

(B) An order entered pursuant to division (A) of this section authorizes the person or entity specified in it, to receive the money or personal property on behalf of the minor from the person under the duty to pay or deliver it, in amounts not exceeding five thousand dollars annually. Money or personal property so received by guardians of the person only, natural guardians, and custodians as described in division (A)(4) of this section may be used by them only for the support, maintenance, or education of the minor involved. The order of the court is prima-facie evidence that a guardian of the person only, a natural guardian, or a custodian as described in division (A)(4) of this section has the authority to use the money or personal property received.

(C) A person who pays or delivers moneys or personal property in accordance with a court order entered pursuant to division (A) of this section is not responsible for the proper application of

the moneys or property by the recipient.

Sec. 2113.86. (A) Unless a will or another governing instrument otherwise provides, and except as otherwise provided in this section, a tax shall be apportioned equitably in accordance with the provisions of this section among all persons interested in an estate in proportion to the value of the interest of each person as determined for estate tax purposes.

(B) Except as otherwise provided in this division, any tax that is apportioned against a gift made in a clause of a will other than a residuary clause or in a provision of an inter vivos trust other than a residuary provision, shall be reapportioned to the residue of the estate or trust. It shall be charged in the same manner as a general administration expense. However, when a portion of the residue of the estate or trust is allowable as a deduction for estate tax purposes, the tax shall be reapportioned to the extent possible to the portion of the residue that is not so allowable.

(C)(1) A tax shall not be apportioned against an interest that is allowable as an estate tax marital or charitable deduction, except to the extent that the interest is a part of the residue of an estate or trust against which tax is reapportioned pursuant to division (B) of this section.

(2) Estate tax of this state or another jurisdiction shall not be reapportioned against an interest that is allowable as a deduction for federal estate tax purposes, to the extent that there is other property in the estate or trust that is not allowable as a deduction for federal estate tax purposes and against which estate tax of this state or another jurisdiction can be apportioned.

(3) A provision in a will or other governing instrument that apportions tax to an interest that is otherwise allowable as an estate tax marital or charitable deduction is ineffective unless it refers to the marital or charitable deduction and expressly and unambiguously acknowledges and accepts any resultant partial loss of the deduction.

(D) A tax shall not be apportioned against property that passes to a surviving spouse as an elective share under section 2106.01 of the Revised Code or as an intestate share under section 2105.06 of the Revised Code, to the extent that there is other property in the estate that is not allowable as a deduction for estate tax purposes against which the tax can be apportioned.

(E)(1) Any federal estate tax credit for state or foreign death taxes on property that is includible in an estate for federal estate tax purposes, shall inure to the benefit of the persons chargeable with the payment of the state or foreign death taxes in proportion to the amount of the taxes paid by each person, but any federal estate tax credit for state or foreign death taxes inuring to the benefit of a person cannot exceed the federal estate tax apportioned to that person.

(2) Any federal estate tax credit for gift taxes paid by a donee of a gift shall inure to the benefit of that donee for purposes of this section.

(3) Credits against tax not covered by division (E)(1) or (2) of this section shall be apportioned equitably among persons in the manner in which the tax is apportioned among them.

(F) Any additional estate tax that is due because a qualified heir has disposed of qualified farm property in a manner not authorized by law or ceased to use any part of the qualified farm property for a qualified use, shall be apportioned against the interest of the qualified heir.

(G) If both a present interest and a future interest in property are involved, a tax shall be apportioned entirely to the principal. This shall be the case even if the future interest qualifies for an estate tax charitable deduction, even if the holder of the present interest also has rights in the principal, and even if the principal is otherwise exempt from apportionment.

(H) Penalties shall be apportioned in the same manner as a tax, and interest on tax shall be apportioned to the income of the estate or trust, unless a court directs a different apportionment of penalties or interest based on a finding that special circumstances make an apportionment as provided in this division inequitable.

(I) If any part of an estate consists of property, the value of which is included in the gross estate of the decedent by reason of section 2044 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 N 2044, as amended, or of section 5731.131 of the Revised Code, the estate is entitled to recover from the persons holding or receiving the property any amount by which the estate tax payable exceeds the estate tax that would have been payable if the value of the property had not been included in the gross estate of the decedent. This division does not apply if the decedent's will or another governing instrument provides otherwise and the will or instrument refers to either section mentioned in this division or to qualified terminable interest marital deduction property.

Sec. 2127.012. (A) In addition to the other methods provided by law, a guardian of the estate may sell at public or private sale, grant options to sell, exchange, re-exchange, or otherwise dispose of any parcel of real estate belonging to the estate at any time, at prices, and upon terms that are consistent with this section, and may execute and deliver deeds and other instruments of conveyance if all of the following conditions are met:

(1) The ward's spouse and all persons entitled to the next estate of inheritance from the ward in the real property give written consent to a power of sale for a particular parcel of real estate or to a power of sale for all the real estate belonging to the estate. Each consent to a power of sale provided for in this section shall be filed in the probate court.

(2) Any sale under a power of sale authorized under this section shall be made at a price of at least eighty per cent of the appraised value, as set forth in an approved inventory, if the real estate was appraised within two years prior to the filing of the consents. If the value of the real estate in an approved inventory was not determined by an appraisement, or the appraisement was completed more than two years prior to the filing of the consents, the real estate shall be appraised and a sale shall be made at a price of at least eighty per cent of the appraised value.

(3) No power of sale provided for in this section is effective if the ward's spouse or any next of kin is a minor. No person may give the consent of the minor that is required by this section.

(4) Upon filing the consents under this section, the guardian shall execute such bond or additional bond payable to the state in an amount that the court considers sufficient, having regard to the amount of real property to be sold, its appraised value, the amount of the original bond given by the guardian, and the distribution to be made of the proceeds arising from the sale.

(B) A ward's spouse who is the guardian of the estate may sell real estate to self pursuant to this section.

Sec. 2137.01. As used in this chapter:

(A) "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(B) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated as agent, attorney in fact, or otherwise.

(C) "Carries" means engages in the transmission of an electronic communication.

(D) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(E) "Content of an electronic communication" means information concerning the substance or meaning of the communication that meets all of the following conditions:

(1) It has been sent or received by a user.

(2) It is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public.

(3) It is not readily accessible to the public.

(F) "Court" means the probate court for all matters in which the court has exclusive jurisdiction under section 2101.24 of the Revised Code. "Court" also includes the probate court or the general division of the court of common pleas for matters in which such courts have concurrent jurisdiction under section 2101.24 of the Revised Code.

(G) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(H) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(I) "Digital asset" means an electronic record in which an individual has a right or interest. "Digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(J) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(K) "Electronic communication" has the same meaning as in 18 U.S.C. 2510(12), as amended.

(L) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(M) "Fiduciary" means an original, additional, or successor agent, guardian, personal representative, or trustee.

(N)(1) "Guardian" means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or the person and the estate of an incompetent or minor. When applicable, "guardian" includes, but is not limited to, a limited guardian, an interim guardian, a standby guardian, and an emergency guardian appointed pursuant to division (B) of section 2111.02 of the Revised Code. "Guardian" also includes both of the following:

(a) An agency under contract with the department of developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent;

(b) A conservator appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(2) "Guardian" does not include a guardian under sections 5905.01 to 5905.19 of the Revised Code.

(O) "Information" means data, text, images, videos, sounds, codes, computer programs,

software, databases, or the like.

(P) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(Q) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.

(R) "Personal representative" means an executor, administrator, special administrator, or other person acting under the authority of the probate court to perform substantially the same function under the law of this state. "Personal representative" also includes a commissioner in a release of assets from administration under section 2113.03 of the Revised Code and an applicant for summary release from administration under section 2113.031 of the Revised Code.

(S) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal.

(T) "Principal" means an individual who grants authority to an agent in a power of attorney.

(U) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(V) "Remote-computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. 2510(14), as amended.

(W) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(X) "Trustee" means a fiduciary with legal title to property pursuant to an agreement or declaration that creates a beneficial interest in another. "Trustee" includes an original, additional, and successor trustee and a cotrustee.

(Y) "User" means a person that has an account with a custodian.

(Z) "Ward" means any person for whom a guardian is acting or for whom the probate court is acting pursuant to section 2111.50 of the Revised Code. "Ward" includes a person for whom a conservator has been appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(AA) "Will" includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills, and instruments admitted to probate under section 2107.081 of the Revised Code. "Will" does not include inter vivos trusts or other instruments that have not been admitted to probate.

Sec. 2137.02. (A) This chapter applies to all of the following:

(1) An agent acting under a power of attorney executed before, on, or after the effective date of this section;

(2) A personal representative acting for a decedent who died before, on, or after the effective date of this section;

(3) A guardianship proceeding commenced before, on, or after the effective date of this section;

(4) A trustee acting under a trust created before, on, or after the effective date of this section;

(5) A custodian, if the user resides in this state or resided in this state at the time of the user's

death.

(B) This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Sec. 2137.03. (A) A user may use an online tool to direct the custodian to disclose or not to disclose to a designated recipient some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(B) If a user has not used an online tool to give direction under division (A) of this section, or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(C) A user's direction under division (A) or (B) of this section overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

Sec. 2137.04. (A) This chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(B) This chapter does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(C) A fiduciary's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under section 2137.03 of the Revised Code.

Sec. 2137.05. (A) When disclosing digital assets of a user under this chapter, the custodian may, at its sole discretion, do any of the following:

(1) Grant a fiduciary or designated recipient full access to the user's account;

(2) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged;

(3) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(B) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

(C) A custodian is not required to disclose under this chapter a digital asset deleted by a user.

(D) If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the users digital assets, the custodian is not required to disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose any of the following:

(1) A subset limited by date of the user's digital assets;

(2) All of the user's digital assets to the fiduciary or designated recipient;

(3) None of the user's digital assets;

(4) All of the user's digital assets to the court for review in camera.

Sec. 2137.06. If a deceased user consented to or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the personal representative gives the custodian all of the following:

(A) A written request for disclosure in physical or electronic form;

(B) A copy of the death certificate of the user;

(C) A copy of the letter of appointment of the personal representative, the entry appointing a commissioner under division (E) of section 2113.03 of the Revised Code, or the entry granting summary release from administration under division (E) of section 2113.031 of the Revised Code;

(D) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications;

(E) If requested by the custodian, any of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(2) Evidence linking the account to the user;

(3) A finding by the court that one of the following applies:

(a) The user had a specific account with the custodian, identifiable by the information specified in division (E)(1) of this section.

(b) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. 2701 et seq., as amended, 47 U.S.C. 222, as amended, or other applicable law.

(c) Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications.

(d) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

Sec. 2137.07. Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the personal representative gives the custodian all of the following:

(A) A written request for disclosure in physical or electronic form;

(B) A copy of the death certificate of the user;

(C) A copy of the letter of appointment of the personal representative, the entry appointing a commissioner under division (E) of section 2113.03 of the Revised Code, or the entry granting summary release from administration under division (E) of section 2113.031 of the Revised Code;

(D) If requested by the custodian, any of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(2) Evidence linking the account to the user;

(3) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate;

(4) A finding by the court that either of the following applies:

(a) The user had a specific account with the custodian, identifiable by the information specified in division (D)(1) of this section.

(b) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

Sec. 2137.08. To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian all of the following:

(A) A written request for disclosure in physical or electronic form;

(B) A copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(C) A certification by the agent, under penalty of perjury, that the power of attorney is in effect;

(D) If requested by the custodian, either of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account;

(2) Evidence linking the account to the principal.

Sec. 2137.09. Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal, if the agent gives the custodian all of the following:

(A) A written request for disclosure in physical or electronic form;

(B) A copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(C) A certification by the agent, under penalty of perjury, that the power of attorney is in effect;

(D) If requested by the custodian, either of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account;

(2) Evidence linking the account to the principal.

Sec. 2137.10. Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

Sec. 2137.11. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust, if the trustee gives the custodian all of the following:

(A) A written request for disclosure in physical or electronic form;

(B) Either a copy of the trust instrument that includes consent to disclosure of the content of electronic communications to the trustee and a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust or a certification of the trust under section 5810.13 of the Revised Code that includes a statement that the trust authorizes disclosure of the content of electronic communications to the trustee;

(C) If requested by the custodian, either of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account;

(2) Evidence linking the account to the trust.

Sec. 2137.12. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest, if the trustee gives the custodian all of the following:

(A) A written request for disclosure in physical or electronic form;

(B) Either a copy of the trust instrument and a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust or a certification of the trust under section 5810.13 of the Revised Code;

(C) If requested by the custodian, either of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account;

(2) Evidence linking the account to the trust.

Sec. 2137.13. (A) After an opportunity for a hearing, the court may grant a guardian access to the digital assets of a ward.

(B) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian the catalogue of electronic communications sent or received by a ward and any digital assets, other than the content of electronic communications, in which the ward has a right or interest, if the guardian gives the custodian all of the following:

(1) A written request for disclosure in physical or electronic form;

(2) A copy of the court order that gives the guardian authority over the digital assets of the ward;

(3) If requested by the custodian, either of the following:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the ward;

(b) Evidence linking the account to the ward.

(C) A guardian of the ward may request a custodian of the digital assets of the ward to suspend or terminate an account of the ward for good cause. A request made under this section shall be accompanied by a copy of the court order giving the guardian authority over the ward.

Sec. 2137.14. (A) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including all of the following:

(1) The duty of care;

(2) The duty of loyalty;

(3) The duty of confidentiality.

(B) All of the following apply to a fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(1) Except as otherwise provided in section 2137.03 of the Revised Code, it is subject to the applicable terms of service.

(2) It is subject to other applicable laws, including copyright law.

(3) In the case of a fiduciary, it is limited by the scope of the fiduciary's duties.

(4) It may not be used to impersonate the user.

(C) A fiduciary with authority over the property of a decedent, ward, principal, or settlor has the right to access any digital asset in which the decedent, ward, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(D) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including section 2913.04 of the Revised Code.

(E) Both of the following apply to a fiduciary with authority over the tangible, personal property of a decedent, ward, principal, or settlor:

(1) The fiduciary has the right to access the property and any digital asset stored in it.

(2) The fiduciary is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including section 2913.04 of the Revised Code.

(F) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(G) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination shall be in writing, in either physical or electronic form, and accompanied by all of the following:

(1) If the user is deceased, a copy of the death certificate of the user;

(2) A copy of the instrument giving the fiduciary authority over the account, as follows:

(a) For a personal representative, a copy of the letter of appointment of the personal representative, the entry appointing a commissioner under division (E) of section 2113.03 of the Revised Code, or the entry granting summary release from administration under division (E) of section 2113.031 of the Revised Code;

(b) For an agent, a copy of the power of attorney;

(c) For a trustee, either a copy of the trust instrument and a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust or a certification of the trust under section 5810.13 of the Revised Code; or

(d) For a guardian, a copy of the court order giving the guardian authority over the ward.

(3) If requested by the custodian, any of the following:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(b) Evidence linking the account to the user;

(c) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in division (G)(3)(a) of this section.

Sec. 2137.15. (A) Not later than sixty days after receipt of the information required under sections 2137.06 to 2137.13 of the Revised Code, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(B) An order under division (A) of this section directing compliance shall contain a finding that compliance is not in violation of 18 U.S.C. 2702, as amended.

(C) A custodian may notify the user that a request for disclosure or to terminate an account was made under this chapter.

(D) A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(E) Nothing in this chapter limits a custodian's ability to obtain, or to require a guardian, agent, or designated recipient requesting disclosure or termination under this chapter to obtain, a court order that does all of the following:

(1) Specifies that an account belongs to the ward or principal;

(2) Specifies that there is sufficient consent from the ward or principal to support the requested disclosure; and

(3) Contains a finding required by law other than this chapter.

(F) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

Sec. 2137.16. In applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Sec. 2137.17. This chapter modifies, limits, or supersedes the "Electronic Signatures in Global and National Commerce Act," 15 U.S.C. 7001 et seq., but does not modify, limit, or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b).

Sec. 2137.18. If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

Sec. 4505.10. (A) In the event of the transfer of ownership of a motor vehicle by operation of law, as upon inheritance, devise, bequest, order in bankruptcy, insolvency, replevin, or execution sale, a motor vehicle is sold to satisfy storage or repair charges, or repossession is had upon default in performance of the terms of a security agreement as provided in Chapter 1309. of the Revised Code and the secured party has notified the debtor as required by division (B) of section 1309.611 of the Revised Code, a clerk of a court of common pleas, upon the surrender of the prior certificate of title or the manufacturer's or importer's certificate, or, when that is not possible, upon presentation of satisfactory proof to the clerk of ownership and rights of possession to the motor vehicle, and upon payment of the fee prescribed in section 4505.09 of the Revised Code and presentation of an application for certificate of title, may issue to the applicant a certificate of title to the motor vehicle. Only an affidavit by the person or agent of the person to whom possession of the motor vehicle has

passed, setting forth the facts entitling the person to the possession and ownership, together with a copy of the journal entry, court order, or instrument upon which the claim of possession and ownership is founded, is satisfactory proof of ownership and right of possession. If the applicant cannot produce that proof of ownership, the applicant may apply directly to the registrar of motor vehicles and submit the evidence the applicant has, and the registrar, if the registrar finds the evidence sufficient, then may authorize a clerk to issue a certificate of title. If the registrar finds the evidence insufficient, the applicant may petition the court of common pleas for a court order ordering the clerk to issue a certificate of title. The court shall grant or deny the petition based on the sufficiency of the evidence presented to the court. If, from the records in the office of the clerk involved, there appears to be any lien on the motor vehicle, the certificate of title shall contain a statement of the lien unless the application is accompanied by proper evidence of its extinction.

(B) A clerk shall transfer a decedent's interest in one or ~~two~~ more automobiles to the surviving spouse of the decedent, as provided in section 2106.18 of the Revised Code, upon receipt of the title or titles. An affidavit executed by the surviving spouse shall be submitted to the clerk with the title or titles. The affidavit shall give the date of death of the decedent, shall state that each automobile for which the decedent's interest is to be so transferred is not disposed of by testamentary disposition, and shall provide an approximate value for each automobile selected to be transferred by the surviving spouse. The affidavit shall also contain a description for each automobile for which the decedent's interest is to be so transferred. The transfer does not affect any liens upon any automobile for which the decedent's interest is so transferred.

(C) Upon the death of one of the persons who have established joint ownership with right of survivorship under section 2131.12 of the Revised Code in a motor vehicle, and upon presentation to a clerk of the title and the certificate of death of the decedent, the clerk shall transfer title to the motor vehicle to the survivor. The transfer does not affect any liens upon any motor vehicle so transferred.

(D) Upon the death of the owner of a motor vehicle designated in beneficiary form under section 2131.13 of the Revised Code, upon application for a certificate of title by the transfer-on-death beneficiary or beneficiaries designated pursuant to that section, and upon presentation to the clerk of the certificate of title and the certificate of death of the decedent, the clerk shall transfer the motor vehicle and issue a certificate of title to the transfer-on-death beneficiary or beneficiaries. The transfer does not affect any liens upon the motor vehicle so transferred.

Sec. 5801.10. (A) As used in this section, "creditor" means any of the following:

(1) A person holding a debt or security for a debt entered into by a trustee on behalf of the trust;

(2) A person holding a debt secured by one or more assets of the trust;

(3) A person having a claim against the trustee or the assets of the trust under section 5805.06 of the Revised Code;

(4) A person who has attached through legal process a beneficiary's interest in the trust.

(B)(1) Subject to division (B)(2) of this section, the parties to an agreement under this section shall be any two or more of the following, or their representatives under the representation provisions of Chapter 5803. of the Revised Code, except that only the settlor and any trustee are required to be parties to an amendment of any revocable trust:

(a) The settlor if living and if no adverse income or transfer tax results would arise from the

settlor's participation;

(b) The beneficiaries;

(c) The currently serving trustees;

(d) Creditors, if their interest is to be affected by the agreement.

(2) In addition to the parties to an agreement under division (B)(1) of this section, the parties shall include the attorney general if an agreement described in division (C)(7) of this section is being made and either of the following applies:

(a) An organization with one or more purposes that are described in division (A) of section 5804.05 of the Revised Code is a beneficiary.

(b) The trust is a charitable trust.

(C) The persons specified in division (B) of this section may by written instrument enter into an agreement with respect to any matter concerning the construction of, administration of, or distributions under the terms of the trust, the investment of income or principal held by the trustee, or other matters. The agreement may not effect a termination of the trust before the date specified for the trust's termination in the terms of the trust, change the interests of the beneficiaries in the trust except as necessary to effect a modification described in division (C)(5), (6), or (7) of this section, or include terms and conditions that could not be properly approved by the court under Chapters 5801. to 5811. of the Revised Code or other applicable law. The invalidity of any provision of the agreement does not affect the validity of other provisions of the agreement. Matters that may be resolved by a private settlement agreement include, but are not limited to, all of the following:

(1) Determining classes of creditors, beneficiaries, heirs, next of kin, or other persons;

(2) Resolving disputes arising out of the administration or distribution under the terms of the trust, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the terms of the trust;

(3) Granting to the trustee necessary or desirable powers not granted in the terms of the trust or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the terms of the trust or, if inconsistent with the express provisions or purposes of the terms of the trust, are necessary for the due administration of the terms of the trust;

(4) Modifying the terms of the trust, if the modification is not inconsistent with any material purpose of the trust;

(5) Modifying the terms of the trust in the manner required to qualify the gift under the terms of the trust for the charitable estate or gift tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by the Internal Revenue Code and regulations promulgated under it in any case in which the parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(6) Modifying the terms of the trust in the manner required to qualify any gift under the terms of the trust for the estate tax marital deduction available to noncitizen spouses, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code and regulations promulgated under it in any case in which the parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(7) Construing or modifying the terms of a trust that refer to the federal estate tax, federal generation-skipping transfer tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settlor;

(8) Resolving any other matter that arises under Chapters 5801. to 5811. of the Revised Code.

(D) No agreement shall be entered into under this section affecting the rights of a creditor without the creditor's consent or affecting the collection rights of federal, state, or local taxing authorities.

(E) Any agreement entered into under this section that complies with the requirements of division (C) of this section shall be final and binding on the parties to the agreement or persons represented by the parties to the agreement whether by reason of Chapter 5803. of the Revised Code or otherwise, and their heirs, successors, and assigns, but shall have no effect on any trustee, settlor, beneficiary, or creditor who is not a party to the agreement or is not represented by a party to the agreement.

(F) Notwithstanding anything in this section, in division (D) of section 5803.03 of the Revised Code, or in any other rule of law to the contrary, a trustee serving under the terms of the trust shall only represent its own individual or corporate interests in negotiating or entering into an agreement subject to this section. No trustee serving under the terms of the trust shall be considered to represent any settlor, beneficiary, or the interests of any settlor or beneficiary in negotiating or entering into an agreement subject to this section.

(G) Any party to a private settlement agreement entered into under this section may request the court to approve the agreement, to determine whether the representation as provided in Chapter 5803. of the Revised Code was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

(H) If an agreement entered into under this section contains a provision requiring binding arbitration of any disputes arising under the agreement, the provision is enforceable.

(I) Nothing in this section affects any of the following:

(1) The right of a beneficiary to disclaim under section 5815.36 of the Revised Code;

(2) The termination or modification of a trust under section 5804.10, 5804.11, 5804.12, 5804.13, 5804.14, 5804.15, or 5804.16 of the Revised Code;

(3) The ability of a trustee to divide or consolidate a trust under section 5804.17 of the Revised Code;

(4) The power of the trustee to make distributions pursuant to section 5808.18 of the Revised Code.

(J) Nothing in this section restricts or limits the jurisdiction of any court to dispose of matters not covered by agreements under this section or to supervise the acts of trustees appointed by that court.

(K) This section shall be liberally construed to favor the validity and enforceability of agreements entered into under it.

(L) A trustee serving under the trust instrument is not liable to any third person arising from any loss due to that trustee's actions or inactions taken or omitted in good faith reliance on the terms of an agreement entered into under this section.

(M) Subject to divisions (B)(2) and (C)(7) of this section, this section does not apply to any

of the following:

(1) A charitable trust that has one or more charitable organizations as qualified beneficiaries;

(2) A charitable trust the terms of which authorize or direct the trustee to distribute trust income or principal to one or more charitable organizations to be selected by the trustee, or for one or more charitable purposes described in division (A) of section 5804.05 of the Revised Code, if any of the following apply:

(a) The distributions may be made on the date that an agreement under this section would be entered into.

(b) The distributions could be made on the date that an agreement under this section would be entered into if the interests of the current beneficiaries of the trust terminated on that date, but the termination of those interests would not cause the trust to terminate.

(c) The distributions could be made on the date that an agreement under this section would be entered into if the trust terminated on that date.

(3) An agreement pursuant to section 109.232 of the Revised Code.

(N) This section does not prohibit some or all of the persons who could enter into an agreement under this section from entering into agreements that are not described in this section and are governed by other law, including the common law. Nothing in this section limits or negates any consents, releases, or ratifications, whether under section 5810.09 of the Revised Code or otherwise, relating to any agreement described in this section or governed by other law.

Sec. 5802.04. An action brought under Chapters 5801. to 5811. of the Revised Code is a civil action subject to the Rules of Civil Procedure, and unless it involves a testamentary or other trust that already is subject to court supervision, is commenced by filing a complaint.

Sec. 5803.02. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. To the extent there is no conflict of interest between the holder of a limited testamentary power of appointment or a presently exercisable limited power of appointment and the persons represented with respect to the particular question or dispute, the holder may also represent and bind persons whose interests as possible appointees are subject to the power. The rights of the holder of a presently exercisable general power of appointment are governed by section 5806.03 of the Revised Code.

Sec. 5804.02. (A) A trust is created only if all of the following apply:

(1) ~~The~~ Subject to division (F) of this section, the settlor of the trust, other than the settlor of a trust created by a court order, has capacity to create a trust.

(2) ~~The~~ Subject to division (F) of this section, the settlor of the trust, other than the settlor of a trust created by a court order, indicates an intention to create the trust.

(3) The trust has a definite beneficiary or is one of the following:

(a) A charitable trust;

(b) A trust for the care of an animal, as provided in section 5804.08 of the Revised Code;

(c) A trust for a noncharitable purpose, as provided in section 5804.09 of the Revised Code.

(4) The trustee has duties to perform.

(5) The same person is not the sole trustee and sole beneficiary.

(B) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(C) A power in a trustee or other person to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails, and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

(D) A trust is valid regardless of the existence, size, or character of the corpus of the trust. This division applies to any trust instrument that was executed prior to, or is executed on or after, January 1, 2007.

(E) A trust is not invalid because a person, including, but not limited to, the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial enjoyment of the corpus of the trust, provided that one or more other persons hold a vested, contingent, or expectant interest relative to the enjoyment of the corpus of the trust upon the cessation of the present beneficial enjoyment. A merger of the legal and equitable titles to the corpus of a trust described in this division does not occur in its creator, and, notwithstanding any contrary provision of Chapter 2107. of the Revised Code, the trust is not a testamentary trust that is required to comply with that chapter in order for its corpus to be legally distributed to other beneficiaries in accordance with the provisions of the trust upon the cessation of the present beneficial enjoyment. This division applies to any trust that satisfies the provisions of this division, whether the trust was executed prior to, on, or after October 10, 1991.

(F) An agent under a power of attorney may create a trust for the principal, whether or not the principal has capacity to create the trust and indicates an intention to create the trust, but only as provided in sections 1337.21 to 1337.64 of the Revised Code, including sections 1337.42 and 1337.58 of the Revised Code and their limitations on creation of trusts and on gifts of property of the principal and the duty of the agent to attempt to preserve the principal's estate plan.

Sec. 5808.16. Without limiting the authority conferred by section 5808.15 of the Revised Code, a trustee may do all of the following:

(A) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(B) Acquire or sell property, for cash or on credit, at public or private sale;

(C) Exchange, partition, or otherwise change the character of trust property;

(D) Deposit trust money in an account in a regulated financial-service institution;

(E) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(F) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(G) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to do any of the following:

(1) Vote, or give proxies to vote, with or without power of substitution, or enter into or

continue a voting trust agreement;

(2) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(3) Pay calls, assessments, and other sums chargeable or accruing against the securities and sell or exercise stock subscription or conversion rights;

(4) Deposit the securities with a depositary or other regulated financial-service institution.

(H) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(I) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(J) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(K) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

(L) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(M) With respect to possible liability for violation of environmental law, do any of the following:

(1) Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(2) Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(3) Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(4) Compromise claims against the trust that may be asserted for an alleged violation of environmental law;

(5) Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law.

(N) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(O) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(P) Exercise elections with respect to federal, state, and local taxes;

(Q) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, exercise rights under any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, including the right to indemnification for

expenses and against liabilities, and take appropriate action to collect the proceeds;

(R) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(S) Guarantee loans made by others to the settlor of a revocable trust and, if the settlor so directs, guarantee loans made by others to a third party and mortgage, pledge, or grant a security interest in the property of a revocable trust to secure the payment of loans made by others to the settlor of the revocable trust and, if the settlor so directs, loans made by others to a third party;

(T) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(U) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by doing any of the following:

(1) Paying it to the beneficiary's guardian of the estate, or, if the beneficiary does not have a guardian of the estate, the beneficiary's guardian of the person;

(2) Paying it to the beneficiary's custodian under sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code and, for that purpose, creating a custodianship;

(3) If the trustee does not know of a guardian of the person or estate, or custodian, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;

(4) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

(V) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(W) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(X) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(Y) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(Z) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(AA) Employ agents, attorneys, accountants, investment advisors, and other professionals.

Sec. 5812.32. (A) As used in this section~~, "payment" :~~

(1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. "Payment" includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer~~, including~~ . For purposes of divisions (D), (E), (F), and (G) of this section, "payment" also includes any payment made from

any separate fund regardless of the reason for the payment.

(2) "Separate fund" includes a private or commercial annuity, an individual retirement account, or a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(B) To the extent that a payment is characterized as interest ~~or~~ , a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate ~~it~~ the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(C) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten per cent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this division, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(D) ~~If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than is provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction~~ Except as otherwise provided in division (E) of this section, divisions (F) and (G) of this section apply, and divisions (B) and (C) of this section do not apply, in determining the allocation of a payment made from a separate fund to either of the following:

(1) A trust for which an election to qualify for a marital deduction under section 2056(b)(7) of the Internal Revenue Code of 1986, 26 U.S.C. 2056(b)(7), as amended, has been made;

(2) A trust that qualifies for the marital deduction under section 2056(b)(5) of the Internal Revenue Code of 1986, 26 U.S.C. 2056(b)(5), as amended.

(E) Divisions (D), (F), and (G) of this section do not apply if and to the extent that the series of payments would, without the application of division (D) of this section, qualify for the marital deduction under section 2056(b)(7)(C) of the Internal Revenue Code of 1986, 26 U.S.C. 2056(b)(7)(C), as amended.

(F) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to sections 5812.01 to 5812.52 of the Revised Code. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(G) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four per cent of the fund's value according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the value of the fund, the internal income of the fund is deemed to equal the product of the interest

rate and the present value of the expected future payments, as determined under section 7520 of the Internal Revenue Code of 1986, 26 U.S.C. 7520, as amended, for the month preceding the accounting period for which the computation is made.

(H) This section does not apply to ~~payments~~ a payment to which section 5812.33 of the Revised Code applies.

(I)(1) This section applies to a trust described in division (D) of this section on and after any of the following dates:

(a) If the trust has not received a payment from a separate fund on the effective date of the amendment of this section, the date of the decedent's death;

(b) If the trust receives the first payment from any and all separate funds payable to the trust in the calendar year beginning January 1 of the year in which the amendment of this section takes effect, the date of the decedent's death;

(c) If the trust is not described in division (I)(1)(a) or (b) of this section, January 1 of the year in which the amendment of this section takes effect.

(2) For purposes of division (I)(1) of this section, "decedent" means the individual by reason of whose death the trust may receive a payment from the separate fund.

Sec. 5812.46. (A) A tax required to be paid by a trustee based on receipts allocated to income shall be paid from income.

(B) A tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(C) A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid ~~proportionately~~ as follows:

(1) From income, to the extent that receipts from the entity are allocated only to income;

(2) From principal, ~~as follows:~~

~~(a) To~~ to the extent that receipts from the entity are allocated only to principal; ~~and~~

~~(b) To~~ (3) Proportionately from principal and income, to the extent that receipts from the entity are allocated to both income and principal;

(4) From principal, to the extent that the ~~trust's share of the entity's taxable income~~ tax exceeds the total receipts ~~described in divisions (C)(1) and (2)(a) of this section~~ from the entity.

(D) ~~For purposes of this section, receipts allocated to principal or income shall be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax~~ After applying divisions (A) to (C) of this section, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

Sec. 5812.51. (A) Sections 5812.01 to 5812.52 of the Revised Code may be cited as the "uniform principal and income act ~~(1997)~~."

(B) In applying and construing the "uniform principal and income act ~~(1997),~~", ~~;~~ consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the "uniform principal and income act~~(1997),~~"~~.~~

Sec. 5814.01. As used in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, unless the context otherwise requires:

(A) "Benefit plan" means any plan of an employer for the benefit of any employee, any plan

for the benefit of any partner, or any plan for the benefit of a proprietor, and includes, but is not limited to, any pension, retirement, death benefit, deferred compensation, employment agency, stock bonus, option, or profit-sharing contract, plan, system, account, or trust.

(B) "Broker" means a person that is lawfully engaged in the business of effecting transactions in securities for the account of others. A "broker" includes a financial institution that effects such transactions and a person who is lawfully engaged in buying and selling securities for the person's own account, through a broker or otherwise, as a part of a regular business.

(C) "Court" means the probate court.

(D) "The custodial property" includes:

(1) All securities, money, life or endowment insurance policies, annuity contracts, benefit plans, real estate, tangible and intangible personal property, proceeds of a life or endowment insurance policy, an annuity contract, or a benefit plan, and other types of property under the supervision of the same custodian for the same minor as a consequence of a transfer or transfers made to the minor, a gift or gifts made to the minor, or a purchase made by the custodian for the minor, in a manner prescribed in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code;

(2) The income from the custodial property;

(3) The proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment, or other disposition of the securities, money, life or endowment insurance policies, annuity contracts, benefit plans, real estate, tangible and intangible personal property, proceeds of a life or endowment insurance policy, an annuity contract, or a benefit plan, other types of property, and income.

(E) "Custodian" or "successor custodian" means a person so designated in a manner prescribed in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code.

(F) "Financial institution" means any bank, as defined in section 1101.01, any building and loan association, as defined in section 1151.01, any credit union as defined in section 1733.01 of the Revised Code, and any federal credit union, as defined in the "Federal Credit Union Act," 73 Stat. 628 (1959), 12 U.S.C.A. 1752, as amended.

(G) "Guardian of the minor" includes the general guardian, guardian, tutor, or curator of the property, estate, or person of a minor.

(H) "Issuer" means a person who places or authorizes the placing of the person's name on a security, other than as a transfer agent, to evidence that it represents a share, participation, or other interest in the person's property or in an enterprise, or to evidence the person's duty or undertaking to perform an obligation that is evidenced by the security, or who becomes responsible for or in place of any such person.

(I) "Legal representative" of a person means the executor, administrator, general guardian, guardian, committee, conservator, tutor, or curator of the person's property or estate.

(J) "Member of the minor's family" means a parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt of the minor, whether of the whole or half blood, or by adoption.

(K) ~~"Minor"~~ (1) Except as provided in division (K)(2) of this section, "minor" means ~~a person~~ an individual who has not attained the age of twenty-one years.

(2) When used with reference to the beneficiary for whose benefit custodial property is held or is to be held, "minor" means an individual who has not attained the age at which the custodian is

required under section 5814.09 of the Revised Code to transfer the custodial property to the beneficiary.

(L) "Security" includes any note, stock, treasury stock, common trust fund, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under an oil, gas, or mining title or lease, collateral trust certificate, transferable share, voting trust certificate, or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing. A "security" does not include a security of which the donor or transferor is the issuer. A security is in "registered form" when it specifies a person who is entitled to it or to the rights that it evidences and its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer.

(M) "Transfer" means a disposition, other than a gift, by a person who is eighteen years of age or older that creates custodial property under sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code.

(N) "Transfer agent" means a person who acts as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of transfers of its securities, in the issue of new securities, or in the cancellation of surrendered securities.

(O) "Transferor" means a person who is eighteen years of age or older, who makes a transfer.

(P) "Trust company" means a financial institution that is authorized to exercise trust powers.

(Q) "Administrator" includes an "administrator with the will annexed."

Sec. 5814.02. (A) A person who is eighteen years of age or older may, during the person's lifetime, make a gift or transfer of a security, money, a life or endowment insurance policy, an annuity contract, a benefit plan, real estate, tangible or intangible personal property, or any other property to, may designate as beneficiary of a life or endowment insurance policy, an annuity contract, or a benefit plan, or make a transfer by the irrevocable exercise of a power of appointment in favor of, a person who is a minor on the date of the gift or transfer:

(1) If the subject of the gift or transfer is a security in registered form, by registering it in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act~~.~~;"~~:~~

(2) If the subject of the gift or transfer is a security not in registered form, by delivering it to the donor or transferor, another person who is eighteen years of age or older, or a trust company, accompanied by a statement of a gift or transfer in the following form, in substance, signed by the donor or transferor and the person or trust company designated as custodian:

"GIFT OR TRANSFER UNDER THE OHIO TRANSFERS TO MINORS ACT

I, ... (name of donor or transferor), hereby deliver to (name of custodian) as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act, the following security (ies): (insert an appropriate description of the security or securities delivered, sufficient to identify it or them).

.....

(signature of donor or transferor)

..... (name of custodian) hereby acknowledges receipt of the above described security (ies) as custodian for the above minor under the Ohio Transfers to Minors Act.

Dated: ....

(signature of custodian)"

(3) If the subject of the gift or transfer is money, by paying or delivering it to a broker, or a financial institution for credit to an account in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act."

(4) If the subject of the gift or transfer is a life or endowment insurance policy, an annuity contract, or a benefit plan, by assigning the policy, contract, or plan to the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act."

(5) If the subject of the gift or transfer is an interest in real estate, by executing and delivering in the appropriate manner a deed, assignment, or similar instrument in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act."

(6) If the subject of the gift or transfer is tangible personal property, by delivering it to the donor or transferor, another person who is eighteen years of age or older, or a trust company, accompanied by a statement of a gift or transfer in the following form, in substance, signed by the donor or transferor and the person or trust company designated as custodian:

"GIFT OR TRANSFER UNDER THE OHIO TRANSFERS TO MINORS ACT

I, ... (name of donor or transferor), hereby deliver to ..... (name of custodian) as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act, the following property: (insert an appropriate description of the property delivered, sufficient to identify it).

.....

(signature of donor or transferor)

..... (name of custodian) hereby acknowledges receipt of the above described property as custodian for the above minor under the Ohio Transfers to Minors Act.

Dated: ....

(signature of custodian)"

(7) If the subject of the gift or transfer is tangible personal property, title to which is evidenced by a certificate of title issued by a department or agency of a state or of the United States, by issuing title to the donor or transferor, another person who is eighteen years of age or older, or a trust company, accompanied by a statement of a gift or transfer in the following form, in substance: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act;"; or by delivering the title to another person who is eighteen years of age or older or a trust company,

endorsed to that person followed in substance by the following words: "as custodian for ~~.....~~ (name of minor) under the Ohio Transfers to Minors Act."

(8) If the subject of the gift or transfer is the designation of a minor as beneficiary of a life or endowment insurance policy, an annuity contract, or a benefit plan, by designating as beneficiary of the policy, contract, or plan the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act."

(9) If the subject of the gift or transfer is an irrevocable exercise of a power of appointment in favor of a minor or is an interest in any property that is not described in divisions (A)(1) to (8) of this section, by causing the ownership of the property to be transferred by any written document in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act."

(B) Trustees, inter vivos or testamentary, executors, and administrators having authority to distribute or pay any trust or estate property to or for the benefit of a minor, or having authority to distribute or pay any trust or estate property to any other person for the benefit of a minor may, if authorized by a will or trust instrument, distribute or pay trust or estate property of any type mentioned in division (A) of this section in the manner and form provided in that division, and may name the custodian or successor custodian of the property if the will or trust instrument does not name an eligible custodian, or if the will or trust does not name an eligible successor custodian and the naming of a successor custodian is necessary. A person who is eighteen years of age or older, in the person's will or trust instrument, may provide that the fiduciary shall make any payment or distribution as provided in this division and may name the custodian and a successor custodian of the trust or estate property. As to any distribution or payment so made, the testator of a will, under the provisions of which a testamentary trust or estate is being administered, or the settlor of an inter vivos trust shall be deemed the donor or transferor.

(C) Any gift, transfer, payment, or distribution that is made in a manner prescribed in division (A), (B), or (E) of this section may be made to only one minor and only one person may be the custodian. All gifts, transfers, payments, and distributions made by a person in a manner prescribed in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code to the same custodian for the benefit of the same minor result in a single custodianship.

(D) A donor or transferor who makes a gift or transfer to a minor in a manner prescribed in division (A) of this section and a trustee, executor, or administrator acting under division (B) or (E) of this section shall promptly do all things within the donor's, transferor's, trustee's, executor's, or administrator's power to put the subject of the gift or transfer in the possession and control of the custodian, but neither the donor's, transferor's, trustee's, executor's, or administrator's failure to comply with this division, nor the designation by the donor, transferor, trustee, executor, or administrator of an ineligible custodian, nor the renunciation by the person or trust company designated as custodian, affects the consummation of the gift or transfer.

(E) If there is no will, or if a will, trust, or other governing instrument does not contain an authorization to make a transfer as described in this division, a trustee, executor, or administrator may make a transfer in a manner prescribed in division (A) of this section to self, another person who

is eighteen years of age or older, or a trust company, as custodian, if all of the following apply:

(1) Irrespective of the value of the property, the trustee, executor, or administrator considers the transfer to be in the best interest of the minor;

(2) Irrespective of the value of the property, the transfer is not prohibited by or inconsistent with the applicable will, trust agreement, or other governing instrument;

(3) If the value of the property exceeds ~~ten~~ twenty-five thousand dollars, the transfer is authorized by the appropriate court.

(F) Except with respect to real property, a donor or transferor who makes a gift or transfer to a minor in a manner prescribed in division (A) of this section and a trustee, executor, or administrator acting under division (B) or (E) of this section may also designate one or more successor custodians, in substance, by adding to such designation the following words or words of similar import for the successor or successors designated: "In the event of the death or inability or unwillingness to serve of ..... (name of custodian), or any successor custodian designated hereby, ... (name of first successor custodian), followed by ..... (name of second successor custodian), in the order named, shall serve as successor custodian."

Sec. 5814.03. (A) A gift or transfer made in a manner prescribed in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, is irrevocable and conveys to the minor indefeasibly vested legal title to the security, money, life or endowment insurance policy, annuity contract, benefit plan, real estate, tangible or intangible personal property, or other property given or, subject to the right of the owner of the policy, contract, or benefit plan to change the beneficiary if the custodian is not the owner, to the proceeds of a life or endowment insurance policy, an annuity contract, or a benefit plan given, but no guardian of the minor has any right, power, duty, or authority with respect to the custodial property except as provided in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code.

(B) By making a gift or transfer in a manner prescribed in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, the donor or transferor incorporates in the gift or transfer all the provisions of these sections and grants to the custodian, and to any issuer, transfer agent, financial institution, broker, or third person dealing with a person or trust company designated as custodian, the respective powers, rights, and immunities provided in these sections.

Sec. 5814.04. (A) The custodian shall collect, hold, manage, invest, and reinvest the custodial property.

(B) The custodian shall pay over to the minor for expenditure by the minor, or expend for the use or benefit of the minor, as much of or all the custodial property as the custodian considers advisable for the use and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in the custodian's discretion considers suitable and proper, with or without court order, with or without regard to the duty or ability of the custodian or of any other person to support the minor or the minor's ability to do so, and with or without regard to any other income or property of the minor that may be applicable or available for any purpose. Any payment or expenditure that is made under this division is in addition to, is not a substitute for, and does not affect the obligation of any person to support the minor for whom the payment or expenditure is made.

(C) The court, on the petition of a parent or guardian of the minor or of the minor, if the minor has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by the minor or to expend as much of or all the custodial property as is necessary for the

use and benefit of the minor.

(D)(1) Except as provided in division (D)(2) of this section and in section 5814.09 of the Revised Code, to the extent that the custodial property is not so expended, the custodian shall deliver or pay the custodial property over to the minor on the minor's attaining the age of twenty-one years or, if the minor dies before attaining the age of twenty-one years, shall, upon the minor's death, deliver or pay the custodial property over to the estate of the minor.

(2) If the donor or transferor, in the written instrument that makes or provides for the gift or transfer, directs the custodian to deliver or pay over the custodial property to the minor on the minor's attaining any age between eighteen and twenty-one, the custodian shall deliver or pay over the custodial property to the minor on the minor's attaining that age, or, if the minor dies before attaining that age, the custodian shall, upon the minor's death, deliver or pay the custodial property over to the estate of the minor.

(E) The custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent person of discretion and intelligence dealing with the property of another, except that the custodian may, in the discretion of the custodian and without liability to the minor or the estate of the minor, retain any custodial property received in a manner prescribed in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code. If a custodian has special skills or is named custodian on the basis of representations of special skills or expertise, the custodian is under a duty to use those skills or that expertise.

(F) The custodian may sell, exchange, convert, or otherwise dispose of custodial property in the manner, at the time or times, for the price or prices, and upon the terms the custodian considers advisable. The custodian may vote in person or by general or limited proxy a security that is custodial property. The custodian may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of an issuer of a security that is custodial property, and to the sale, lease, pledge, or mortgage of any property by or to such an issuer, and to any other action by such an issuer. The custodian may purchase any life or endowment insurance policy or annuity contract on the life of the minor or any member of the family of the minor and pay, from funds in the custodian's custody, any premiums on any life or endowment insurance policy or annuity contract held by the custodian as custodial property. The custodian may execute and deliver any and all instruments in writing that the custodian considers advisable to carry out any of the custodian's powers as custodian.

(G) The custodian shall register each security that is custodial property and in registered form in the name of the custodian, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act," or shall maintain each security that is custodial property and in registered form in an account with a broker or in a financial institution in the name of the custodian, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act." A security held in account with a broker or in a financial institution in the name of the custodian may be held in the name of the broker or financial institution. A security that is custodial property and in registered form and that is held by a broker or in a financial institution in which the broker or financial institution does not have a lien for indebtedness due to it from a custodial account may not be pledged, lent, hypothecated, or disposed of except upon the specific instructions of the custodian. The custodian shall hold all money that is custodial

property in an account with a broker or in a financial institution in the name of the custodian, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act." The custodian shall hold all life or endowment insurance policies, annuity contracts, or benefit plans that are custodial property in the name of the custodian, followed, in substance, by the words "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act." The custodian shall take title to all real estate that is custodial property in the name of the custodian, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act." In the event one or more successor custodians have been designated by the donor, transferor, trustee, executor, or administrator pursuant to division (F) of section 5814.02 of the Revised Code or by the custodian pursuant to division (E) of section 5814.07 of the Revised Code, each registration, account, policy, contract, plan, or title in the name of the custodian set forth in this division shall include such designation of successor custodian or custodians. The custodian shall keep all other custodial property separate and distinct from the custodian's own property in a manner to identify it clearly as custodial property.

(H) The custodian shall keep records of all transactions with respect to the custodial property and make the records available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if the minor has attained the age of fourteen years.

(I) A custodian has, with respect to the custodial property, in addition to the rights and powers provided in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, all the rights and powers that a guardian has with respect to property not held as custodial property.

(J) The custodian may invest in or pay premiums on any life or endowment insurance policy or annuity contract on either of the following:

(1) The life of the minor, if the minor or the estate of the minor is the sole beneficiary under the policy or contract;

(2) The life of any person in whom the minor has an insurable interest, if the minor, the minor's estate, or the custodian in the custodian's capacity as custodian is the sole beneficiary.

(K) All of the rights, powers, and authority of the custodian over custodial property, including all of the incidents of ownership in any life or endowment insurance policy, annuity contract, or benefit plan, are held only in the capacity of the custodian as custodian.

Sec. 5814.05. (A) A custodian is entitled to reimbursement from the custodial property for reasonable expenses incurred in the performance of the custodian's duties.

(B) A custodian may act without compensation for the custodian's services.

(C) Unless the custodian is a donor or transferor, the custodian may receive from custodial property reasonable compensation for the custodian's services determined by one of the following standards in the order stated:

(1) A direction by the donor or transferor when the gift or transfer is made;

(2) A statute of this state applicable to custodians;

(3) The statute of this state applicable to guardians;

(4) An order of the court.

(D) Except as otherwise provided in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, a custodian shall not be required to give a bond for the performance of the custodian's duties.

(E) A custodian not compensated for the custodian's services is not liable for losses to the

custodial property unless they result from the custodian's bad faith, intentional wrongdoing, or gross negligence or from the custodian's failure to maintain the standard of prudence in investing the custodial property provided in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code.

Sec. 5814.06. An issuer, transfer agent, financial institution, broker, life insurance company, or other person acting on the instructions of or otherwise dealing with any person purporting to act as a donor or transferor or dealing with any person or trust company purporting to act as a custodian is not required to do any of the following:

(A) Determine either of the following:

(1) Whether the person or trust company designated by the purported donor or transferor, or the person or trust company purporting to act as a custodian, has been duly designated;

(2) Whether any purchase, sale, or transfer to or by, or any other act of, any person or trust company purporting to act as a custodian is in accordance with or authorized by sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code.

(B) Inquire into the validity or propriety under sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code of any instrument or instructions executed or given by a person purporting to act as a donor or transferor or by a person or trust company purporting to act as a custodian;

(C) See to the application by any person or trust company purporting to act as a custodian of any money or other property paid or delivered to the person or trust company.

Sec. 5814.07. (A) Any person who is eighteen years of age or older or a trust company is eligible to become a successor custodian. A successor custodian has all the rights, powers, duties, and immunities of a custodian designated in a manner prescribed by sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code.

(B) A custodian may resign and designate the custodian's successor by doing all of the following:

(1) Executing an instrument of resignation that designates the successor custodian;

(2) Causing each security that is custodial property and in registered form to be registered in the name of the successor custodian followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act;"

(3) Executing in the appropriate manner a deed, assignment, or similar instrument for all interest in real estate that is custodial property in the name of the successor custodian, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act;";

(4) Delivering to the successor custodian the instrument of resignation, each security registered in the name of the successor custodian, each deed, assignment, or similar instrument for all interest in real estate that is in the name of the successor custodian, and all other custodial property, together with any additional instruments that are required for the transfer of the custodial property.

(C) A custodian may petition the court for permission to resign and for the designation of a successor custodian.

(D) A custodian may designate by the custodian's will a successor custodian, which designation is effective at the custodian's death. Upon the custodian's death, the custodian's legal representative shall do each of the following:

(1) Cause each security that is custodial property and in registered form to be registered in the

name of the successor custodian, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act;";

(2) Execute in the appropriate manner a deed, assignment, or similar instrument for all interest in real estate that is custodial property in the name of the successor custodian, followed, in substance, by the words: "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act;";

(3) Deliver to the successor custodian each security registered in the name of the successor custodian, each deed, assignment, or similar instrument for all interest in real estate that is in the name of the successor custodian, and all other custodial property, together with any additional instruments that are required for the transfer of the custodial property.

(E) A custodian may designate one or more successor custodians by transferring the property of any type specified in division (A) of section 5814.02 of the Revised Code, other than real estate, in the manner and form provided in that division, to self as custodian, followed by the designation of the successor custodian or custodians in the manner and form provided in division (F) of section 5814.02 of the Revised Code. A custodian may designate one or more successor custodians of real property by designating the successor custodian or custodians in the manner and form provided in sections 5302.22 to 5302.23 of the Revised Code. A designation of a successor custodian or custodians by the custodian shall replace any previous designation of successor custodians by the donor, transferor, or previous custodian.

(F) If no eligible successor custodian is designated by the donor ~~or~~, transferor, trustee, executor, or administrator pursuant to division (F) of section 5814.02 of the Revised Code or in the donor's or transferor's will or trust, or by the custodian in the custodian's will~~, or if the custodian dies intestate~~ pursuant to division (D) of this section or by transfer pursuant to division (E) of this section, the legal representative of a custodian who is deceased or is adjudged to be an incompetent by a court~~, the legal representative of the custodian~~ may designate a successor custodian. If the court in which the estate or guardianship proceedings relative to the custodian are pending approves the designation, the designation shall be regarded as having been effective as of the date of the death of the custodian or as of the date the custodian was adjudged to be an incompetent. Upon the approval of the court, the legal representative of the custodian shall cause the custodial property to be transferred or registered in the name of the successor custodian as provided in divisions (D)(1) to (3) of this section.

~~(F)~~ (G) If a person or entity designated as successor custodian is not eligible, or renounces or dies before the minor attains the age of twenty-one years or before the minor attains the age at which the custodian is required under section 5814.09 of the Revised Code to deliver the custodial property to the minor, or if the custodian dies without designating a successor custodian and division ~~(E)~~ (F) of this section does not apply because the custodian does not have a legal representative, the guardian of the minor shall be the successor custodian. If the minor does not have a guardian, a donor or transferor, the legal representative of the donor or transferor, the legal representative of the custodian, a member of the minor's family who is eighteen years of age or older, or the minor, if the minor has attained the age of fourteen years, may petition the court for the designation of a successor custodian.

~~(G)~~ (H) A donor or transferor, the legal representative of a donor or transferor, a member of the minor's family who is eighteen years of age or older, a guardian of the minor, or the minor, if the

minor has attained the age of fourteen years, may petition the court that, for cause shown in the petition, the custodian be removed and a successor custodian be designated or, in the alternative, that the custodian be required to give bond for the performance of the custodian's duties.

~~(H)~~ (I) Upon the filing of a petition as provided in this section, the court shall grant an order, directed to the persons and returnable on any notice that the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, grant any relief that the court finds to be in the best interests of the minor.

Sec. 5814.08. (A) The minor, if the minor has attained the age of fourteen years, or the legal representative of the minor, a member of the minor's family who is eighteen years of age or older, or a donor or transferor or the donor's or transferor's legal representative may petition the court for an accounting by the custodian or the custodian's legal representative. A successor custodian may petition the court for an accounting by the custodian that the successor custodian succeeded.

(B) The court, in a proceeding under sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, or otherwise, may require or permit the custodian or the custodian's legal representative to account and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer of the custodial property.

Sec. 5814.09. (A) Subject to the requirements and limitations of this section, the time for delivery to the minor of custodial property transferred under or pursuant to division (A) of section 5814.02 of the Revised Code may be delayed until a specified time after the minor attains the age of twenty-one years, which time shall be specified in the written instrument that makes or provides for the gift or transfer pursuant to divisions (A)(1) to (9) of section 5814.02 of the Revised Code.

(B) To specify a delayed time for delivery to the minor of the custodial property, the words "as custodian for ..... (name of minor) until age ..... (age of delivery of property to minor) under the Ohio Transfers to Minors Act," shall be substituted in substance for the words "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act."

(C) The time for delivery to the minor of custodial property transferred under a will, trust instrument, or irrevocable exercise of a testamentary power of appointment may be delayed under this section only if the governing will, trust, or exercise of the power of appointment provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time shall not be later than the date the minor attains the age of twenty-five years.

(D) If the custodial property is transferred by inter vivos gift and the time for delivery of the custodial property to the minor is delayed beyond the time the minor attains the age of twenty-one years, the custodian, nevertheless, shall deliver the custodial property to the minor if requested in writing by the minor within sixty days of the minor attaining the age of twenty-one years, unless the donor or transferor, in the written instrument of gift or transfer pursuant to divisions (A)(1) to (9) of section 5814.02 of the Revised Code, provides that the custodial property may not be delivered to the minor prior to attaining the specified age of delivery, which time shall not be later than the date the minor attains the age of twenty-five years.

(E) If the time for delivery to the minor of custodial property is delayed until a specified time after the minor attains the age of twenty-one years and the minor dies prior to attaining that age, the custodian shall, upon the minor's death, deliver the custodial property to the estate of the minor.

(F) A custodian may not commingle the assets of custodial property that have different delivery dates.

Sec. ~~5814.09~~ 5814.10. (A) Sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code shall be construed to effectuate their general purpose to make uniform the law of those states that enact similar provisions.

(B) Sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code shall not be construed as providing an exclusive method for making gifts or transfers to minors.

(C) Nothing in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code~~,~~ shall affect gifts made under former sections 1339.19 to 1339.28 of the Revised Code, nor the powers, duties, and immunities conferred by gifts in such manner upon custodians and persons dealing with custodians. Sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code henceforth apply, however, to all gifts made in a manner and form prescribed in former sections 1339.19 to 1339.28 of the Revised Code, except insofar as the application impairs constitutionally vested rights. Sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code shall be construed as a continuation of the provisions of former sections 1339.19 to 1339.28 of the Revised Code, according to the language employed, and not as a new enactment.

(D) Nothing in sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, as of May 7, 1986, shall affect gifts made under those sections as they existed prior to May 7, 1986, or the powers, duties, and immunities conferred by the gifts in any manner upon custodians and persons dealing with custodians. Sections 5814.01 to ~~5814.09~~ 5814.10 of the Revised Code, as of May 7, 1986, hereafter apply to all gifts made in a manner and form prescribed in those sections as they existed prior to May 7, 1986, except to the extent that the application of those sections, as of May 7, 1986, would impair constitutionally vested rights.

Sec. 5815.23. (A) Except as provided in division (B) of this section, an instrument that creates an inter vivos or testamentary trust shall not require or permit the accumulation for more than one year of any income of property that satisfies both of the following:

(1) The property is granted to a surviving spouse of the testator or other settlor.

(2) The property qualifies for the federal estate tax marital deduction allowed by subtitle B, Chapter 11 of the "Internal Revenue Code of 1986," 26 U.S.C. 2056, as amended, the estate tax marital deduction allowed by division (A) of section 5731.15 of the Revised Code, or the qualified terminable interest property deduction allowed by division (B) of section 5731.15 of the Revised Code.

(B)(1) Division (A) of this section does not apply if an instrument that creates an inter vivos or testamentary trust expressly states the intention of the testator or other settlor that obtaining a marital deduction or a qualified terminable interest property deduction as described in division (A)(2) of this section is less important than requiring or permitting the accumulation of income of property in accordance with a provision in the instrument that requires or permits the accumulation for more than one year of any income of property.

(2) Division (A) of this section does not apply to any beneficiary of an inter vivos or testamentary trust other than the surviving spouse of the testator or other settlor or to any inter vivos or testamentary trust of which the surviving spouse of the testator or other settlor is a beneficiary if an interest in property does not qualify for a marital deduction or a qualified terminable interest

property deduction as described in division (A)(2) of this section.

(C)~~(1) The trustee of a trust that qualifies for an estate tax marital deduction for federal or Ohio estate tax purposes and that is the beneficiary of an individual retirement account has a fiduciary duty, in regard to the income distribution provision of the trust, to withdraw and distribute the income of the individual retirement account, at least annually, to the surviving spouse of the testator or other settlor.~~

~~(2) A trustee's fiduciary duty as described in division (C)(1) of this section is satisfied if the terms of the trust instrument expressly provide the surviving spouse a right to withdraw all of the assets from the trust or a right to compel the trustee to withdraw and distribute the income of the individual retirement account to the surviving spouse.~~

~~(D)~~ Divisions (A)~~;~~ and (B)~~, and (C)(1)~~ of this section are intended to codify existing fiduciary and trust law principles relating to the interpretation of a testator's or other settlor's intent with respect to the income provisions of a trust. Divisions (A)~~;~~ and (B)~~, and (C)~~ of this section apply to trust instruments executed prior to and existing on October 1, 1996, or executed thereafter. The trustee of a trust described in division (A) or (B) of this section, in a written trust amendment, may elect to not apply divisions (A) and (B) of this section to the trust. Any election of that nature, when made, is irrevocable.

SECTION 2. That existing sections 1337.60, 2101.026, 2105.02, 2105.14, 2105.31, 2105.32, 2105.33, 2105.34, 2105.35, 2105.36, 2105.37, 2105.39, 2106.13, 2106.18, 2107.07, 2107.10, 2109.62, 2111.131, 2113.86, 4505.10, 5801.10, 5803.02, 5804.02, 5808.16, 5812.32, 5812.46, 5812.51, 5814.01, 5814.02, 5814.03, 5814.04, 5814.05, 5814.06, 5814.07, 5814.08, 5814.09, and 5815.23 and section 2105.38 of the Revised Code are hereby repealed.

SECTION 3. Section 2101.16 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. S.B. 23 and Am. Sub. S.B. 43 of the 130th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Speaker _____ of the House of Representatives.

President _____ of the Senate.

Passed _____, 20____

Approved _____, 20____

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

_____

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ____ day of _____, A. D. 20____.

_____

Secretary of State.

File No. _____ Effective Date _____

As Passed by the House

132nd General Assembly

Regular Session **Sub. H. B. No. 595**

2017-2018

Representatives Cupp, Rezabek

Cosponsors: Representatives Seitz, Riedel, Manning, Anielski, Ashford, Blessing, Brown, Craig, Dever, Ginter, Green, Hambley, Holmes, Leland, Miller, Perales, Rogers, Wiggam, Wilkin

A BILL

To amend sections 313.14, 2101.24, 2105.19, 2107.01, 2107.05, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.52, 2107.71, 2137.01, 2721.03, 5802.03, 5806.04, and 5808.19, to enact sections 2111.182, 2111.52, 2113.032, 5802.05, 5817.01, 5817.02, 5817.03, 5817.04, 5817.05, 5817.06, 5817.07, 5817.08, 5817.09, 5817.10, 5817.11, 5817.12, 5817.13, and 5817.14, and to repeal sections 2107.081, 2107.082, 2107.083, 2107.084, and 2107.085 of the Revised Code relative to procedures for a testator to file a declaratory judgment action to declare the validity of a will prior to death and the settlor of a trust to file such an action to declare its validity, exceptions to antilapse provisions in class gifts in wills and trusts, incorporation of a written trust into a will, trusts for a minor, arbitration of trust disputes, the creation of county and multicounty guardianship services boards, the coroner's disposition of person dying of suspicious or

unusual death, an application for the release of medical records and medical billing records, and adding involuntary manslaughter not resulting from a felony vehicular homicide offense to the list of offenses excluding an individual from inheriting from a decedent.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 313.14, 2101.24, 2105.19, 2107.01, 2107.05, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.52, 2107.71, 2137.01, 2721.03, 5802.03, 5806.04, and 5808.19 be amended and sections 2111.182, 2111.52, 2113.032, 5802.05, 5817.01, 5817.02, 5817.03, 5817.04, 5817.05, 5817.06, 5817.07, 5817.08, 5817.09, 5817.10, 5817.11, 5817.12, 5817.13, and 5817.14 of the Revised Code be enacted to read as follows:

Sec. 313.14. (A)(1) The coroner shall make a reasonable effort to notify any known relatives of a deceased person who meets death in the manner described by section 313.12 of the Revised Code by letter or otherwise. The ~~next of kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person. If relatives of the deceased are unknown, the coroner shall make a diligent effort to ascertain the next of kin, other relatives, or friends of the deceased person~~ coroner shall also make a reasonable effort to determine the identity of the person who has been assigned the rights of disposition for the deceased person under sections 2108.70 to 2108.90 of the Revised Code and shall notify that person. After

the coroner has completed the performance of the coroner's legal duties with respect to the body of the deceased person, the coroner shall return the body to that person.

(2) The coroner shall take charge and possession of all moneys, clothing, and other valuable personal effects of ~~such~~ the deceased person, found in connection with or pertaining to ~~such~~ the body, and shall store ~~such~~ the possessions in the county coroner's office or such other suitable place as is provided for ~~such~~ that storage by the board of county commissioners. If the coroner considers it advisable, the coroner may, after taking adequate precautions for the security of ~~such~~ those possessions, store the possessions where the coroner finds them until other storage space becomes available. The person who has been assigned the rights of disposition for the deceased person under sections 2108.70 to 2108.90 of the Revised Code may request the coroner to give those possessions to that person.

(B) In cases in which the cost of the burial is paid by the county, after using such of the clothing as is necessary in the burial of the body, the coroner shall sell at public auction the valuable personal effects of ~~such~~ the deceased persons, found in connection with or pertaining to the unclaimed dead body, except firearms, which shall be disposed of as provided in division (C) of this section. The coroner shall make a verified inventory of ~~such~~ the effects and they shall be sold within eighteen months after burial, or after delivery of ~~such~~ the body in accordance with section 1713.34 of the Revised Code. All moneys derived from ~~such~~ the sale shall be deposited in the county treasury. A notice of ~~such~~ the sale shall be given in one newspaper of general circulation in the county, for five days in succession, and the sale shall be held immediately thereafter.

The cost of such advertisement and notices shall be paid by the board upon the submission of a verified statement ~~therefor~~ for that cost, certified to the coroner.

(C) If a firearm is included in the personal effects of a deceased person who meets death in the manner described by section 313.12 of the Revised Code, the coroner shall deliver the firearm to the chief of police of the municipal corporation within which the body is found, or to the sheriff of the county if the body is not found within a municipal corporation. Upon delivery of the firearm to the chief of police or the sheriff, the chief of police or sheriff shall give the coroner a receipt for the firearm that states the date of delivery and an accurate description of the firearm. The firearm shall be used for evidentiary purposes only.

The person who has been assigned the rights of disposition for the deceased ~~person's next of kin or other relative~~ person under sections 2108.70 to 2108.90 of the Revised Code may request that the firearm be given to ~~the next of kin or other relative~~ that person once the firearm is no longer needed for evidentiary purposes. The chief of police or the sheriff shall give the firearm to ~~the next of kin or other relative~~ that person who requested the firearm only if the ~~next of kin or other relative~~ person may lawfully possess the firearm under applicable law of this state or the United States. The chief of police or the sheriff shall keep a record identifying the ~~next of kin or other relative~~ person to whom the firearm is given, the date the firearm was given to ~~the next of kin or other relative~~ that person, and an accurate description of the firearm.

If ~~a next of kin or other relative~~ the person who has been

assigned the rights of disposition for the deceased person under sections 2108.70 to 2108.90 of the Revised Code does not request the firearm or is not entitled to possess the firearm, the firearm shall be used at the discretion of the chief of police or the sheriff.

(D) This section does not invalidate section 1713.34 of the Revised Code.

Sec. 2101.24. (A)(1) Except as otherwise provided by law, the probate court has exclusive jurisdiction:

(a) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country. If the probate judge is unavoidably absent, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of these acts shall be preserved in the usual records of the probate court.

(b) To grant and revoke letters testamentary and of administration;

(c) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(d) To appoint the attorney general to serve as the administrator of an estate pursuant to section 2113.06 of the Revised Code;

(e) To appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts;

(f) To grant marriage licenses;

(g) To make inquests respecting persons who are so mentally impaired as a result of a mental or physical illness or disability, as a result of intellectual disability, or as a result of chronic substance abuse, that they are unable to manage their property and affairs effectively, subject to guardianship;

(h) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(i) To authorize the sale of lands, equitable estates, or interests in lands or equitable estates, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(j) To authorize the completion of real property contracts on petition of executors and administrators;

(k) To construe wills;

(l) To render declaratory judgments, including, but not limited to, those rendered pursuant to ~~section 2107.084~~ Chapter 5817. of the Revised Code;

(m) To direct and control the conduct of fiduciaries and settle their accounts;

(n) To authorize the sale or lease of any estate created by will if the estate is held in trust, on petition by the trustee;

(o) To terminate a testamentary trust in any case in which a court of equity may do so;

(p) To hear and determine actions to contest the validity of wills;

(q) To make a determination of the presumption of death of missing persons and to adjudicate the property rights and obligations of all parties affected by the presumption;

(r) To act for and issue orders regarding wards pursuant to section 2111.50 of the Revised Code;

(s) To hear and determine actions against sureties on the bonds of fiduciaries appointed by the probate court;

(t) To hear and determine actions involving informed consent for medication of persons hospitalized pursuant to section 5122.141 or 5122.15 of the Revised Code;

(u) To hear and determine actions relating to durable powers of attorney for health care as described in division (D) of section 1337.16 of the Revised Code;

(v) To hear and determine actions commenced by objecting individuals, in accordance with section 2133.05 of the Revised Code;

(w) To hear and determine complaints that pertain to the use or continuation, or the withholding or withdrawal, of life-sustaining treatment in connection with certain patients allegedly in a terminal condition or in a permanently unconscious state pursuant to division (E) of section 2133.08 of the Revised Code, in accordance with that division;

(x) To hear and determine applications that pertain to the withholding or withdrawal of nutrition and hydration from certain patients allegedly in a permanently unconscious state pursuant to section 2133.09 of the Revised Code, in accordance with that section;

(y) To hear and determine applications of attending

physicians in accordance with division (B) of section 2133.15 of the Revised Code;

(z) To hear and determine actions relative to the use or continuation of comfort care in connection with certain principals under durable powers of attorney for health care, declarants under declarations, or patients in accordance with division (E) of either section 1337.16 or 2133.12 of the Revised Code;

(aa) To hear and determine applications for an order relieving an estate from administration under section 2113.03 of the Revised Code;

(bb) To hear and determine applications for an order granting a summary release from administration under section 2113.031 of the Revised Code;

(cc) To hear and determine actions relating to the exercise of the right of disposition, in accordance with section 2108.90 of the Revised Code;

(dd) To hear and determine actions relating to the disinterment and reinterment of human remains under section 517.23 of the Revised Code;

(ee) To hear and determine petitions for an order for treatment of a person suffering from alcohol and other drug abuse filed under section 5119.93 of the Revised Code and to order treatment of that nature in accordance with, and take other actions afforded to the court under, sections 5119.90 to 5119.98 of the Revised Code.

(2) In addition to the exclusive jurisdiction conferred upon the probate court by division (A)(1) of this section, the probate court shall have exclusive jurisdiction over a

particular subject matter if both of the following apply:

(a) Another section of the Revised Code expressly confers jurisdiction over that subject matter upon the probate court.

(b) No section of the Revised Code expressly confers jurisdiction over that subject matter upon any other court or agency.

(B)(1) The probate court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders, and to hear and determine actions as follows:

(a) If jurisdiction relative to a particular subject matter is stated to be concurrent in a section of the Revised Code or has been construed by judicial decision to be concurrent, any action that involves that subject matter;

(b) Any action that involves an inter vivos trust; a trust created pursuant to section 5815.28 of the Revised Code; a charitable trust or foundation; subject to divisions (A)(1)(t) and (y) of this section, a power of attorney, including, but not limited to, a durable power of attorney; the medical treatment of a competent adult; or a writ of habeas corpus;

(c) Subject to section 2101.31 of the Revised Code, any action with respect to a probate estate, guardianship, trust, or post-death dispute that involves any of the following:

(i) A designation or removal of a beneficiary of a life insurance policy, annuity contract, retirement plan, brokerage account, security account, bank account, real property, or tangible personal property;

(ii) A designation or removal of a payable-on-death

beneficiary or transfer-on-death beneficiary;

(iii) A change in the title to any asset involving a joint and survivorship interest;

(iv) An alleged gift;

(v) The passing of assets upon the death of an individual otherwise than by will, intestate succession, or trust.

(2) Any action that involves a concurrent jurisdiction subject matter and that is before the probate court may be transferred by the probate court, on its order, to the general division of the court of common pleas.

(3) Notwithstanding that the probate court has exclusive jurisdiction to render declaratory judgments under Chapter 5817. of the Revised Code, the probate court may transfer the proceeding to the general division of the court of common pleas pursuant to division (A) of section 5817.04 of the Revised Code.

(C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.

(D) The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

Sec. 2105.19. (A) Except as provided in division (C) of this section, no person who is convicted of, pleads guilty to, or is found not guilty by reason of insanity of a violation of or complicity in the violation of section 2903.01, 2903.02, or 2903.03 of the Revised Code or a violation of division (A) of section 2903.04 of the Revised Code that is not a proximate

result of a felony violation of section 2903.06 of the Revised Code, or of an existing or former law of any other state, the United States, or a foreign nation, substantially equivalent to a violation of or complicity in the violation of any of these sections, no person who is indicted for a violation of or complicity in the violation of any of those sections or laws and subsequently is adjudicated incompetent to stand trial on that charge, and no juvenile who is found to be a delinquent child by reason of committing an act that, if committed by an adult, would be a violation of or complicity in the violation of any of those sections or laws, shall in any way benefit by the death. All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's death, shall pass or be paid or distributed as if the person who caused the death of the decedent had predeceased the decedent.

(B) A person prohibited by division (A) of this section from benefiting by the death of another is a constructive trustee for the benefit of those entitled to any property or benefit that the person has obtained, or over which the person has exerted control, because of the decedent's death. A person who purchases any such property or benefit from the constructive trustee, for value, in good faith, and without notice of the constructive trustee's disability under division (A) of this section, acquires good title, but the constructive trustee is accountable to the beneficiaries for the proceeds or value of the property or benefit.

(C) A person who is prohibited from benefiting from a death pursuant to division (A) of this section either because the person was adjudicated incompetent to stand trial or was found not guilty by reason of insanity, or the person's guardian

appointed pursuant to Chapter 2111. of the Revised Code or other legal representative, may file a complaint to declare the person's right to benefit from the death in the probate court in which the decedent's estate is being administered or that released the estate from administration. The complaint shall be filed no later than sixty days after the person is adjudicated incompetent to stand trial or found not guilty by reason of insanity. The court shall notify each person who is a devisee or legatee under the decedent's will, or if there is no will, each person who is an heir of the decedent pursuant to section 2105.06 of the Revised Code that a complaint of that nature has been filed within ten days after the filing of the complaint. The person who files the complaint, and each person who is required to be notified of the filing of the complaint under this division, is entitled to a jury trial in the action. To assert the right, the person desiring a jury trial shall demand a jury in the manner prescribed in the Civil Rules.

A person who files a complaint pursuant to this division shall be restored to the person's right to benefit from the death unless the court determines, by a preponderance of the evidence, that the person would have been convicted of a violation of, or complicity in the violation of, section 2903.01, 2903.02, or 2903.03 of the Revised Code or a violation of division (A) of section 2903.04 of the Revised Code that is not a proximate result of a felony violation of section 2903.06 of the Revised Code, or of a law of another state, the United States, or a foreign nation that is substantially similar to any of those sections, if the person had been brought to trial in the case in which the person was adjudicated incompetent or if the person were not insane at the time of the commission of the offense.

Sec. 2107.01. As used in Chapters 2101. to 2131. of the Revised Code:

(A) "Will" includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills, and instruments ~~admitted to probate~~ declared valid under division (A)(1) of section ~~2107.081~~ 5817.10 of the Revised Code, but "will" does not include inter vivos trusts or other instruments that have not been admitted to probate.

(B) "Testator" means any person who makes a will.

Sec. 2107.05. (A) An existing document, book, record, or memorandum may be incorporated in a will by reference, if referred to as being in existence at the time the will is executed. That document, book, record, or memorandum shall be deposited in the probate court when the will is probated or within thirty days after the will is probated, unless the court grants an extension of time for good cause shown. A copy may be substituted for the original document, book, record, or memorandum if the copy is certified to be correct by a person authorized to take acknowledgments.

(B) Notwithstanding division (A) of this section, if a will incorporates a trust instrument only in the event that a bequest or devise to the trust is ineffective, the trust instrument shall be deposited in the probate court not later than thirty days after the final determination that such bequest or devise is ineffective.

(C) If a testator intends to incorporate a trust instrument in a will, the testator's will shall manifest that intent through the use of the term "incorporate," "made a part of," or similar language. In the absence of such clear and

express intent, a trust instrument shall not be incorporated into or made a part of the will. Any language in the testator's will that only identifies a trust shall not be sufficient to manifest an intent to incorporate that trust instrument by reference in the will.

(D) The amendment of this section by adding divisions (B) and (C) applies, and shall be construed as applying, to the wills of testators who die on or after the effective date of this amendment.

Sec. 2107.07. A will may be deposited by the testator, or by some person for the testator, in the office of the judge of the probate court in the county in which the testator lives, before or after the death of the testator, and if deposited after the death of the testator, with or without applying for its probate. Upon the payment of the fee of twenty-five dollars to the court, the judge shall receive, keep, and give a certificate of deposit for the will. That will shall be safely kept until delivered or disposed of as provided by section 2107.08 of the Revised Code. If the will is not delivered or disposed of as provided in that section within one hundred years after the date the will was deposited, the judge may dispose of the will in any manner the judge considers feasible. The judge shall retain an electronic copy of the will prior to its disposal after one hundred years under this section.

Every will that is so deposited shall be enclosed in a sealed envelope that shall be indorsed with the name of the testator. The judge shall indorse on the envelope the date of delivery and the person by whom the will was delivered. The envelope may be indorsed with the name of a person to whom it is to be delivered after the death of the testator. The will shall

not be opened or read until delivered to a person entitled to receive it, until the testator files a complaint in the probate court for a declaratory judgment of the validity of the will pursuant to section ~~2107.081~~ 5817.02 of the Revised Code, or until otherwise disposed of as provided in section 2107.08 of the Revised Code. Subject to section 2107.08 of the Revised Code, the deposited will shall not be a public record until the time that an application is filed to probate it.

Sec. 2107.08. During the lifetime of a testator, the testator's will, deposited according to section 2107.07 of the Revised Code, shall be delivered only to the testator, to some person authorized by the testator by a written order, or to a probate court for a determination of its validity when the testator so requests. After the testator's death, the will shall be delivered to the person named in the indorsement on the envelope of the will, if there is a person named who demands it. If the testator has filed a complaint in the probate court for a judgment declaring the validity of the will pursuant to section ~~2107.081~~ 5817.02 of the Revised Code and ~~the court has rendered the~~ a judgment is rendered pursuant to division (A)(1) of section 5817.10 of the Revised Code declaring the will valid, the ~~probate~~ judge ~~with possession~~ of the court who rendered the judgment shall deliver the will to the proper probate court as determined under section 2107.11 of the Revised Code, upon the death of the testator, for probate.

If no person named in the indorsement demands the will and it is not one that has been declared valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, it shall be publicly opened in the probate court within one month after notice of the testator's death and retained in the office of the probate judge until offered for probate. If the jurisdiction

belongs to any other probate court, the will shall be delivered to the person entitled to its custody, to be presented for probate in the other court. If the probate judge who opens the will has jurisdiction of it, the probate judge immediately shall give notice of its existence to the executor named in the will or, if any, to the persons holding a power to nominate an executor as described in section 2107.65 of the Revised Code, or, if it is the case, to the executor named in the will and to the persons holding a power to nominate a coexecutor as described in that section. If no executor is named and no persons hold a power to nominate an executor as described in that section, the probate judge shall give notice to other persons immediately interested.

Sec. 2107.09. (A) If real property is devised or personal property is bequeathed by a will, the executor or any interested person may cause the will to be brought before the probate court of the county in which the decedent was domiciled. By judicial order, the court may compel the person having the custody or control of the will to produce it before the court for the purpose of being proved.

If the person having the custody or control of the will intentionally conceals or withholds it or neglects or refuses to produce it for probate without reasonable cause, the person may be committed to the county jail and kept in custody until the will is produced. The person also shall be liable to any party aggrieved for the damages sustained by that neglect or refusal.

Any judicial order issued pursuant to this section may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered.

The officer to whom the process is delivered shall be

liable for neglect in its service or return in the same manner as sheriffs are liable for neglect in not serving or returning a capias issued upon an indictment.

(B) In the case of a will that has been declared valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, the ~~probate~~ judge of the probate court or of the general division of the court of common pleas to which the proceeding was transferred pursuant to division (A) of section 5817.04 of the Revised Code who made the declaration ~~or who has possession of the will~~ shall cause ~~the will and~~ the judgment declaring ~~validity~~ the will valid to be brought before the proper probate court as determined by section 2107.11 of the Revised Code at a time after the death of the testator. If the death of the testator is brought to the attention of the ~~probate~~ applicable judge by an interested party, the judge shall cause the judgment declaring the will valid to be brought before the proper probate court at that time.

Sec. 2107.10. (A) No property or right, testate or intestate, shall pass to a beneficiary named in a will who knows of the existence of the will for one year after the death of the testator and has the power to control it and, without reasonable cause, intentionally conceals or withholds it or neglects or refuses within that one year to cause it to be offered for or admitted to probate. The property devised or bequeathed to that beneficiary shall pass as if the beneficiary had predeceased the testator.

(B) No property or right, testate or intestate, passes to a beneficiary named in a will when the will was declared valid ~~and filed with a probate judge~~ by a court pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, the

declaration ~~and filing~~ took place in a county different from the county in which the will of the testator would be probated under section 2107.11 of the Revised Code, and the named beneficiary knew of the declaration ~~and filing~~ and of the death of the testator and did not notify the ~~probate~~ judge ~~with whom~~ of the court in which the will was ~~filed~~ declared valid. This division does not preclude a named beneficiary from acquiring property or rights from the estate of the testator for failing to notify a ~~probate~~ judge of that court if the named beneficiary reasonably believes that the judge has previously been notified of the testator's death.

Sec. 2107.11. (A) A will shall be admitted to probate:

(1) In the county in this state in which the testator was domiciled at the time of the testator's death;

(2) In any county of this state where any real property or personal property of the testator is located if, at the time of the testator's death, the testator was not domiciled in this state, and provided that the will has not previously been admitted to probate in this state or in the state of the testator's domicile;

(3) In the county of this state in which a ~~probate~~ court rendered a judgment declaring that the will was valid ~~and in which the will was filed with the probate court~~ pursuant to division (A)(1) of section 5817.10 of the Revised Code.

(B) For the purpose of division (A)(2) of this section, intangible personal property is located in the place where the instrument evidencing a debt, obligation, stock, or chose in action is located or if there is no instrument of that nature where the debtor resides.

Sec. 2107.12. When a will is presented for probate or for a declaratory judgment of its validity pursuant to ~~section 2107.081~~ Chapter 5817. of the Revised Code, persons interested in its outcome may contest the jurisdiction of the court to entertain the application. Preceding a hearing of a contest as to jurisdiction, all parties named in such will as legatees, devisees, trustees, or executors shall have notice ~~thereof~~ of the hearing in such manner as may be ordered by the court.

When ~~such~~ that contest is made, the parties may call witnesses and shall be heard upon the question involved. The decision of the court as to its jurisdiction may be reviewed on error.

Sec. 2107.16. (A) When offered for probate, a will may be admitted to probate and allowed upon such proof as would be satisfactory, and in like manner as if an absent or incompetent witness were dead:

(1) If it appears to the probate court that a witness to such will has gone to parts unknown;

(2) If the witness was competent at the time of attesting its execution and afterward became incompetent;

(3) If testimony of a witness cannot be obtained within a reasonable time.

(B) When offered for probate, a will shall be admitted to probate and allowed when there has been a prior judgment by a ~~probate~~ court declaring that the will is valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, if the will ~~has not been removed from the possession of the probate judge and~~ has not been ~~modified or~~ revoked ~~under division (C) or (D) of section 2107.084 of the Revised Code~~.

Sec. 2107.18. The probate court shall admit a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

The probate court shall admit a will to probate when there has been a prior judgment by a ~~probate~~ court declaring that the will is valid, rendered pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, if the will ~~has not been removed from the possession of the probate judge and~~ has not been ~~modified or~~ revoked ~~under division (C) or (D) of section 2107.084 of the Revised Code~~.

Sec. 2107.20. When admitted to probate every will shall be filed in the office of the probate judge and recorded, together with any testimony or prior judgment of a ~~probate~~ court declaring the will valid pursuant to division (A)(1) of section 5817.10 of the Revised Code, by the judge or the clerk of the probate court in a book to be kept for that purpose.

A copy of the recorded will, with a copy of the order of probate annexed to the copy of the recorded will, certified by the judge under seal of the judge's court, shall be as effectual in all cases as the original would be, if established by proof.

Sec. 2107.22. (A)(1)(a) When a will has been admitted to probate by a probate court and another will of later date is presented to the same court for probate, notice of the will of

later date shall be given to those persons required to be notified under section 2107.19 of the Revised Code, and to the fiduciaries and beneficiaries under the will of earlier date. The probate court may admit the will of later date to probate the same as if no earlier will had been so admitted if it appears from the face of the will of later date, or if an interested person makes a demand as described in division (A)(1)(b) of this section and it appears from the testimony of the witnesses to the will given in accordance with that division, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

(b) Upon the demand of a person interested in having a will of later date admitted to probate, the probate court shall cause at least two of the witnesses to the will of later date, and any other witnesses that the interested person desires to have appear, to come before the probate court and provide testimony. If the interested person so requests, the probate court shall issue a subpoena to compel the presence of any such witness before the probate court to provide testimony.

Witnesses before the probate court pursuant to this division shall be examined, and may be cross-examined, in open court, and their testimony shall be reduced to writing and then filed in the records of the probate court pertaining to the testator's estate.

(2) When an authenticated copy of a will has been admitted to record by a probate court, and an authenticated copy of a

will of later date that was executed and proved as required by law, is presented to the same court for record, it shall be admitted to record in the same manner as if no authenticated copy of the will of earlier date had been so admitted.

(3) If a probate court admits a will of later date to probate, or an authenticated copy of a will of later date to record, its order shall operate as a revocation of the order admitting the will of earlier date to probate, or shall operate as a revocation of the order admitting the authenticated copy of the will of earlier date to record. The probate court shall enter on the record of the earlier will a marginal note "later will admitted to probate ..." (giving the date admitted).

(B) When a will that has been declared valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code has been admitted to probate by a probate court, and an authenticated copy of another will of later date that was executed and proved as required by law is presented to the same court for record, the will of later date shall be admitted the same as if no other will had been admitted and the proceedings shall continue as provided in this section.

Sec. 2107.33. (A) A will shall be revoked in the following manners:

(1) By the testator by tearing, canceling, obliterating, or destroying it with the intention of revoking it;

(2) By some person, at the request of the testator and in the testator's presence, by tearing, canceling, obliterating, or destroying it with the intention of revoking it;

(3) By some person tearing, canceling, obliterating, or destroying it pursuant to the testator's express written

direction;

(4) By some other written will or codicil, executed as prescribed by this chapter;

(5) By some other writing that is signed, attested, and subscribed in the manner provided by this chapter.

(B) ~~A will that has been declared valid and is in the possession of a probate judge also may be revoked according to division (C) of section 2107.084 of the Revised Code.~~

~~(C) If a testator removes a will that has been declared valid and is in the possession of a probate judge pursuant to section 2107.084 of the Revised Code from the possession of the judge, the declaration of validity that was rendered no longer has any effect.~~

~~(D)~~ If after executing a will, a testator is divorced, obtains a dissolution of marriage, has the testator's marriage annulled, or, upon actual separation from the testator's spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, any disposition or appointment of property made by the will to the former spouse or to a trust with powers created by or available to the former spouse, any provision in the will conferring a general or special power of appointment on the former spouse, and any nomination in the will of the former spouse as executor, trustee, or guardian shall be revoked unless the will expressly provides otherwise.

~~(E)~~ (C) Property prevented from passing to a former spouse or to a trust with powers created by or available to the former spouse because of revocation by this section shall pass as if

the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse shall be interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they shall be deemed to be revived by the testator's remarriage with the former spouse or upon the termination of a separation agreement executed by them.

~~(F)~~ (D) A bond, agreement, or covenant made by a testator, for a valuable consideration, to convey property previously devised or bequeathed in a will does not revoke the devise or bequest. The property passes by the devise or bequest, subject to the remedies on the bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, that might be had by law against the heirs of the testator, or the testator's next of kin, if the property had descended to them.

~~(G)~~ (E) A testator's revocation of a will shall be valid only if the testator, at the time of the revocation, has the same capacity as the law requires for the execution of a will.

~~(H)~~ (F) As used in this section:

(1) "Trust with powers created by or available to the former spouse" means a trust that is revocable by the former spouse, with respect to which the former spouse has a power of withdrawal, or with respect to which the former spouse may take a distribution that is not subject to an ascertainable standard but does not mean a trust in which those powers of the former spouse are revoked by section 5815.31 of the Revised Code or similar provisions in the law of another state.

(2) "Ascertainable standard" means a standard that is

related to a trust beneficiary's health, maintenance, support, or education.

Sec. 2107.52. (A) As used in this section:

(1) "Class member" means an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had the individual survived the testator.

(2) "Descendant of a grandparent" means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under either of the following:

(a) The rules of construction applicable to a class gift created in the testator's will if the devise or the exercise of the power of appointment is in the form of a class gift;

(b) The rules for intestate succession if the devise or the exercise of the power of appointment is not in the form of a class gift.

(3) "Devise" means an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment.

(4) "Devisee" means any of the following:

(a) A class member if the devise is in the form of a class gift;

(b) An individual or class member who was deceased at the time the testator executed the testator's will or an individual or class member who was then living but who failed to survive the testator;

(c) An appointee under a power of appointment exercised by

the testator's will.

(5) "Per stirpes" means that the shares of the descendants of a devisee who does not survive the testator are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the devisee had died intestate and unmarried on the date of the testator's death.

(6) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor.

(7) "Surviving devisee" or "surviving descendant" means a devisee or descendant, whichever is applicable, who survives the testator by at least one hundred twenty hours.

(8) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(B)(1) As used in "surviving descendants" in divisions (B)(2)(a) and (b) of this section, "descendants" means the descendants of a deceased devisee or class member under the applicable division who would take under a class gift created in the testator's will.

(2) Unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:

(a) If the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. The surviving descendants take, per stirpes, the property to which the devisee would have been entitled had the devisee survived

the testator.

(b) If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import that includes more than one generation, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take, per stirpes, the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For purposes of division (B)(2)(b) of this section, "deceased devisee" means a class member who failed to survive the testator by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Attaching the word "surviving" or "living" to a devise, such as a gift "to my surviving (or living) children," is not, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(2) Attaching other words of survivorship to a devise, such as "to my child, if my child survives me," is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the

application of division (B) of this section.

(3) A residuary clause is not a sufficient indication of an intent to negate the application of division (B) of this section unless the will specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(4) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment may be substituted for the appointee under this section, whether or not the descendant is an object of the power of appointment.

(D) Except as provided in division (A), (B), or (C) of this section, each of the following applies:

(1) A devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(2) If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

(3) If a residuary devise fails for any reason in its entirety, the residue passes by intestate succession.

(E) This section applies only to outright devises and appointments. Devises and appointments in trust, including to a testamentary trust, are subject to section 5808.19 of the Revised Code.

(F) This section applies to wills of decedents who die on

or after ~~the effective date of this section~~ March 22, 2012.

Sec. 2107.71. (A) A person interested in a will or codicil admitted to probate in the probate court that has not been declared valid by judgment of a ~~probate~~ court pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code ~~or that has been declared valid by judgment of a probate court pursuant to section 2107.084 of the Revised Code but has been removed from the possession of the probate judge,~~ may contest its validity by filing a complaint in the probate court in the county in which the will or codicil was admitted to probate.

(B) Except as otherwise provided in this division, no person may contest the validity of any will or codicil as to facts decided if it was submitted to a probate court by the testator during the testator's lifetime and declared valid by judgment of ~~the probate~~ a court ~~and filed with the judge of the probate court~~ pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code ~~and if the will was not removed from the possession of the probate judge~~. A person may contest the validity of that will~~, modification,~~ or codicil as to those facts if the person is one who should have been named a party defendant in the action in which the will~~, modification,~~ or codicil was declared valid, pursuant to division (A) of section ~~2107.081 or 2107.084~~ 5817.05 of the Revised Code, and if the person was not named a defendant and properly served in that action. Upon the filing of a complaint contesting the validity of a will or codicil that is authorized by this division, the court shall proceed with the action ~~in the same manner as if the will, modification, or codicil had not been previously declared valid under sections 2107.081 to 2107.085 of the Revised Code~~.

(C) No person may introduce, as evidence in an action

authorized by this section contesting the validity of a will, the fact that the testator of the will did not file a complaint for a judgment declaring its validity under ~~section 2107.081~~ Chapter 5817. of the Revised Code.

Sec. 2111.182. If a minor is entitled to money or property whether by settlement or judgment for personal injury or damage to tangible or intangible property, inheritance or otherwise, the probate court may order that all or a portion of the amount received by the minor be deposited into a trust for the benefit of that beneficiary until the beneficiary reaches twenty-five years of age, and order the distribution of the amount in accordance with the provisions of the trust. Prior to the appointment as a trustee of a trust created pursuant to this section, the person to be appointed shall be approved by a parent or guardian of the minor beneficiary of the trust, unless otherwise ordered by the probate court.

Sec. 2111.52. (A) A probate court may accept funds or other program assistance from, or charge fees for services described in division (C) of this section rendered to, individuals, corporations, agencies, or organizations, including, but not limited to, a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, unless a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities does not agree to the payment of those fees. Any funds or fees received by the probate court under this division shall be paid into the county treasury and credited to a fund to be known as the county probate court guardianship services fund.

(B) The probate courts of two or more counties may accept

funds or other program assistance from, or charge fees for services described in division (C) of this section rendered to, individuals, corporations, agencies, or organizations, including, but not limited to, a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, unless a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities does not agree to the payment of those fees. Any funds or fees received by the probate courts of two or more counties under this division shall be paid into the county treasury of one or more of the counties and credited to a fund to be known as the multicounty probate court guardianship services fund.

(C) The moneys in a county or multicounty probate court guardianship services fund shall be used for services to help ensure the treatment of any person who is under the care of a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, or any other guardianships. These services include, but are not limited to, involuntary commitment proceedings and the establishment and management of adult guardianships, including all associated expenses, for wards who are under the care of a county board of alcohol, drug addiction, and mental health services, a county board of developmental disabilities, or any other guardianships.

(D) If a judge of a probate court determines that some of the moneys in the county or multicounty probate court guardianship services fund are needed for the efficient operation of that probate court, the moneys may be used for the acquisition of equipment, the hiring and training of staff, community services programs, volunteer guardianship training services, the employment of magistrates, and other related

services.

(E) The moneys in the county or multicounty probate court guardianship services fund that may be used in part for the establishment and management of adult guardianships under division (C) of this section may be utilized to establish a county or multicounty guardianship service.

(F)(1) A county or multicounty guardianship service under division (E) of this section is established by creating a county or multicounty guardianship service board. The judge of the probate court shall appoint one member. The board of directors of a county board of developmental disabilities shall appoint one member. The board of directors of a county board of alcohol, drug addiction, and mental health services shall appoint one member. The term of appointment of each member is four years.

(2) The county or multicounty guardianship services board may appoint a director of the board. The board shall determine the compensation of the director based on the availability of funds contained in the county or multicounty probate court guardianship services fund.

(3) The county or multicounty guardianship services board may receive appointments from one or more county probate courts to serve as guardians of both the person and estate of wards. The director or any designee of a county or multicounty guardianship services board may act on behalf of the board in relation to all guardianship matters.

(4) The director of a county or multicounty guardianship services board may hire employees subject to available funds in the county or multicounty probate court guardianship services fund.

(5) The county or multicounty guardianship services board may charge a reasonable fee for services provided to wards. A probate judge shall approve any fees charged by the board under division (F)(5) of this section.

(6) The county or multicounty guardianship services board that is created under division (F)(1) of this section shall promulgate all rules and regulations necessary for the efficient operation of the board and the county or multicounty guardianship services.

Sec. 2113.032. Any person who is entitled to be appointed as a personal representative of a decedent may file an application with the probate court in the county in which the decedent resided seeking the release of the decedent's medical records and medical billing records. The application shall include a decedent's estate form listing the decedent's known surviving spouse, children, next of kin, legatees, and devisees, if any. The application may be filed prior to the filing of any application for authority to administer the decedent's estate. Upon the filing of the application and the payment of a filing fee as determined by the court, the probate court may order that release without a hearing and direct all medical providers that provided medical care or treatment to the decedent to release those medical records and medical billing records to the applicant for the limited purpose of deciding whether or not to file a wrongful death claim. The medical records and medical billing records are confidential and shall not be made available for public viewing. The probate court shall send copies of the application and the judgment entry to anyone listed on the decedent's estate form described in this section. Upon obtaining the requested applicable records, the applicant shall file a report with the court certifying that all requested medical

records and medical billing records have been received and shall indicate whether an administration of the decedent's estate will be filed within the applicable statute of limitations filing time.

Sec. 2137.01. As used in this chapter:

(A) "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(B) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated as agent, attorney in fact, or otherwise.

(C) "Carries" means engages in the transmission of an electronic communication.

(D) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(E) "Content of an electronic communication" means information concerning the substance or meaning of the communication that meets all of the following conditions:

(1) It has been sent or received by a user.

(2) It is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public.

(3) It is not readily accessible to the public.

(F) "Court" means the probate court for all matters in which the court has exclusive jurisdiction under section 2101.24 of the Revised Code. "Court" also includes the probate court or the general division of the court of common pleas for matters in which such courts have concurrent jurisdiction under section 2101.24 of the Revised Code.

(G) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(H) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(I) "Digital asset" means an electronic record in which an individual has a right or interest. "Digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(J) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(K) "Electronic communication" has the same meaning as in 18 U.S.C. 2510(12), as amended.

(L) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(M) "Fiduciary" means an original, additional, or successor agent, guardian, personal representative, or trustee.

(N)(1) "Guardian" means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or the person and the estate of an incompetent or minor. When applicable, "guardian"

includes, but is not limited to, a limited guardian, an interim guardian, a standby guardian, and an emergency guardian appointed pursuant to division (B) of section 2111.02 of the Revised Code. "Guardian" also includes both of the following:

(a) An agency under contract with the department of developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent;

(b) A conservator appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(2) "Guardian" does not include a guardian under sections 5905.01 to 5905.19 of the Revised Code.

(O) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(P) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(Q) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.

(R) "Personal representative" means an executor, administrator, special administrator, or other person acting

under the authority of the probate court to perform substantially the same function under the law of this state. "Personal representative" also includes a commissioner in a release of assets from administration under section 2113.03 of the Revised Code and an applicant for summary release from administration under section 2113.031 of the Revised Code.

(S) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal.

(T) "Principal" means an individual who grants authority to an agent in a power of attorney.

(U) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(V) "Remote-computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. 2510(14), as amended.

(W) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(X) "Trustee" means a fiduciary with legal title to property pursuant to an agreement or declaration that creates a beneficial interest in another. "Trustee" includes an original, additional, and successor trustee and a cotrustee.

(Y) "User" means a person that has an account with a custodian.

(Z) "Ward" means any person for whom a guardian is acting or for whom the probate court is acting pursuant to section

2111.50 of the Revised Code. "Ward" includes a person for whom a conservator has been appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(AA) "Will" includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills, and instruments admitted to probate under ~~section 2107.081~~ Chapter 5817. of the Revised Code. "Will" does not include inter vivos trusts or other instruments that have not been admitted to probate.

Sec. 2721.03. Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

The testator of a will may have the validity of the will determined at any time during the testator's lifetime pursuant to ~~sections 2107.081 to 2107.085~~ Chapter 5817. of the Revised Code. The settlor of a trust may have the validity of the trust determined at any time during the settlor's lifetime pursuant to Chapter 5817. of the Revised Code.

Sec. 5802.03. ~~The~~ (A) Except as otherwise provided in division (B) of this section, the probate division of the court of common pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the

court of common pleas to issue writs and orders and to hear and determine any action that involves an inter vivos trust.

(B) The probate division of the court of common pleas has exclusive jurisdiction to render declaratory judgments under Chapter 5817. of the Revised Code. However, the probate division of the court of common pleas may transfer a declaratory judgment proceeding under that chapter to the general division of the court of common pleas pursuant to division (A) of section 5817.04 of the Revised Code.

Sec. 5802.05. (A) A provision in the terms of a trust, excluding a testamentary trust, that requires the arbitration of disputes, other than disputes of the validity of all or a part of a trust instrument, between or among the beneficiaries and a fiduciary under the trust, or a combination of those persons or entities, is enforceable.

(B) Unless otherwise specified in the terms of the trust, a trust provision requiring arbitration as described in division (A) of this section shall be presumed to require binding arbitration under Chapter 2711. of the Revised Code.

Sec. 5806.04. (A) ~~Any~~ Subject to division (E) of this section, any of the following actions pertaining to a revocable trust that is made irrevocable by the death of the settlor of the trust shall be commenced by the earlier of the date that is two years after the date of the death of the settlor of the trust or that is six months from the date on which the trustee sends the person bringing the action a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed under this division for commencing an action:

(1) An action to contest the validity of the trust;

(2) An action to contest the validity of any amendment to the trust that was made during the lifetime of the settlor of the trust;

(3) An action to contest the revocation of the trust during the lifetime of the settlor of the trust;

(4) An action to contest the validity of any transfer made to the trust during the lifetime of the settlor of the trust.

(B) Upon the death of the settlor of a revocable trust that was made irrevocable by the death of the settlor, the trustee, without liability, may proceed to distribute the trust property in accordance with the terms of the trust unless either of the following applies:

(1) The trustee has actual knowledge of a pending action to contest the validity of the trust, any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust.

(2) The trustee receives written notification from a potential contestant of a potential action to contest the validity of the trust, any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust, and the action is actually filed within ninety days after the written notification was given to the trustee.

(C) If a distribution of trust property is made pursuant to division (B) of this section, a beneficiary of the trust shall return any distribution to the extent that it exceeds the distribution to which the beneficiary is entitled if the trust, an amendment to the trust, or a transfer made to the trust later

is determined to be invalid.

(D) This section applies only to revocable trusts that are made irrevocable by the death of the settlor of the trust if the grantor dies on or after July 23, 2002.

(E) Except as otherwise provided in this division, no person may contest the validity of any trust as to facts decided if the trust was submitted to a probate court by the settlor during the settlor's lifetime and declared valid by the judgment of a court pursuant to division (B)(1) of section 5817.10 of the Revised Code. A person may contest the validity of that trust as to those facts if the person is one who should have been named a party defendant in the action in which the trust was declared valid, pursuant to division (A) of section 5817.06 of the Revised Code, and if the person was not named a defendant and properly served in that action.

Sec. 5808.19. (A) As used in this section, unless otherwise provided in any other provision in this section:

(1) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(2) "Class member" means an individual who fails to survive the distribution date by at least one hundred twenty hours but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date by at least one hundred twenty hours.

(3) "Descendant of a grandparent of the transferor" means an individual who would qualify as a descendant of a grandparent of the transferor under the rules of construction that would apply to a class gift under the transferor's will to the

descendants of the transferor's grandparent.

(4) "Distribution date," with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day but may occur at a time during the course of a day.

(5) "Future interest" means an alternative future interest or a future interest in the form of a class gift.

(6) "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or a transfer to an existing trust, or by an exercise of a power of appointment to an existing trust, that directs the continuance of an existing trust, designates a beneficiary of an existing trust, or creates a trust.

(7) "Per stirpes" means that the shares of the descendants of a beneficiary who does not survive the distribution date by at least one hundred twenty hours are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the beneficiary had died intestate and unmarried on the distribution date.

(8) "Revocable trust" means a trust that was revocable immediately before the settlor's death by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, was serving.

(9) "Stepchild" means a child of the surviving, deceased,

or former spouse of the transferor and not of the transferor.

(10) "Transferor" means any of the following:

(a) The donor and donee of a power of appointment, if the future interest was in property as a result of the exercise of a power of appointment;

(b) The testator, if the future interest was devised by will;

(c) The settlor, if the future interest was conveyed by inter vivos trust.

(B)(1)(a) As used in "surviving descendants" in divisions (B)(2)(b)(i) and (ii) of this section, "descendants" means the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

(b) As used in divisions (B)(2)(b)(i) and (ii) of this section, "surviving beneficiaries" or "surviving descendants" means beneficiaries or descendants, whichever is applicable, who survive the distribution date by at least one hundred twenty hours.

(2) Unless a contrary intent appears in the instrument creating a future interest under the terms of a trust, each of the following applies:

(a) A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date by at least one hundred twenty hours.

(b) If a beneficiary of a future interest under the terms of a trust does not survive the distribution date by at least one hundred twenty hours and if the beneficiary is a grandparent of the transferor, a descendant of a grandparent of the

transferor, or a stepchild of the transferor, either of the following applies:

(i) If the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. The surviving descendants take, per stirpes, the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date by at least one hundred twenty hours.

(ii) If the future interest is in the form of a class gift, other than a future interest to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import that includes more than one generation, a substitute gift is created in the surviving descendants of the deceased beneficiary or beneficiaries. The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least one hundred twenty hours passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date by at least one hundred twenty hours. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take, per stirpes, the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date by at least one hundred twenty hours. For purposes of division (B)(2)(b)(ii) of this section, "deceased beneficiary" means a class member who failed to survive the distribution date by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Describing a class of beneficiaries as "surviving" or "living," without specifying when the beneficiaries must be surviving or living, such as a gift "for my spouse for life, then to my surviving (or living) children," is not, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section.

(2) Subject to division (C)(1) of this section, attaching words of survivorship to a future interest under the terms of a trust, such as "for my spouse for life, then to my children who survive my spouse" or "for my spouse for life, then to my then-living children" is, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section. Words of survivorship under division (C)(2) of this section include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed as condition-precedent, condition-subsequent, or in any other form.

(3) A residuary clause in a will is not a sufficient indication of an intent that is contrary to the application of this section, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause. A residuary clause in a revocable trust instrument is not a sufficient indication of an intent that is contrary to the application of this section unless the distribution date is the date of the settlor's death and the revocable trust instrument specifically provides that upon lapse or failure the

nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(D) If, after the application of divisions (B) and (C) of this section there is no surviving taker of the property, and a contrary intent does not appear in the instrument creating the future interest, the property passes in the following order:

(1) If the future interest was created by the exercise of a power of appointment, the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.

(2) If no taker is produced under division (D)(1) of this section and the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will. For purposes of division (D)(2) of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(3) If no taker is produced under divisions (D)(1) and (2) of this section, the transferor is deceased, and the trust was created in a nonresiduary gift under the terms of a revocable trust of the transferor, the property passes under the residuary clause in the transferor's revocable trust instrument. For purposes of division (D)(3) of this section, the residuary clause in the transferor's revocable trust instrument is treated as creating a future interest under the terms of a trust.

(4) If no taker is produced under divisions (D)(1), (2), and (3) of this section, the property passes to those persons who would succeed to the transferor's intestate estate and in the shares as provided in the intestate succession law of the

transferor's domicile if the transferor died on the distribution date. Notwithstanding division (A)(10) of this section, for purposes of division (D)(4) of this section, if the future interest was created by the exercise of a power of appointment, "transferor" means the donor if the power is a nongeneral power, or the donee if the power is a general power.

(E) This section applies to all trusts that become irrevocable on or after ~~the effective date of this section~~ March 22, 2012. This section does not apply to any trust that was irrevocable before ~~the effective date of this section~~ March 22, 2012, even if property was added to the trust on or after ~~that effective date~~ March 22, 2012.

Sec. 5817.01. As used in this chapter:

(A)(1) "Beneficiary under a trust" means either of the following:

(a) Any person that has a present or future beneficial interest in a trust, whether vested or contingent;

(b) Any person that, in a capacity other than that of trustee, holds a power of appointment over trust property, but does not include the class of permitted appointees among whom the power holder may appoint.

(2) "Beneficiary under a trust" includes a charitable organization that is expressly designated in the terms of the trust to receive distributions, but does not include any charitable organization that is not expressly designated in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions.

(B)(1) "Beneficiary under a will" means either of the following:

(a) Any person designated in a will to receive a testamentary disposition of real or personal property;

(b) Any person that, in a capacity other than that of executor, holds a power of appointment over estate assets, but does not include the class of permitted appointees among whom the power holder may appoint.

(2) "Beneficiary under a will" includes a charitable organization that is expressly designated in the terms of the will to receive testamentary distributions, but does not include any charitable organization that is not expressly designated in the terms of the will to receive distributions, but to whom the executor may in its discretion make distributions.

(C) "Court" means the probate court of the county in which the complaint under section 5817.02 or 5817.03 of the Revised Code is filed or the general division of the court of common pleas to which the probate court transfers the proceeding under division (A) of section 5817.04 of the Revised Code.

(D) "Related trust" means a trust for which both of the following apply:

(1) The testator is the settlor of the trust.

(2) The trust is named as a beneficiary in the will in accordance with section 2107.63 of the Revised Code.

(E) "Related will" means a will for which both of the following apply:

(1) The testator is the settlor of a trust.

(2) The will names the trust as a beneficiary in accordance with section 2107.63 of the Revised Code.

(F) "Trust" means an inter vivos revocable or irrevocable trust instrument to which, at the time the complaint for declaration of validity is filed under section 5817.03 of the Revised Code, either of the following applies:

(1) The settlor resides in, or is domiciled in, this state.

(2) The trust's principal place of administration is in this state.

Sec. 5817.02. (A) A testator may file a complaint with the probate court to determine before the testator's death that the testator's will is a valid will subject only to subsequent revocation or modification of the will. The right to file a complaint for a determination of the validity of a testator's will under this chapter, or to voluntarily dismiss a complaint once filed, is personal to the testator and may not be exercised by the testator's guardian or an agent under the testator's power of attorney.

(B) A testator who desires to obtain a validity determination as to the testator's will shall file a complaint to determine the validity of both the will and any related trust.

(C) The failure of a testator to file a complaint for a judgment declaring the validity of a will shall not be construed as evidence or an admission that the will is not valid.

(D) A complaint for a determination of the validity of a testator's will shall be accompanied by an express written waiver of the testator's physician-patient privilege provided in division (B) of section 2317.02 of the Revised Code.

Sec. 5817.03. (A) A settlor may file a complaint with the

probate court to determine before the settlor's death that the settlor's trust is valid and enforceable under its terms, subject only to a subsequent revocation or modification of the trust. The right to file a complaint for a determination of the validity of a settlor's trust under this chapter, or to voluntarily dismiss a complaint once filed, is personal to the settlor and may not be exercised by the settlor's guardian or an agent under the settlor's power of attorney.

(B) A settlor who desires to obtain a validity determination as to the settlor's trust shall file a complaint to determine the validity of both the trust and the related will.

(C) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust shall not be construed as evidence or an admission that the trust is not valid.

(D) A complaint for a determination of the validity of a settlor's trust shall be accompanied by an express written waiver of the settlor's physician-patient privilege provided in division (B) of section 2317.02 of the Revised Code.

Sec. 5817.04. (A) A complaint to determine the validity of a will or a trust shall be filed with the probate court. The probate judge, upon the motion of a party or the judge's own motion, may transfer the proceeding to the general division of the court of common pleas.

(B) The venue for a complaint under section 5817.02 of the Revised Code is either of the following:

(1) The probate court of the county in this state where the testator is domiciled;

(2) If the testator is not domiciled in this state, the probate court of any county in this state where any real property or personal property of the testator is located or, if there is no such property, the probate court of any county in this state.

(C) The venue for a complaint under section 5817.03 of the Revised Code is either of the following:

(1) The probate court of the county in this state where the settlor resides or is domiciled;

(2) If the settlor does not reside or is not domiciled in this state, the probate court of the county in this state in which the trust's principal place of administration is located.

Sec. 5817.05. (A) A complaint under section 5817.02 of the Revised Code shall name as party defendants all of the following, as applicable:

(1) The testator's spouse;

(2) The testator's children;

(3) The testator's heirs who would take property pursuant to section 2105.06 of the Revised Code had the testator died intestate at the time the complaint is filed;

(4) The testator's beneficiaries under the will;

(5) Any beneficiary under the testator's most recent prior will.

(B) A complaint under section 5817.02 of the Revised Code may name as a party defendant any other person that the testator believes may have a pecuniary interest in the determination of the validity of the testator's will.

(C) A complaint under section 5817.02 of the Revised Code may contain all or any of the following:

(1) A statement that a copy of the will has been filed with the court;

(2) A statement that the will is in writing;

(3) A statement that the will was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's express direction;

(4) A statement that the will was signed in the conscious presence of the testator by two or more competent individuals, each of whom either witnessed the testator sign the will, or heard the testator acknowledge signing the will;

(5) A statement that the will was executed with the testator's testamentary intent;

(6) A statement that the testator had testamentary capacity;

(7) A statement that the testator executed the will free from undue influence, not under restraint or duress, and in the exercise of the testator's free will;

(8) A statement that the execution of the will was not the result of fraud or mistake;

(9) The names and addresses of the testator and all of the defendants and, if any of the defendants are minors, their ages;

(10) A statement that the will has not been revoked or modified;

(11) A statement that the testator is familiar with the

contents of the will.

Sec. 5817.06. (A) A complaint under section 5817.03 of the Revised Code shall name as party defendants the following, as applicable:

(1) The settlor's spouse;

(2) The settlor's children;

(3) The settlor's heirs who would take property pursuant to section 2105.06 of the Revised Code had the settlor died intestate at the time the complaint is filed;

(4) The trustee or trustees under the trust;

(5) The beneficiaries under the trust;

(6) If the trust amends, amends and restates, or replaces a prior trust, any beneficiary under the settlor's most recent prior trust.

(B) A complaint under section 5817.03 of the Revised Code may name as a party defendant any other person that the settlor believes may have a pecuniary interest in the determination of the validity of the settlor's trust.

(C) A complaint under section 5817.03 of the Revised Code may contain all or any of the following:

(1) A statement that a copy of the trust has been filed with the court;

(2) A statement that the trust is in writing and was signed by the settlor;

(3) A statement that the trust was executed with the intent to create a trust;

(4) A statement that the settlor had the legal capacity to enter into and establish the trust;

(5) A statement that the trust has a definite beneficiary or is one of the following:

(a) A charitable trust;

(b) A trust for the care of an animal as provided in section 5804.08 of the Revised Code;

(c) A trust for a noncharitable purpose as provided in section 5804.09 of the Revised Code.

(6) A statement that the trustee of the trust has duties to perform;

(7) A statement that the same person is not the sole trustee and sole beneficiary of the trust;

(8) A statement that the settlor executed the trust free from undue influence, not under restraint or duress, and in the exercise of the settlor's free will;

(9) A statement that execution of the trust was not the result of fraud or mistake;

(10) The names and addresses of the settlor and all of the defendants and, if any of the defendants are minors, their ages;

(11) A statement that the trust has not been revoked or modified;

(12) A statement that the settlor is familiar with the contents of the trust.

Sec. 5817.07. (A) Service of process, with a copy of the complaint and the will, and a copy of the related trust, if applicable, shall be made on every party defendant named in the

complaint filed under section 5817.02 of the Revised Code, as provided in the applicable Rules of Civil Procedure.

(B) Service of process, with a copy of the complaint and the trust, and a copy of the related will, if applicable, shall be made on every party defendant named in the complaint filed under section 5817.03 of the Revised Code, as provided in the applicable Rules of Civil Procedure.

Sec. 5817.08. (A) After a complaint is filed under section 5817.02 or 5817.03 of the Revised Code, the court shall fix a time and place for a hearing.

(B) Notice of the hearing shall be given to the testator or settlor, as applicable, and to all party defendants, as provided in the applicable Rules of Civil Procedure.

(C) The hearing shall be adversarial in nature and shall be conducted pursuant to sections 2101.31 and 2721.10 of the Revised Code, except as otherwise provided in this chapter.

Sec. 5817.09. (A) The testator or settlor has the burden of establishing prima facie proof of the execution of the will or trust, as applicable. A person who opposes the complaint has the burden of establishing one or more of the following:

(1) The lack of testamentary intent or the intent to create a trust, as the case may be;

(2) The lack of the testator's testamentary capacity, or the settlor's legal capacity to enter into and establish the trust;

(3) Undue influence, restraint, or duress on the testator or settlor;

(4) Fraud or mistake in the execution of the will or

trust;

(5) Revocation of the will or trust.

(B) A party to the proceeding has the ultimate burden of persuasion as to the matters for which the party has the initial burden of proof.

Sec. 5817.10. (A)(1) The court shall declare the will valid if it finds all of the following:

(a) The will was properly executed pursuant to section 2107.03 of the Revised Code or under any prior law of this state that was in effect at the time of execution.

(b) The testator had the requisite testamentary capacity, was free from undue influence, and was not under restraint or duress.

(c) The execution of the will was not the result of fraud or mistake.

(2) After the testator's death, unless the will is modified or revoked after the court's declaration under division (A)(1) of this section, the will has full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request.

(B)(1) The court shall declare the trust valid if it finds all of the following:

(a) The trust meets the requirements of section 5804.02 of the Revised Code.

(b) The settlor had the legal capacity to enter into and establish the trust, was free from undue influence, and was not under restraint or duress.

(c) The execution of the trust was not the result of fraud or mistake.

(2) Unless the trust is modified or revoked after the court's declaration, the trust has full legal effect.

(C) The court may, if it finds the will or trust to be valid, attach a copy of the valid document to the court's judgment entry, but failure to do so shall not affect the determination of validity of the will or trust.

Sec. 5817.11. (A) Unless the will or trust is modified or revoked, and except as otherwise provided in this section, no person may contest the validity of a will or trust that is declared valid in a proceeding pursuant to this chapter.

(B) The failure to name a necessary defendant under division (A) of section 5817.05 of the Revised Code is not jurisdictional. A declaration of a will's validity under this chapter shall be binding upon all defendants who were named or represented, and properly served pursuant to division (A) of section 5817.07 of the Revised Code, notwithstanding the failure to name a necessary defendant. However, if a person is one who should have been named a party defendant in the action in which the will was declared valid and if the person was not named a defendant and properly served in that action, that person, after the testator's death, may contest the validity of a will declared valid.

(C) The failure to name a necessary defendant under division (A) of section 5817.06 of the Revised Code is not jurisdictional. A declaration of a trust's validity under this chapter shall be binding upon all defendants who were named or represented, and properly served pursuant to division (B) of

section 5817.07 of the Revised Code, notwithstanding the failure to name a necessary defendant. However, if a person is one who should have been named a party defendant in the action in which the trust was declared valid and if the person was not named a defendant and properly served in that action, that person may contest the validity of a trust declared valid.

(D) In determining whether a person was a party defendant and properly served in an action to declare a will or trust valid under this chapter, the representation rules of Chapter 5803. of the Revised Code shall be applied, and a person represented in the action under those rules is bound by the declaration of validity even if, by the time of the testator's death, or the challenge to the trust, the representing person has died or would no longer be able to represent the person to be represented in the proceeding under this chapter.

Sec. 5817.12. (A) After a declaration of a will's validity under division (A)(1) of section 5817.10 of the Revised Code, the will may be modified by a later will or codicil executed according to the laws of this state or another state, and the will may be revoked under section 2107.33 of the Revised Code or other applicable law.

(B) The revocation by a later will, or other document under section 2107.33 of the Revised Code, of a will that has been declared valid under division (A)(1) of section 5817.10 of the Revised Code does not affect the will or the prior declaration of its validity if the later will or other document is found by a court of competent jurisdiction to be invalid due to the testator's lack of testamentary capacity, or undue influence, restraint, or duress on the testator, or otherwise.

(C) The amendment by a later codicil of a will that has

been declared valid under division (A)(1) of section 5817.10 of the Revised Code does not affect the will or the prior declaration of its validity except as provided by the codicil. However, the codicil is not considered validated under this chapter unless its validity is also declared as provided in this chapter.

Sec. 5817.13. (A) After a declaration of a trust's validity under division (B)(1) of section 5817.10 of the Revised Code, the trust may be modified, terminated, revoked, or reformed under sections 5804.10 to 5804.16 of the Revised Code, or other applicable law.

(B) The modification, termination, revocation, or reformation by a new trust or other document of a trust that has been declared valid under division (B)(1) of section 5817.10 of the Revised Code does not affect the trust or the prior declaration of its validity if the later trust or other document is found by a court of competent jurisdiction to be invalid due to the settlor's lack of capacity, or undue influence, restraint, or duress on the settlor, or otherwise.

(C) An amendment of a trust that has been declared valid under division (B)(1) of section 5817.10 of the Revised Code does not affect the trust or the prior declaration of its validity except as provided by the amendment. However, the amendment is not considered validated under this chapter unless its validity is also declared as provided in this chapter.

Sec. 5817.14. (A) The finding of facts by a court in a proceeding brought under this chapter is not admissible as evidence in any proceeding other than a proceeding brought to determine the validity of a will or trust.

(B) The determination or judgment rendered in a proceeding under this chapter is not binding upon the parties to that proceeding in any action that is not brought to determine the validity of a will or trust.

(C) The failure of a testator to file a complaint for a judgment declaring the validity of a will that the testator has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator.

(D) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust that the settlor has executed is not admissible as evidence in any proceeding to determine the validity of that trust or any other trust executed by the settlor.

Section 2. That existing sections 313.14, 2101.24, 2105.19, 2107.01, 2107.05, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.52, 2107.71, 2137.01, 2721.03, 5802.03, 5806.04, and 5808.19 and sections 2107.081, 2107.082, 2107.083, 2107.084, and 2107.085 of the Revised Code are hereby repealed.

Section 3. This act's amendment of section 2107.05 of the Revised Code is intended to abrogate the holdings of the Ohio Supreme Court in *Hageman v. Cleveland Trust Company*, 45 Ohio St.2d 178 (1976) and the Ohio Second District Court of Appeals in *Gehrke v. Senkiw*, 2016 Ohio 2657 (2016).

Section 4. Section 2101.24 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. S.B. 23 of the 130th General Assembly and Sub. H.B. 158 of the 131st General Assembly. The General Assembly,

applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.