39th Annual Probate Practice Seminar

October 4, 2019

Trumbull County Probate Court

Judge James A. Fredericka

Ciminero's Banquet Centre
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Niles, Ohio 44446

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39th ANNUAL PROBATE PRACTICE SEMINAR

October 4, 2019

8:00 - 8:30	**Registration**	
8:30 - 9:00	**Probate Updates:** **Probate Omnibus Bill** **HB 595**	John T. Shorts, Magistrate Christopher J. Schiavone, Magistrate ***Trumbull County Probate Court***
9:00 -9:45	**Nuts & Bolts of** **Will Construction**	Hon. Richard P. Carey ***Clark County Probate Court***
9:45 –10:45	**Civil Procedure Refresher**	Bernadette Bollas Genetin, Esq., Professor of Law ***University of Akron School of Law***
10:45 - 11:00	**Refreshment Break**	
11:00 – 11:30	**Wrongful Death/Personal Injury** **Releases from Administration**	Jeffrey R. Davis, Magistrate Emily Clark Weston, Magistrate ***Trumbull County Probate Court***
11:30 – 12:00	**Alternative Dispute Resolution** **in the Probate Court**	William D. Dowling, Esq. ***Dowling Mediation***
12:00 – 1:00	**Lunch**	
1:00 – 1:30	**Fiduciary Income Tax**	Karen S. Cohen, CPA ***Home Savings***
1:30 – 2:30	**The Disciplinary Process** **Professionalism**	Kimberly Vanover Riley, Esq. ***Montgomery Jonson LLP***
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. Mark J. Bartolotta ***Lake 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:

Probate Omnibus Bill
HB 595

John T. Shorts, Chief Magistrate
Christopher J. Schiavone, Magistrate
Trumbull County Probate Court

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

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

HOUSE BILL 595
PROBATE OMNIBUS BILL
EFFECTIVE MARCH 22, 2019

"SLAYER STATUTE" ADDITION

- RC 2105.19 expanded to include involuntary manslaughter pursuant to RC 2903.04(A) that was not a proximate result of committing felony aggravated vehicular homicide pursuant to RC 2903.06

INCORPORATION OF A TRUST INTO A WILL

- RC 2107.05 amended to clarify the procedure for incorporation of a written trust into a testator's will.
- RC 2107.05(B) now states that if incorporation of a trust instrument into a will is conditioned on the determination that a bequest or devise to the trustee is otherwise ineffective, the trust instrument must be deposited in the probate court no later than 30 days after final determination of ineffectiveness.
- Clear intent of the testator is required

REQUIREMENT OF TESTATOR PHYSICAL PRESENCE

- The bill modifies the statute on admission of a will to probate to require a testator to be physically present when a will was executed.

RC 2107.18 & RC 2107.22

DECEASED DEVISEE/ANTI-LAPSE PROTECTION

- RC 2107.52 provides that when a will makes a gift to a class and a member of the class predeceases the testator, a substitute gift will be made to the descendants of the deceased class member.
- Clarifies that the exception to this "anti-lapse" protection for class gifts in wills and trusts only applies to gifts to multi-generational classes.

RC 2107.52(B)(2)(b) & RC 5808.19(B)(2)(b)(ii)

FIDUCIARY FUNDS IOLTA ACCOUNTS

- Modifies the recently enacted IOLTA language from HB 223.
- Fiduciaries may still transfer funds to attorneys for deposit in an IOLTA account.
- Probate court approval is no longer required
- Funds can be deposited if they are <u>either</u> nominal in amount or held for a short period of time.
- Prior law required both conditions to be met.

RC 2109.41 & RC 4705.09

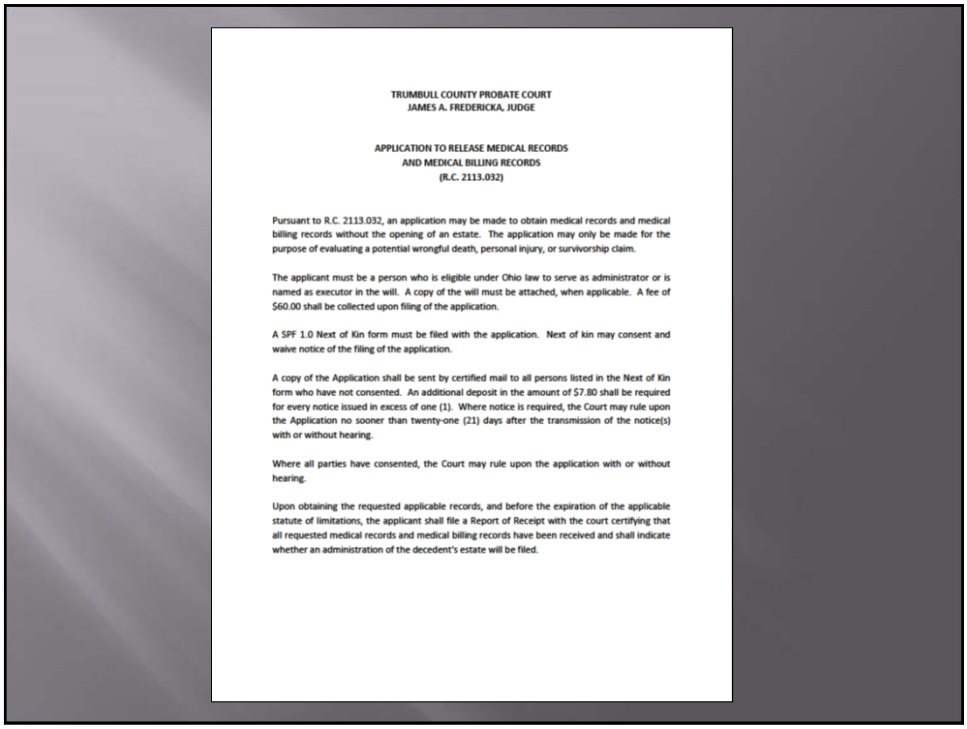
TRUST TO AGE 25 AUTHORITY

- RC 2111.182 created to grant the probate court authority to create a trust for a minor beneficiary until the beneficiary reaches age 25.
- Consistent with the wrongful death statute.

MEDICAL RECORDS RELEASE

- Creates a streamlined procedure for allowing a person eligible to be appointed as a personal representative or named as an executor in a will to file an application with the probate court to release the decedent's medical records and medical billing records for the limited purpose of deciding whether or not to file a wrongful death claim.

RC 2113.032



TRUMBULL COUNTY PROBATE COURT
JAMES A. FREDERICKA, JUDGE

APPLICATION TO RELEASE MEDICAL RECORDS
AND MEDICAL BILLING RECORDS
(R.C. 2113.032)

Pursuant to R.C. 2113.032, an application may be made to obtain medical records and medical billing records without the opening of an estate. The application may only be made for the purpose of evaluating a potential wrongful death, personal injury, or survivorship claim.

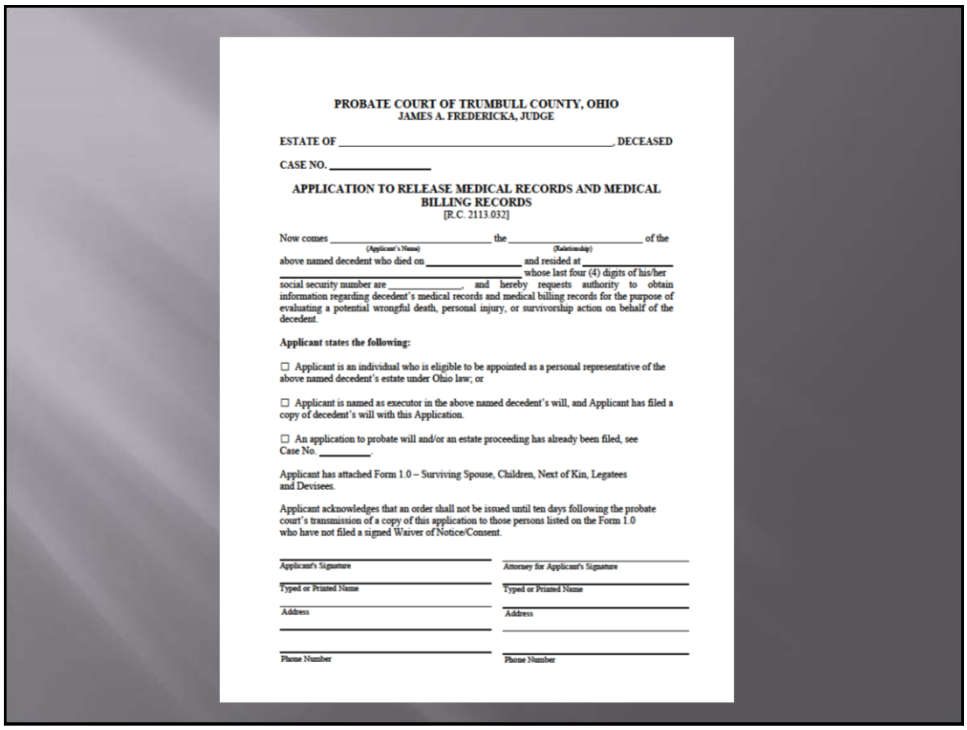
The applicant must be a person who is eligible under Ohio law to serve as administrator or is named as executor in the will. A copy of the will must be attached, when applicable. A fee of $60.00 shall be collected upon filing of the application.

A SPF 1.0 Next of Kin form must be filed with the application. Next of kin may consent and waive notice of the filing of the application.

A copy of the Application shall be sent by certified mail to all persons listed in the Next of Kin form who have not consented. An additional deposit in the amount of $7.80 shall be required for every notice issued in excess of one (1). Where notice is required, the Court may rule upon the Application no sooner than twenty-one (21) days after the transmission of the notice(s) with or without hearing.

Where all parties have consented, the Court may rule upon the application with or without hearing.

Upon obtaining the requested applicable records, and before the expiration of the applicable statute of limitations, the applicant shall file a Report of Receipt 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.



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

ESTATE OF _____, DECEASED

CASE NO. _____

APPLICATION TO RELEASE MEDICAL RECORDS AND MEDICAL BILLING RECORDS
[R.C. 2113.032]

Now comes _____ (Applicant's Name) the _____ (Relationship) of the above named decedent who died on _____ and resided at _____ whose last four (4) digits of his/her social security number are _____, and hereby requests authority to obtain information regarding decedent's medical records and medical billing records for the purpose of evaluating a potential wrongful death, personal injury, or survivorship action on behalf of the decedent.

Applicant states the following:

☐ Applicant is an individual who is eligible to be appointed as a personal representative of the above named decedent's estate under Ohio law; or

☐ Applicant is named as executor in the above named decedent's will, and Applicant has filed a copy of decedent's will with this Application.

☐ An application to probate will and/or an estate proceeding has already been filed, see Case No. _____.

Applicant has attached Form 1.0 – Surviving Spouse, Children, Next of Kin, Legatees and Devisees.

Applicant acknowledges that an order shall not be issued until ten days following the probate court's transmission of a copy of this application to those persons listed on the Form 1.0 who have not filed a signed Waiver of Notice/Consent.

Applicant's Signature	Attorney for Applicant's Signature
Typed or Printed Name	Typed or Printed Name
Address	Address
Phone Number	Phone Number

DETERMINATION OF VALIDITY OF A TRUST OR WILL

Creates Revised Code Chapter 5817

- Allows for a declaratory judgment on the validity of a trust during the settlor's lifetime.
- Although the probate court maintains exclusive jurisdiction, the probate court has discretion to transfer to the court of common pleas, general division, if needed for contested jury trials.
- The bill eliminates the requirement that a will declared valid must not be removed form the possession of the probate judge to remain valid.

TRUST DISPUTE ARBITRATION

- The bill clarifies when the terms of a trust may require that the trustee and/or beneficiaries settle disputes by arbitration.

RC 5802.05

SPECIAL NEEDS TRUSTS EFFECTIVE DATE

- The bill codifies the effective date for creation of Ohio special needs trusts to align it with the effective date of the establishing federal law: December 13, 2016.

RC 5163.21(F)(1)(a)(iii)

NUTS & BOLTS of WILL CONSTRUCTION

Hon. Richard P. Carey
Clark County Probate Court

"WILL CONSTRUCTION"

HON. RICHARD P. CAREY is in his fourth term as the Probate Judge for Clark County, Ohio. After graduating at the bottom of his class from the University of Notre Dame and the Ohio Northern University Pettit School of Law, Carey is delighted to be invited *anywhere* to speak, let alone this conference of great probate minds. Carey claims to have served as an assistant prosecuting attorney for eight years and a municipal court judge for ten years before retiring to, err, serving on the probate bench. There are unconfirmed rumors that he is currently the president of the Ohio Association of Probate Judges, although there have been several demands for a recount. He was the starting center for his 6th grade basketball team and still has all four years of collegiate eligibility.

Construction of Wills

A Starter Kit by the guy from Clark County

(For when you are really bored)

What This is Not

- **A.** Not a Will Contest
- **B.** Not a Lost Will Hearing
- **C.** Not a question of whether the will is an original
- **D.** Not an action to enforce an agreement as between heirs to change the nature of the distribution, eg., instead of the will directives, the parties agree to split everything 50-50. Such a dispute, if not part of a Will Contest settlement, is not "directly related" to the administration of the testator's estate. *Zuendel v. Zuendel*, 63 Ohio St.3d 733 (1992).

What This Is

An action asking the Court to declare the proper interpretation of a will, and to that end adjust the interests of the respective parties.

How This Comes Before the Court

A. By way of an Exception to an Account

B. By Will Construction Action

> RC 2107.46: "Any fiduciary may file an action in the probate court against creditors, legatees, distributees, or other parties, and ask the direction or judgement of the probate court in any matter respecting the trust, estate, or property to be administered, and the rights of the parties in interest.
> If any fiduciary fails for thirty days to file an action under this section after a written request from a party in interest, the party making the request may file the action."

When

After a fiduciary is appointed and before approval of the final account.

Parties

Necessary parties are "interested parties". Judgements construing wills are not conclusive against beneficiaries not parties to the action. *In re Kachelmacher* (1931), 40 Ohio App. 178.

RC 2721.05, with respect to Declaratory Judgments, provides that in will / trust construction cases, "[a]ny person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust,

or if the estate of a decedent, an infant, an incompetent person, or an insolvent person, may have a declaration of rights or legal relations in respect " to said case.

Hearing

No hearing is actually required by the statute. Often, the matter is one of interpretation by the court based on the language employed. However, there are occasions where it is appropriate to take evidence.

Role of Court

The role of the court in a will construction is to ascertain and give effect to the testator's intent. *Oliver v. Bank One, Dayton, N.A.* (1991), 60 Ohio St.3d 32; *Wendell v. AmeriTrust Co., N.A.* (1994), 69 Ohio St.3d 74. The order is declaratory in nature.

The seminal case: *Townsend's Exrs. v. Townsend* (1874), 25 Ohio St. 477:

> "1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.
>
> "2. Such intention must be ascertained from the words contained in the will.
>
> "3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appears from the context that they were used by the testator in some secondary sense.
>
> "4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it."

Rules of Construction

*** Cardinal Rule: Discern and give effect to the intention of the testator. The following rules yield to the express intention of the testator. *Casey v. Gallagher* (1967) 11 Ohio St.2d 42, 51.

1. In aid of determining intent, it is presumed that a testator is familiar with the law. *Townsend, Id.*

2. Testator's intention must be ascertained from the words in the will. *Carr v. Stradley* (1977), 52 Ohio St.2d 220. "The express language of the instrument generally provides the court with the indicators of the [testator's] intentions, and the words used in the instrument are presumed to be used in their ordinary sense." *Stevens v. Natl. City Bank* (1989), 45 Ohio St.3d. 276. at 279.

3. "It is said that a will speaks from the time of execution as to its meaning and from the death of testator as to its effect and operation." So, when a legacy is “the amount of cash in a metal box”, it refers to the amount of cash in the box at the time of death. *In Re Evans Estate* (1956), 165 Ohio St. 27.

4. Every devise of real estate conveys all of the testator’s interest in said real estate unless a contrary intention presents in the will. RC 2105.51.

5. "[W]henever a testator refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event." Eg, a bequest to a township which after the will is split in two becomes a gift to the territorial boundaries of the township when will was executed, and not simply a named township. *The Board of Education of Fairfield Township v. Ladd* (1875), 26 Ohio St. 210.

6. Property acquired after the execution of the will passes under the will unless the will manifests a different intention. RC 2107.50.

7. While the law disfavors intestate disposition, *Wendell v. AmeriTrust Co., N.A.* (1994), 69 Ohio St.3d 74, 77, 630 N.E.2d 368, 371, the law does not prohibit it.

8. A specific devisee of real estate, or remainder interest, has the right, if the real estate is purchased, condemned, or subject to fire/casualty insurance, to the *balance* of the purchase price, the *unpaid amount* of the condemnation award, and the *unpaid proceeds* from the insurance. 2107.501

9. When two different constructions are possible, the court should give effect to the one which sustains the provisions of the will, rather than to the one which defeats it. *McMerriman v. Schiel* (1923), 108 Ohio St. 334.

10. Undevised real property must be sold before devised real property to pay the debts of the estate absent a contrary intention in the will. 2107.53

11. Heirs: An "heir" is defined in *Holt v. Miller* (1938), 133 Ohio St. 418, 14 N.E.2d 409, wherein it is stated: "In its technical sense, the term 'heirs' embraces those persons who take the estate of an intestate under the statute of descent and distribution * * *." as cited in *Boulger v, Evans* (1978), 54 Ohio St.2d 371.

12. Heirs: No one is the "heir" of a living person. The usual rule is that heirs are determined as of the date of the testator's death. *Casey v. Gallagher* (1967) 11 Ohio St.2d 42, 49 and 50.

13. Heirs: The sense in which the term "heirs" is used in a will is always open to inquiry. It has often been properly held to mean "next of kin," and should be so understood whenever the context so requires. This, of course, would mean generally heirs according to the statute of distribution. However, the testator's language may exclude the spouse as an "heir": where a testator makes a provision for his wife, in lieu of dower, and directs that, in the event of her claiming dower, the balance of certain personal property bequeathed for her support "shall be shared equally among my heirs." *Jones v. Lloyd* (1878), 33 Ohio St. 572.

14. "Next or nearest of kin": The phrase "nearest of kin" and "next of kin" when employed in a last will and testament, in the absence of language in the will manifesting a different intention, is to be so construed as to embrace within its meaning such as would inherit under the statutes of descent and distribution, and in the order and proportion therein provided. *Godfrey v. Epple* (1919), 100 Ohio St. 447. And under the laws of descent and distribution, there are *some* classes, eg, children of the decedent and brothers/sisters of the decedent, who if they predecease the decedent and have children of their own (to wit: lineal descendants), their children will take per stirpes.

15. "Anti-lapse" statute (RC 2107.52(B)):

Note: Under the common law a testamentary gift to a beneficiary who predeceased the testator lapsed even if the beneficiary was related to the testator by blood. Today there are two ways to avoid the lapse of a bequest when the beneficiary predeceases the testator. One is through the application of R.C. 2107.52, the Ohio anti-lapse statute. The other way is through an expression of the testator's intention that the bequest not lapse.

A. Applies when devise is to testator's child, stepchild, grandchild, parent, grandparent, sibling, niece, nephew, grandniece, grandnephew (ie., descendants of testator's grandparents).

B. Devisee pre-deceases the testator (even if before the execution of the will),or fails to survive him/her by 5 days (120 hrs.).

C. If the devise is to a *specific* individual (ie., not a class gift), that gift is equally split among the individual's "surviving" descendants.

D. If the devise is to a *class* of individuals (eg., "my children: Paul, John, George, and Ringo") the share of those deceased individuals is equally split both by the "surviving descendants" and the "surviving devisees" of the individual.

   But, the gift *will* "lapse" to the surviving devisees if the testator describes the class as "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives" or "family," or "language of similar import." (Probably because "heirs" are not determined until the date of death.) "Children" ruled to be "language of similar import." *Castillo v. Ott*, 2015-Ohio-905 (in a rare affirmation of the Lucas County Probate Court.)

   Likewise, a gift will lapse if the devisee is otherwise *not* a "family" member as defined above.

E. This statute will apply, and a gift will not lapse, even if the testator uses the words "surviving" or "living" attached to the devisee (probably because still a bit imprecise.) Instead, there must be more specific words such as "my child, should my child survive me" to defeat the statute. Other language which can defeat the statute: "should this gift lapse or fail for any reason, then the gift shall pass under the residuary clause."

F. The statute does not appear to apply to residuary clause distributions left to two or more "persons" per RC 2107.52(D)(2). See #17 below. The statue seems to differentiate between residuary gifts and non-residuary gifts.

16. A devise, other than a residuary devise, that fails becomes part of the residuary. RC 2107.52(D).

17. If the residue is devised to two or more "persons", and if a "share" of the residue "fails for any reason," that share is split by the other person(s). RC 2107.52(D)(2).

18. *Per Stirpes* and *Per Capita* are terms which do not designate *who* receives; but rather *what* they receive. *Richland Trust Co. v. Becvar* (1975), 44 Ohio St.2d 219.

   a. With *per stirpes,* the descendants split equally that share to which their ancestor was entitled by representation (representing their ancestor).

   b. With *per capita,* all of the beneficiaries share equally per head. *Mooney v. Purpus* (1904), 70 Ohio St. 57, 65, 70 N.E. 894, 895. Language such as "share and share alike" presumptively indicates an intent for the beneficiaries to take *per capita* and not *per stirpes*. Id. at syllabus. See, also, *Huston v. Crook* (1882), 38 Ohio St. 328, 331

19. Powers of Executor: When a will does "hereby authorize and *empower him to sell* and by deed duly executed to convey all said real estate to the purchaser or purchasers thereof, *if necessary* for the purpose of distributing my said estate among the devisees and legatees aforesaid." That the power of sale vested in the executor was a "naked power" only, not a power coupled with an interest in the land, and could only be exercised, if necessary, for the purpose of making distribution among the devisees. A devisee may sell and convey his undivided share as real estate before distribution, but the purchaser takes the same subject to this power of sale, the same as his grantor, if its exercise becomes necessary. *Hoyt v. Day* (1877), 32 Ohio St. 101.

20. *Ejusdom Generis* is a rule of construction in which a presumption exists, "where a more general description is coupled with an enumeration of things, the description shall cover only things of the same kind." *Creamer v. Harris* (1914), 90 Ohio St. 160, 165. E.g., "personal property such as household goods" would not include bank accounts. However, a general term will not be reduced by a particular description when the description appears to be an example or a means for identifying the property further. "I give all of my personal property and household goods to…" interpreted to include intangible property. *Sandy v. Mouhot*, Id.

21. Conditional and contingent wills are fully recognized in the American and English cases. *McMerriman v. Schiel* (1923) 108 Ohio St. 334.

22. Abatement: Abatement occurs when the decedent's estate is insufficient to satisfy all debts and testamentary bequests, and refers to the resultant reduction or diminution of a beneficiary's bequest under the will. Common law provides that, when the estate is insufficient to satisfy estate debts and bequests, the following rules apply in the absence of a clear expression of the testator's intent otherwise: the residuary beneficiary abates before the general; the general beneficiary abates before the specific and demonstrative; finally, the specific and demonstrative beneficiaries abate last. *In Re Estate of Oberstar* (1998), 126 Ohio App.3d 30.

23. Charity: Under Ohio law, gifts for charitable purposes are favored, and are construed to give them effect, if possible. *Gearhart v. Richardson* (1924), 109 Ohio St. 418.

Evidence

A. Four Corners of the will: Look at the language used by the Testator. *Knepper v. Knepper* (1921) 103 Ohio St. 529.

1. The court should first look at the four corners of the will document---the language of the will itself---to discern the testator's intention. If it is clear and unambiguous, simply follow that intention. *Carnahan v. Johnson* (1998), 17 Ohio App.3d 195. The words used by the testator in the Will must be afforded their ordinary and usual meaning. *Findley v. Conneaut* (1945), 145 Ohio St. 480.

2. Only when the words are ambiguous does the trial court need to employ the rules of construction in its interpretation of the language therein. *Polen v. Baker* (2000 4th dist.) 99 CA 34.

B. Extrinsic Evidence

1. The testator's intent is to be ascertained, and to the extent possible, such should be determined from the instrument itself. *Hess v. Sommers* (1982), 4 Ohio App.3d 281, 4 OBR 500, 448 N.E.2d 494. However, this rule of construction is not absolute and the court is not limited to the four corners of the will to determine the testatrix's intent, *Roelofs v. Apple* (1975), 49 Ohio App.2d 155.

2. A court may consider extrinsic evidence, such as affidavits, to give effect to the testator's intent when the terms of a will are ambiguous. *Sandy v. Mouhot* (1982), 1 Ohio St.3d 143, 146. It is well settled that where there is some doubt as to the meaning of the will the court may admit extrinsic evidence of the testator's family situation * * *." *Holmes v. Hrobon* (1953), 158 Ohio St. 508.

3. "Where a term in a will is susceptible to various meanings, the Probate Court may consider the circumstances surrounding the drafting of the instrument, in order to arrive at a construction consistent with the overall intent of the testator so as to uphold all parts of the will." *Wills v. Union Savings & Trust* (1982), 69 Ohio St.2d 382.

4. It is, however, well settled that where there is some doubt as to the meaning of the will the court may admit extrinsic evidence of the testator's family situation, his business and financial circumstances, the nature and extent of his investments, the character and manner of operation of his business and the natural objects of his bounty. With such evidence the court is better able to see things as the testator saw them and to construe the words used in the will as he understood them and to give that construction which he intended. These rules do not make admissible conversation between the testator and the scrivener at the time the will was drawn or with respect to its meaning. *Holmes v. Hrobon* (1953), 158 Ohio St. 508.

5. One example of extrinsic evidence would be the stipulation that the will in question is one of two reciprocal wills. *Oliver v. Bank One, Dayton* (1991) 60 Ohio St.3d 32.

6. In *Boggs v. Taylor* (1875), 26 Ohio St. 604, the Ohio Supreme Court permitted consideration of parol evidence to shed light on the phrase: "the home farm where I now reside."

C. Statements of the Decedent

1. Evid. R.804(B)(5) permits statements of the testator to be admitted, despite hearsay rule, if 1) the estate representative is a party, 2) the statement is made prior to death (hmmm?) and 3) the statement is made to rebut the testimony of an adverse party on a matter within the knowledge of the testator.

2. The only party who can testify about the statements of the decedent is the personal representative of the estate when rebutting another party. See 2nd Dist Ct of Appeals Case: *Mancz v. McHenry*, 2012-Ohio-3285, interpreting Evid. R. 804(B)(5). This rule used to be the Dead Man's Statute but was replaced by this evidentiary rule.

3. The testimony of an attorney is not competent to vary the terms of a written instrument prepared by him as such, and in a proceeding to construe a will the attorney who wrote the will, and with whom the testator consulted concerning it, is not competent to testify concerning a communication made to him by his client touching his estate, the objects of his bounty or the meaning and effect of provisions contained in the will. *Knepper v. Knepper* (1921), 103 Ohio St. 529. (Distinguished from the permissible testimony as a witness to the will's execution.)

Life Estates

1. "The law favors the vesting of estates at the earliest possible moment, and a remainder after a life estate vests with the remainderman at the death of the testator, in the absence of a clearly expressed intention to postpone the vesting until some future time." *Ohio Nat'l Bank of Columbus v. Boone* (1942), 139 Ohio St. 361.

2. Effect: What about a life estate given to a surviving spouse with unfettered discretion to use the res for his/her "care and maintenance"? RC 2113.58 affords the court the oversight to protect the remainderman's interest in personal property, permitting the court---subject to the testator's intent--- to either give the property into the hands of the spouse, or leave the property in the hands of the fiduciary for use by the spouse. The surviving spouse (as a "quasi trustee"), or the fiduciary, has a duty to protect that amount of the res not used for "care and maintenance" for the remainderman. *Kurtz v. Brown* (1976), 53 Ohio App.2d 190.

3. Converting real estate to personal property does not destroy the remaindermen of the vested interests; but it also does not limit the surviving spouse's right to invade the res for his/her care and maintenance. *Kurtz,* Id.

4. Where a testator made a devise to his son John "through his natural life and then to his heirs," and in another part of the will used the word "heirs" in the sense of "children" -- Held, that the son took a life estate only, with remainder to his children, and not to his heirs generally, and that upon his death without any children, the devise in remainder failed, and the estate reverted to the heirs of the testator (and not of the son). *Bunnell v. Evans* (1875), 26 Ohio St. 409.

Examples

1. Use of technical term: Where a testator made a devise to his son John "through his natural life and then to his heirs," and in another part of the will used the word "heirs" in the sense of "children" -- Held, that the son took a life estate only, with remainder to his children, and not to his heirs generally, and that upon his death without any children, the devise in remainder failed, and the estate reverted to the heirs of the testator (and not of the son). *Bunnell v. Evans* (1875), 26 Ohio St. 409. *Cultice v. Mills* (1918), 97 Ohio St. 112.

2. Power of Creditor to attach: The levy of an attachment, in an action against a devisee, will not defeat or prevent the execution of a power of sale, given by the testator to his executor, nor will such levy affect the title of the purchaser at the executor's sale. A testator devised his estate to his five children in equal shares, and authorized and empowered his executor to sell and convey all the real estate of which he died seized. A creditor of one of the devisees caused an attachment to be levied on an undivided fifth part of said real estate. Afterward, the executor, in execution of the power, sold and conveyed all said real estate. Held: That the purchaser acquired title to the land conveyed, unaffected by the levy of the attachment. *Smyth v. Anderson* (1876), 31 Ohio St. 144.

3. Equity: On the other hand, when the terms of the will are not ambiguous, a court may not consider extrinsic evidence, even where it may lead to an inequitable result. *Church v. Morgan* (1996) 115 Ohio App.3d 477, which considered a testator who executed a will leaving a specific account to a friend. Within hours of signing the will, and at the suggestion of her POA---who had no knowledge of the terms of the will---she moved the funds from that account into a certificate of deposit to earn a

higher interest rate. The appellate court disallowed the testimony of the POA: Therefore, when the language of the will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself. Only when the express language of the will creates doubt as to its meaning may the court consider extrinsic evidence to determine the testator's intent.

4. Life estates: If a testator leaves a life estate in a parcel of real estate to a child, with the remainder to the grandchildren, each grandchild's interest in the parcel vests at the time of the testator's death. If the grandchild should die before the child's life estate ends, the heirs of the grandchild inherit the grandchild's remainderman interest. *Peters v. Allison* (2004). 158 Ohio App.3d 223.

5. Statement of reason for will: A will that begins: "in case that I meet with accident on this journey, I leave…" should be considered as a statement of inducement and not a contingency to validity of the will. Where a contingency exists in a will, wherein testator has made it entirely clear that the will shall not become operative except upon the happening of such contingency, or where by express language it is provided that the will shall become void if such contingency does not occur, this court would not hesitate to give full effect to the intent thus clearly expressed, ad declare the will invalid. The courts should treat the statement as an inducement for making the will, if possible, and not as a condition to its operation, unless the words or the surrounding circumstances clearly show that it was intended to be contingent. *McMerriman v. Schiel* (1923) 108 Ohio St. 334.

6. Extrinsic evidence: It is in view of this fact, that the law not only allows but requires the instrument to be read in the light of the surrounding circumstances, and permits the introduction of such extrinsic evidence as will enable the court to place itself in his situation, to see things as the testator saw them, and to apply his language as he understood and intended it. So, the Supreme Court considered evidence which showed that the testator feared that his estate would not be sufficient to cover specific bequests---which then led the Court to construe his intent. *Wills v. Union Savings & Trust Co*. (1982), 69 Ohio St.2d 382.

7. Extrinsic evidence for purposes of identification of beneficiaries: Extrinsic evidence was accepted to show that "my legal heirs, meaning my brothers and sisters" included a half-sister and a step-brother where it showed that, in fact, the testator

had but one sister and no brothers, but had referred to the half-sister as "sister" and the step-brother as "brother." *Griffitt v. Weitzel* (1915), 17 Ohio N.P.49.

8. Drafting Error: Where the attorney drafting the will inadvertently inserts the name "Joyce Smith" as opposed to "George Smith" and files an affidavit to that effect with no opposition, the Court may declare and correct the mistake. *Kaplain v. Fair*, 2004 Ohio 3457.

9. Anti-lapse statute: Language in a residuary clause that provided for distribution to three named beneficiaries, "or their survivors, absolutely and in fee simple, equally, share and share alike" refers to the survivors among those named in that clause, and that the child of a deceased named beneficiary was not entitled to share in the estate. Rather, the testator intended for per capita, or equal, distribution of the residuary estate to those named individuals who survived her. And because the will provides for such distribution, the will evinces sufficient intent to avoid application of the antilapse statute. *Polen v. Baker*, 92 Ohio St.3d 563 (2001).

10. Extrinsic Evidence: A bequest was made to the "First Presbyterian Society of Gallipolis". However, there were two churches in Gallipolis with the exact same name. The Court considered the circumstances of the existence of the churches at the time of the execution of the Will, and the subsequent split within the congregation, to discern which church should receive the bequest. *First Presbyterian Society vs. First Presbyterian Society* (1874), 25 Ohio St. 128.

11. Gift to a charity not yet in being? Case law exists which permit a charity created within a "reasonable time" after death to receive a bequest from the estate. *Rice v. Stanley* (1975), 42 Ohio St.2d 209. *Rice* also suggested that if the charity was never organized, the probate court would frame and develop a plan to distribute the property to designated charitable purpose.

12. Blood relations: The term 'niece' or 'nephew' was held to be those of that relation by consanguinity only. The court concluded that when the testator used the phrase 'my nieces and nephews' in his will he meant the children of his brothers and sisters and not the nieces and nephews of the testator's prior deceased spouse. *Frederick v. Hoffman* (1966), 7 Ohio App.2d 27.

Good Luck.

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
CLARK COUNTY, OHIO

In the matter of	:	
		CASE NO. 20160123A
Deborah Potts, Spec. Adm.,	:	
Plaintiff	:	
-vs-	:	JUDGE RICHARD P. CAREY
Glenn Allen Potts, et al.	:	**ENTRY**
Defendants	:	

This matter is before the Court to consider a complaint for construction of a Will filed by Special Administrator Deborah Potts on March 12, 2019. The Administrator represents that she is in doubt as to the true construction of certain paragraphs of the Decedent's Last Will and Testament. The Court's attention is directed toward Article IV of the said Last Will and Testament which reads as follows:

ARTICLE IV
Specific Gifts

A. Gifts of Specified Items of Property. I give all my interest in certain items of tangible personal property to the beneficiaries designated in this section as follows:

1. **Specific Gift One.** I give and wish for my living daughter to live at my home 4523 EnonXenia Road upon her death my two remaining sons Glen A. Potts and Foster Ray Potts will have my eatate (sic) 50% to each one to my daughter, JoElla Denzer if she survives me. If JoElla Denzer does not survive me no property shall pass under this Article.

Glenn Allen Potts, the son of the decedent, filed an Answer by and through counsel, Attorney Andrew Elder. Kristy Ratliff, the granddaughter of the decedent, by way of the decedent's son, Foster Ray Potts, filed an Answer pro se. And Jessica Anon and Misti Couch, grandchildren by

way of the decedent's children, Albert Estes, Jr. and Donna Estes respectively, filed an Answer by and through counsel, Attorney Paul Kavanagh. All interested parties were given an opportunity to file respective briefs on the issue.

As it has been represented by the parties in their briefs in the underlying estate, the decedent, Ruby Estes, died on December 29, 2015. On December 10th of that year, Ruby Estes signed her Last Will and Testament; and therein listed the following as her children, to-wit: Glenn Allen Potts, Foster Ray Potts, JoElla Denzer, "Albert Estes, Jr. (deceased)", and "Donna K. Estes (deceased)". This comprised the full list of children as referred to in her Will. Glenn Allen Potts survived the decedent and remains alive to date. Foster Ray Potts survived the testator by more than five days but less than thirty days, dying on January 21, 2016. JoElla Denzer survived the testator by approximately two years. Albert Estes Jr., who predeceased the testator, is survived by children Jessica Anon and Andrea Estes. Donna K. Estes, who predeceased the testator, is survived by her one child, Misti Couch.

The role of the Court in a will construction case is to ascertain and give effect to the testator's intent. *Oliver v. Bank One Dayton N.A. (1991),* 60 OhioSt 3rd 32. In this case, the Court would agree with counsel that the Will herein was inartfully drafted. Nevertheless, the Court must first look to the four corners of the Will document to discern the intention of the testator if possible. To this end, when two different constructions are possible, the Court must give effect to the one which sustains the provisions of the Will, rather than to the one that defeats it. *McMerriman v. Schiel (1923),* 108 OhioSt. 334.

In this case, the Court finds it beneficial to begin with a review of the residuary clause. In Article V, the testator employs the following language: "I give all of the rest and residue of my estate, wherever located … to my descendants if they survive me per stirpes." In *Black's*

Law Dictionary 908 (9th Edition 2009) "descendant" is defined as "[o]ne who follows in the bloodline of an ancestor, either lineally or collaterally. Examples are children and grandchildren." The testator adds the language "per stirpes" to her instructions. This language does have legal significance, as it helps to suggest an intent to limit the definition of "descendants" to a particular class --- here, children --- with the next line of descendants --- i.e. grandchildren --- in a position to take, not directly, but by representation. The Court, then, finds that the intention of the testator in this case by using the word "descendants" is to describe her named children.

The Court notes, however, that the word "descendants" is further qualified with the language, "if they survive me". This suggests that the testator deemed their survival of her to be of import. As stated above, the testator specifically in Article I announced that two children were already deceased, that is Albert Estes Jr. and Donna K. Estes. For this reason, the class of potential beneficiaries in the residuary clause is reduced, as of the time the Will was executed, from five to three children, to-wit: Glenn Allen Potts, Foster Ray Potts and JoElla Denzer.

This having been considered, the Court returns to an examination of Article IV. The testator's language in Article IV A is that she was giving "all my interest in certain items of *tangible personal property* to the beneficiaries designated in this section." Unfortunately, there is, in fact, no specific gift of tangible personal property expressed by the testator. Rather the sole asset specifically described is a parcel of real estate located at 4523 Enon Xenia Road. Under these circumstances, the use of the words "tangible personal property" should be deemed a scriveners error and without legal effect and, to that end, ignored.

The Court next considers that JoElla Denzer, and more specifically her status as living or deceased at the time of the testator's demise, holds the key to the interpretation and execution of

the Will herein. The Court finds the following language in the body of Article IV, A.1: "to my daughter, JoElla Denzer, if she survives me." As written, if JoElla Denzer were *not* to survive the testator, then the real estate would pass under the residuary clause, and Article IV paragraph A1 would have no effect or operation. On the other hand, if JoElla Denzer survived the testator, then the testator specifically devised a life estate regarding the real property to JoElla Denzer. This is the natural and legal consequence of the language "I give and wish for my living daughter to live at my home 4523 Enon Xenia Road" as amplified by the additional language "upon her death".

As represented by the parties, JoElla Denzer did in fact survive the testator by more than thirty days. And, accordingly, she was given a vested life estate interest in said described real property. She did, apparently, reside in this property until her death.

The Court now looks to Article IV paragraph A1 to discern what is to become of the property upon JoElla's death. The Court finds, albeit poorly drafted, the following language, to-wit: "upon her death my two remaining sons, Glenn A. Potts and Foster Ray Potts, will have my estate 50% to each one…" Confusion is compounded by the additional language which then followed: "to my daughter, JoElla Denzer, if she survives me." The Court, after reflection, finds that this language was mistakenly placed at that point of the paragraph and has no legal effect with respect to this remainder interest. That is to say that neither JoElla Denzer, nor her heirs, stand to receive any interest beyond the stated life estate. The reason for this is that if each son receives 50%, as per the directive of the Will, there is no extra interest to pass to any other person. So, at the end of the day, the Court does find that the testator intended to and did devise her real estate to her two sons, Glenn A. Potts and Foster Ray Potts, with a life estate vested to

JoElla Denzer. Moreover, these respective interests vested immediately upon the death of the testator. *Woodbridge v. Branning* (1836), 14 OhioSt. 328.

The legal twist that presents itself with this interpretation is that Foster Ray Potts died within thirty days of the testator. Article VIII, paragraph B states that "[t]o 'survive' me, as that term is used in this Will, a person must continue to live for thirty (30) days after my death." It is suggested that this would mean that the interest devised to Foster Ray Potts should therefore lapse to his brother , Glenn A. Potts.

Two things. First, the thirty day requirement under Article VIII is limited in application to those parts of the Will where the term is used, "to survive me". Article IV, paragraph A1, however, does not use any such survivorship language per se as a condition of operation, but rather simply employs the language: "upon her death my two remaining sons, Glenn A. Potts and Foster Ray Potts," (clearly consistent with the assertion that the third son had already passed).

Secondly, we must consider R.C. 2107.52 as there has been a suggestion that Foster's devise must lapse. The "anti-lapse" statute is of use herein, but only to the extent that it defines who is and who isn't a surviving devisee. R.C. 2107.52 defines "surviving devisee" as one who survives the testator by at least 120 hours. That is five days. R.C. 2107.52 (A)(7). In light of the observations in the former paragraph, the thirty day requirement per Article VII must yield to the lesser five day requirement per R.C. 2107.52. The Court believes that since Foster Ray Potts survived the testator by more than five days, he must be considered under law to be a "surviving devisee" for purposes of the anti-lapse statute. Once Foster Ray Potts is discerned to be a surviving devisee, the anti-lapse statute is of no further service: there is no lapse as a result of death. What this means is that the 50% interest in the real property vests in Foster Ray Potts;

and does not lapse to Glenn A. Potts nor does it vest by representation in his descendants --- as would have been the result had the anti-lapse statute been applied.

Accordingly, and with respect to the real estate listed as 4532 Enon Xenia Road, Glenn A. Potts and Foster Ray Potts each received a devise of 50% interest in said real estate upon the death of the testator. Glenn A. Potts enjoys that 50% interest to date. Insofar as Foster Ray Potts is now deceased, his 50% interest becomes an estate asset in the Estate of Foster Ray Potts and passes either in accordance with his Last Will and Testament or by the laws of intestate succession.

The Court now returns to the matter of the operation of the residuary clause in Article V. The specific question here is who should receive the funds subject thereto. The Court focuses its attention on the following Article V language, to-wit: "to my descendants if they survive me per stirpes." As previously stated, the Court finds the bequest of the residuary to be a "class gift" to a class comprised of three of the children named in Article I of the Will. Here, unlike Article IV, the testator did specifically employ the words "if they survive me". And so here, the thirty day time requirement, and not the lesser five day requirement, would apply. To that end, only two of the testator's children survived her by thirty days --- Glenn A. Potts and JoElla Denzer --- and so only these two children make up the class of beneficiaries in light of this language.

This Court notes that generally a class gift to "descendants" does not trigger the application of the anti-lapse statute. See 2107.52(B)(2)(b). Rather, the use of that term, especially as coupled with the language: "if they survive me," evinces the intention of the testator that the gift be enjoyed only by the "children" who survived her --- that is, that the share of a deceased child would, indeed, lapse. This inures to the benefit of Glenn A. Potts and JoElla

Denzer; but is of no value to the descendants of Foster Ray Potts, Albert Estes, Jr. and Donna Estes.

Accordingly, Glenn A. Potts would take 50% of the residuum and the lineal descendants of JoElla Denzer --- as she is now deceased --- would take the balance. Sadly, however, and as represented to the Court, JoElla Denzer died without any children. As a result, the devise of the residuary to JoElla Denzer fails. Pursuant to R.C. 2107.52 (D), the share of a residuary devisee that fails for any reason passes to the other residuary devisee. That is to say that Glenn A. Potts receives that residue which otherwise would have passed to any children of JoElla Denzer.

The Court has been advised that the Special Administrator has sold the real property in question. Accordingly, the Court now declares that Glenn A. Potts receive 50% of the proceeds from said sale, and the Estate of Foster Ray Potts receive 50% of the proceeds of said sale. Furthermore, Glenn A. Potts is to receive the residuary of the estate assets in total.

IT IS SO ORDERED.

THIS IS A FINAL APPEALABLE ORDER.

RICHARD P. CAREY, PROBATE JUDGE

cc: Andrew Elder, Esq.
Paul Kavanagh, Esq.
Jack Spencer, Esq.
Kristy Ratliff, pro se
Andrea Estes

CIVIL PROCEDURE REFRESHER

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Biography

Professor **Bernadette Bollas Genetin** is a Professor of Law at The University of Akron School of Law where she teaches Civil Procedure, Federal Jurisdiction and Procedure, and Complex Litigation. A past Chair and current Executive Committee member of the AALS Section on Litigation, Professor Genetin writes in the area of federal rulemaking, concentrating on the intersection of federal procedural rules and congressional statutes and on the separation of powers and federalism issues that may result when federal rules and statutes conflict. Professor Genetin has recently turned her focus to the interplay between the federal e-discovery rules and state e-discovery. Professor Genetin received her B.A. degree, with highest honors, from The University of Notre Dame, where she was also inducted into Phi Beta Kappa. Professor Genetin received her law degree, with highest honors, from The Ohio State University College of Law, where she served as Editor-in-Chief of the Ohio State Law Journal and was a member of the Order of the Coif. Prior to joining the Akron Law faculty, Professor Genetin clerked in the United States Court of Appeals for the Second Circuit and worked in private practice as an associate attorney and as a partner for law firms in Columbus, Ohio and Canton, Ohio.

A Civil Procedure Refresher

By Bernadette Bollas Genetin

This discussion of the Ohio Rules of Civil Procedure provides information on the following issues:

- Applicability of the Ohio Rules in the Probate Division of the Common Pleas Courts (Ohio Civ. R. 73);
- Real parties in interest (Ohio Civ. R. 17);
- Pleading issues (Ohio Civ. R. 8 and 12);
- Dismissals (Ohio Civ. R. 41);
- Discovery (Ohio Civ. R. 26-37); and
- Subpoenas (Ohio Civ. R. 45).

I. **Applicability of Ohio Civil Rules in the Probate Court**

Ohio Civ. R. 73 lists particular Rules of Civil Procedure that apply in the probate division and some rules that do not. It then provides that all of the Rules of Civil Procedure apply – even if not mentioned expressly – "except to the extent that by their nature they would be clearly inapplicable."

Civ. R. 73 explicitly addresses the applicability of the following provisions in Probate Court:

(1) Venue. Civ. R. 73(B) provides that Civ. R. 3(B), regarding venue, is inapplicable in probate court. *See* Civ. R. 73(B). Instead, Rule 73(B) provides that Ohio R.C. Chapters 2101 through 2131 provide for venue.

Rule 73 also provides that proceedings that are improperly venued in the general division "shall" be transferred to the probate division, rather than dismissed. Further, the court may award costs, including reasonable attorney fees through the time of transfer against the party who filed in an improper venue.

(2) Service of Summons. Civ. R. 4 through 4.6 apply in probate proceedings. *See* Civ. R. 73(C).

(3) Service and Filing of Pleadings and Papers after the Original Pleading. Documents filed after the original pleadings must include a certificate of service, as required by Civ. R. 5.

(4) Service of Notice. In proceedings in which "notice" must be given other than the original service of summons and complaint, Civ. R. 73(E) (1) provides that the notice must be in writing; and (2) specifies seven types of notice that may be sufficient:

a. Delivering a copy to the person to be served

b. By leaving a copy at "the usual place of residence" of the person to be served
c. By U.S. certified or express mail, return receipt requested, or by a commercial carrier service with a form of delivery requiring a signed receipt, with the instructions specified in Rule 73(E)(3)
d. By U.S. ordinary mail, if a U.S. certified or express mail envelope is returned indicating that it was unclaimed, but not if the U.S. ordinary mail is returned indicting failure of delivery
e. By publication once each week for three consecutive weeks in a "newspaper of general circulation in the county" in certain instances in which a person or the residence of the person to be served is unknown and cannot be ascertained with reasonable diligence and an appropriate, specified affidavit is filed with the court
f. By another method that the court may order.

See Rule 73(E). Additionally, Rule 73(F) specifies acceptable means of establishing proof of service of notice. Civ. R. 73(G) permits waiver of service of notice under the same conditions in which Civ. R. 4(D) permits waiver of service of a summons and complaint. In each case, any person who is entitled to service may waive the service if that person is at least 18 years old and is not under a disability.

(5) Clerk Must Serve Copies of the Judgment on Parties. Civ. R. 73(I) clarifies that Civ. R. 58 applies in probate matters, and the clerk must serve signed copies of judgments upon the parties. Notice of the judgment will be provided to each plaintiff, applicant, or movant, to any person who filed a responsive pleading or exceptions, and to other persons, as directed by the court.

II. Real Party in Interest – Civ. R. 17(A)

Ohio Civ. R. 17(A) provides that every case must be prosecuted in the name of the real party in interest. To meet this requirement, a party must have a real interest in the subject matter of the action, not just an interest in the outcome of the action. *Phillips v. May*, 2004-Ohio-5942, ¶. One method of ascertaining if a party has the requisite real interest is determine if the party is directedly benefitted or injured by the outcome of the case. *Id*.

Some Persons Authorized by Rule to Sue on Behalf of Others. Civ. R. 17(A) also provides special applications of the rule, which permit certain persons to file an action for the benefit of another without joining the party for whose benefit the action is brought. These parties include an executor, administrator, guardian, bailee, trustee of an express trust, a party with whom a contract has been made for the benefit of another, and person authorized by statute to sue in a representative capacity. *Id*.

Reasonable Time for Joinder or Substitution of the Real Party in Interest, or Ratification. Additionally, if an action is filed by a person who is not a real party in interest, the action may not

be dismissed until a reasonable time has been allowed after objection for the joinder or substitution of the real party in interest or for the ratification of the action. *Id*.; *see also U.S. Bank Nat'l Assn. v. Morales*, 2009-Ohio-5635, ¶ 33. Once the appropriate party has been joined or substituted or the action has been ratified, the action will proceed as though filed in the name of the real party in interest. *Id*.

Minors or Incompetent Persons. If a minor or incompetent person has a representative, including a guardian or other fiduciary, that representative may sue on behalf of the minor or incompetent person and may defend actions against the minor or incompetent person. Civ. R. 17(B).

A parent is a natural guardian of a minor, and this is codified in Ohio R.C. § 2111.08. If, however, the natural guardian has an adverse interest to the child, the court must appoint a guardian *ad litem* to represent the minor or other person who has a legal disability. *See* Ohio R.C. 2111.23. Of course, because Rule 17(A) encompasses a standing requirement, a child must have an interest in the lawsuit, before a parent or guardian ad litem may represent the child in the action. Thus, in *Driggers v. Driggers*, 115 Ohio App. 3d 229, 233 (1996), the court denied a woman the right to intervene in her daughter's divorce proceeding, on behalf of certain grandchildren from her daughter's first marriage, when the daughter died during the divorce proceedings. *Id*. The court denied intervention, reasoning that, because custody was not at issue in the divorce proceeding, the children were not real parties in interest. *Id*.

If the minor or incompetent person does not have an appointed representative, a next friend or guardian may sue on the person's behalf. Civ. R. 17(B). If a minor or incompetent person is not represented, the court must appoint a guardian *ad litem* or make another appropriate order for the protection of the minor or incompetent. *Id*.

III. Pleadings and Responses to Pleadings

A. *The Complaint*

Civ. R. 8 applies to pleadings containing claims for relief, including the complaint, counterclaims, cross-claims, or third-party claims. Civ. R. 8(A) requires that pleadings containing a claim for relief must include (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for the relief the party claims.

Amount of Recovery. If a party seeks more than $25,000, the party shall make that demand in the pleading but shall not allege in the demand the specific amount claimed, unless the claim is based on a written instrument that has been attached as set forth in Civ. R. 10(A).

Any time after the pleading has been filed and served, any party may request in writing a written statement of the amount of recovery sought. The court may, upon motion, order that the party seeking recovery respond to the written request.

Notice Pleading. In Ohio, pleadings are generally considered to give notice of the general nature of the claims at issue and not to provide specific factual information regarding the claims alleged. Instead, parties will discover the facts of the case through discovery. This is at variance with the current construction of the federal rules of civil procedure, which requires a heightened pleading, often referred to as "plausibility" pleading. Although some Ohio courts have entertained arguments that Ohio Civ. R. 8(A) should be construed to require heightened pleading, the Ohio Supreme Court has not construed Rule 8 in that manner.

B. *Serving the Complaint*

Service of the Summons and Complaint. Upon the filing of a complaint, the Clerk will issue a summons for service of each defendant listed in the complaint, *see* Civ. R. 4(A). Thus, Plaintiff must ensure that every defendant is listed in the caption of the complaint. A copy of the complaint must be attached to each summons. Civ. R. 4(B). The Plaintiff must also provide enough copies of the complaint to the Clerk so that the Clerk may serve each summons with an attached copy of the complaint.

Service of the summons must be made as set forth in Rule 4.1 and 4.2, unless a defendant waives service.

Waiver of Service. Civ. R. 4(D) permits waiver of service of the summons "in writing" by persons entitled to service under Rule 4.2, who are at least 18 years old and not under a disability.

Time Limit for Service. Civ. R. 4(E) provides that service of the summons and complaint must be made within 6 months of the filing of the complaint, unless the party seeking service can show good cause why service was not effected within that time. Absent service within 6 months or good cause, the court may, on its own initiative, dismiss the case as to the defendant upon whom service was not made. The court must provide notice of any dismissal to all parties. This rule does not apply to out-of-state defendants.

Civ. R. 3(A) provides that an action will be deemed commenced on that date filed, if service of the summons and complaint on defendants is made within one year of the filing. Civ. R. 3(A) has been considered limit the time for service of out-of-state and foreign defendants and to indicate the permissible extensions for "good cause" under Civ. R. 4(E). *See* A.J. Stephani and Glen Weissenberger, Weissenberger's Ohio Civil Procedure Litigation Manual, 2019 Edition, at Chapter 3, page 17.

Methods of Service. Civ. R. 4.1 provides the methods for service of process on in-state defendants.

In general, the Clerk may serve a summons and complaint by express or certified U.S. mail or by commercial services, for service within the state of Ohio. *See* Civ. R. 4.1(A)(1). Civ. R. 4.1 also provides for personal service, if the plaintiff provides a request in writing. In such instances, the process server may be a sheriff or other official, or the process may be served by any person, who is not less than 18 years old, is not a party to the action at issue, and who has been designated by court order to make service. *See* Civ. R. 4.1(B) also provides that if service is not made within 28 days, the person attempting to serve process should endorse that fact and the reason for the failure of service on the process and return the process to the clerk, who will make an entry on the docket.

Process on in-state defendants may also be served by "residence service." *See* Civ. R. 4.1(C). In this case, residence service may be made by the appropriate county or court official or a by person who is at least 18 years old, not a party to the suit, and has been designated to serve process by court order. *See* Civ. R. 4.1(C). Residence service may be made by leaving a copy of the summons and complaint at the usual place of residence of the person to be served with "someone of suitable age and discretion then residing therein." *Id*. As with personal service, a person serving by residence service has 28 days to make service. If service is not completed within that time period, the person attempting to serve process should endorse that fact and the reason for the failure of service on the process and return the process to the clerk, who will make an entry on the docket.

Persons Who May Be Served. Persons entitled to service are listed in Civ. R. 4.2(A)-(O). The various subsections indicate, for the different types of defendants, who may be served.

- *Individuals*. Individuals, other than persons under 16 years old and incompetent persons.
- *Persons Under 16*. Note that only a person who is at least 18 may waive service of the summons.
- *Incompetent Persons*
- *Individuals Confined in Penal Institutions*
- *Incompetent Persons Confined in Any Institution*
- *A corporation, Domestic or Foreign*
- *A Limited Liability Company*
- *A Partnership, Limited Partnership, or Limited Partnership Association*
- *An Unincorporated Association*
- *A Professional Association*
- *The State of Ohio or Any of Its Departments, Offices, Institutions*
- *A County or Its Offices, Agencies, Districts, Departments, Institutions, or Administrative Units*
- *A Township*

- *A Municipal Corporation or Any of Its Offices, Departments, Agencies, Authorities, Institutions, or Administrative Units*
- *Other Governmental Institutions*

Methods of Serving Out-of State and Foreign Defendants. Methods for serving out-of-state defendants and foreign defendants are set forth in Ohio Civ. R. 4.3 and 4.5, respectively.

Service by Publication. Civ. R. 4.4 provides for service by publication in the following instances: (1) when the address of the person to be served is unknown, Civ. R. 4.4(A)(1); (2) when service by publication is permitted by law.

Service by publication is viewed as permissible primarily as a last resort, when service may not otherwise be made. The person seeking service by publication must file an affidavit attesting that the residence of the person to be served is unknown, all efforts made to determine the residence, and that the residence cannot be determined with reasonable diligence. Civ. R. 4.4(A).

C. ***Responding to the Complaint – The Answer***

Timing of Responses to the Complaint. In general, a defending party must either file an Answer or a motion to dismiss within 28 days after service of the summons and complaint. *See* Civ. R. 12(A)(1). Rule 12(A)(2) provides the timeline for filing a reply to a counterclaim and an answer to a cross-claim.

Timeline for Filing a Responsive Pleading if the Defending Party First Files a Motion to Dismiss. Civ. R. 12(A)(2)(a) and (b) provide that a motion under Rule 12 alters the general timelines for responding to a pleading. If the court denies a Rule 12 motion, the responsive pleading must be filed within 14 days after notice of the court's action. *See* Civ. R. 12(A)(2)(a). If the court grants the motion, the responsive pleading must be filed within 14 days after service of the pleading that complies with the court's order.

The Answer. Civ. R. 8(B) and (C) set for general requirements for an Answer (and other responsive pleadings). Rule 8(B) requires that an Answer must (1) set forth the party's defenses in "short and plain terms"' and (2) admit and deny all averments by the adverse party.

1. *Admissions and Denials*. Rule 8(B) requires that parties must "fairly meet" the substance of the averments and that the pleader when the pleader may in good faith deny only part of an averment, the pleader must "specify so much of [the averment] as is true and material," and deny only the remainder. Rule 8(B) also specifies that a party may indicate that it is "without knowledge or information sufficient to form a belief as to the truth of the averment" and this will have the effect of a denial.

If a responsive pleading is required, any averment that is not denied will be deemed admitted, except for allegations regarding the amount damages. *See* Civ. R. 8(D).

2. *Affirmative Defenses*. Defending parties must also include all affirmative defenses in an answer. *See* Rule 8(C). Rule 8(C) lists a number of affirmative defenses, but the list is nonexclusive.

3. *Counterclaims*. A responsive pleading, such as an Answer, must also include any compulsory counterclaims. *See* Civ. R. 13(A). Compulsory include most transactionally related counterclaims, that is counterclaims that "arise out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id*. Counterclaims that are not yet ripe are not compulsory, even if transactionally related, and counterclaims that are already the subject of another pending action are not deemed "compulsory." *Id*. Parties may, but need not, include permissive counterclaims in an Answer. Permissive counterclaims are those that do not arise out of the same transaction or occurrence as the opposing party's claims. *See* Civ. R. 13(B).

D. Responding to the Complaint – The 12(B)Motions

Instead of filing an Answer, defending parties may file a Rule 12 motion. Rule 12 includes a number of Rule 12(B) motions, the Rule 12(C) motion for judgment on the pleadings, the Rule 12(E) motion for a more definite statement, and the Rule 12(F) motion to strike.

Rule 12 also contains a "consolidation" provision, which requires parties to consolidate all or most motions in a single motion. Further, if a party fails to comply with the consolidation requirements, it may waive some motions. Thus, Rule 12 can be viewed as a trap for the unwary.

Civ. R. 12(B) Motions. Rule 12(B) provides seven motions that a defending party may either include in its Answer or in a pre-Answer motion. These motions are as follows:

- Rule 12(B)(1) – lack of subject matter jurisdiction
- Rule 12(B)(2) – lack of personal jurisdiction
- Rule 12(B)(3) – improper venue
- Rule 12(B)(4) – insufficiency of process
- Rule 12(B)(5) – insufficiency of service of process
- Rule 12(B)(6) – failure to state a claim upon which relief may be granted
- Rule 12(B)(7) – failure to join a party under Rule 19 or Rule 19.1

Rule 12(B) provides that these motions must be made, if at all, by a pre-Answer motion.

Waiver of Rule 12(B) Motions. Rule 12(B) must also be read in conjunction with Rules 12(G) and 12(H). Rule 12(G) provides that a party who makes a motion under this Rule 12 -- and

this means any Rule 12 motion, including motions under Rule 12(B), 12(C), 12(E), and 12(F) – must combine that motion with any other Rule 12 motions them available. If a party fails to make a consolidated motion that includes all available Rule 12 motions, it may irrevocably waive the omitted motion.

Rule 12(H) indicates which Rule 12 motions are waived or preserved, if not consolidated with a party's first motion under Rule 12. Rule 12(H) provides as follows:

- *Immediately Waived*. Defenses 12(B)(2)-(B)(5) are waived if not included as follows: (1) in a party's first pre-Answer motion under Rule 12; (2) in the party's Answer; or (3) in an Answer that was amended "as a matter of course" within the guidelines of Civ. R. 15(A). The motions subject to immediate waiver are the Rule 12(B)(2) motion for lack of personal jurisdiction, the Rule 12(B)(3) motion for improper venue; the Rule 12(B)(4) motion for insufficient process; and the rule 12(B)(5) motion for insufficient service of process.

  A party may amend "as a matter of course" (1) if the pleading was one to which no responsive pleading was required, within 28 days after serving the pleading; and (2) if the pleading was one as to which a responsive pleading was required, within 28 days after service of the responsive pleading or within 28 days after service of a Rule 12(B), (E), or (F) motion, whichever is earlier.

- *Preserved Through Trial, If Not Immediately Asserted*. The more substantive motions – 12(B(6) failure to state a claim upon which relief may be granted and 12(B)(7) failure to join parties under Rule 19 or 19.1 – are not immediately waived if omitted from the first Rule 12 motion. Defenses based on failure to state a claim upon which relief may be granted, failure to join parties under Ruel 19 or 19.1, and failure to state a legal defense to a claim may be made in any pleading, by a Rule 12(C) motion for judgment on the pleadings, or at trial.

- *Preserved Through Appeals*. The defense of lack of subject matter jurisdiction may be raised at any time. It may even be raised for the first time on the appeal of the case. Further, the court may raise issue on its own.

The Rule 12(B)(6) Motion. The Rule 12(B)(6) motion for failure to state a claim upon which relief may be granted must be based solely on the allegations of the pleadings.

If the party presenting the 12(B)(6) motion adds additional matter that is outside the pleadings, such as affidavits purporting to assert additional facts, the motion must be treated as a Rule 56 summary judgment motion, unless the judge excludes the additional materials. If a judge considers the additional material and, thus, elects to treat the motion as a Rule 56 motion

for summary judgment, the judge will provide each party a "reasonable opportunity to present all materials made pertinent to" a Rule 56 motion. As a practical matter, that means that the motion will often be considered at the close of discovery.

Rule 12(C) Motion for Judgment on the Pleadings. A motion for judgment on the pleadings is based solely on the pleadings. For example, a Rule 12(C) motion might be made based on the averments in the Complaint and the admissions, denials, and defenses included in the Answer. If based on these matters, it is clear that there is no factual dispute and one party is entitled to judgment as a matter of law, the court may enter judgment on the pleadings.

As with the Rule 12(B)(6) motion, if a party appends additional information not included in the pleadings, the court may consider the extra material and treat the motion as one for summary judgment under Rule 56, or it may exclude the material and consider the motion as a Rue 12(C) motion.

Preliminary Hearings Available for Rule 12(B) and (C) Motions. Civ. R. 12(D) provides that preliminary hearings may be held on the defenses set forth in Rule 12(B)(1) –(7) or for the Rule 12(C) motion for judgment on the pleadings.

Motion for a More Definite Statement. Rule 12(E) permits parties to file a motion for more definite statement when a pleading is so vague or ambiguous that a party cannot file a responsive pleading. Because of the availability of the Rule 12(B)(6) motion, this motion is little-used. Nevertheless, if the motion is made, outlining the defects and indicating the desired additional information, and the judge grants the motion, the offending party must comply with the court order within 14 days after notice of the order or within the time established in the order. If the party does not do so, the court may strike the pleading or grant other relief as it deems just.

Motion to Strike. A motion to strike must be made before responding to the complaint or within 28 days after receiving a pleading to which no responsive pleading is permitted. Alternatively, the court may raise the issues upon its own motion. The motion to strike may be used to request the striking of a legally insufficient defense or legally insufficient allegation in a claim or it may be used against matter that is "redundant, immaterial, impertinent, or scandalous."

IV. Dismissal of Actions

Civ. R. 41 sets forth means for voluntary and involuntary dismissal of actions.

1. *Voluntary Dismissal by Plaintiff's Notice of Dismissal*

Civ. R. 41(A) provides for voluntary dismissals. Under Rule 41(A)(1)(a), a plaintiff may dismiss the entire action by filing a notice of dismissal at any time before commencement of the trial, unless a counterclaim has been filed that cannot remain pending without the plaintiff's claim. This dismissal applies to the whole action, rather than to individual claims in the action.

Other claimants, including those filing a counterclaim, a cross-claim, or a third-party claim, may also file notice of a voluntary dismissal to file all their claims, as long as they do so before the commencement of trial. Civ. R. 41(C).

Two Dismissal Rule. A claimant who seeks to take advantage of the ability to file a notice of dismissal must ensure that it has not previously filed a voluntary notice of dismissal under Rule 41(A)(1)(a). A second voluntary dismissal "operates as an adjudication upon the merits" of any claim for which the plaintiff has previously filed a notice of dismissal in any court. Civ. R. 41(A)(1)(b).

Exceptions to Notice of Dismissal. Actions that are in the form of class actions under Rule 23, derivative actions by shareholders under Rule 23.1, or receiverships under Rule 66, may not be dismissed voluntarily under Rule 41(A)(1)(a). Instead, each of these actions requires court approval or a court order for dismissal.

2. ***Voluntary Dismissal by Stipulation***.

Parties may jointly dismiss an action by means of a stipulation of voluntary dismissal that is signed by all parties to the action. Civ. R. 41(A)(1)(b).

3. ***Dismissal by Court Order***.

Plaintiff may also seek a dismissal of an action by court order, but the dismissal will be subject to the terms and conditions that the court deems proper. Civ. R. 41(A)(2). Unless otherwise specified, a court order of dismissal under Rule 41(A)(2) will be without prejudice.

4. ***Involuntary Dismissals***.

Rule 41 includes two types of involuntary dismissals.

Involuntary Dismissal – Failure to Prosecute or Comply with Civil Rules or a Court Order. Rule 41(B)(1) first permits an involuntary dismissal for failure to prosecute the action or for failure to comply with the Ohio Civil Rules or with any court order. Civ. R. 41(B)(1). In these instances, after providing notice to plaintiff's attorney, the court may dismiss an action or a claim.

Dismissal in a Non-Jury Action. Rule 41(B)(2) also provides for dismissal of a non-jury action after the plaintiff completes the presentation of its evidence. In such a case, the defendant may move for a dismissal on the ground that, under the facts presented and the law, the plaintiff has not established a right to relief. The court may then consider the facts, render judgment against the plaintiff, or deny the motion and defer decision until all evidence has been presented. If the court enters judgment on the merits against plaintiff, it shall, upon the request of any party, make findings of fact and conclusions of law as provided for in Civ. R. 52.

5. ***Adjudication on the Merits***.

Dismissals under Rule 41(B)(2) and any court dismissal not provided for in this Rule 41, operate as an adjudication on the merits, *unless* the court specifically states to the contrary in its order of dismissal or the dismissal is one for lack of personal jurisdiction, subject matter jurisdiction, or failure to join a required party under Rule 19 or 19.1. *See* Civ. R. 41(B)(3) and (4).

6. ***Court May Impose Costs of Previously Dismissed Action***.

Civ. R. 41(D) provides that, if a plaintiff who previously dismissed a claim in any court files a new action that includes that same claim against the same defendant, the court may make an order requiring the plaintiff to pay the costs of the previously dismissed claim. The court may also stay the second action until the plaintiff complies with the order.

V. Discovery and Subpoenas

A. *Ohio Civ. R. 26 – General Provisions Governing Discovery*

Ohio Civ. 26 is the workhorse of the civil discovery rules. It provides the following general information regarding discovery:

- The policies underlying civil discovery in Ohio, which may often influence the outcome of a discovery dispute;[1]

- The broad scope of permissible discovery,[2] and recognized exceptions to broad discovery, including exceptions based on (1) privilege and relevance; (2) the work product or trial preparation protection; (3) electronically stored information that might impose undue burden or expense; (4) discovery of expert witnesses; and (5) case-specific exceptions to discovery obtained through a protective order;[3] and

- General discovery procedures, including
  - The permitted frequency of discovery;[4]
  - The assertion of privilege or the trial-preparation (work product) protection;[5]
  - The procedure for attempting to obtain privilege or work product protection for inadvertently produced discovery materials;[6]
  - The sequence and timing of discovery;[7] and

[1] Civ. R. 26(A).
[2] Civ. R. 26(B)(1).
[3] Civ. R. 26(B)(1), (3), (4), and (5) and Civ. R. 26(C).
[4] Civ. R. 26(A) (last sentence).
[5] Civ. R. 26(B)(6)(a).
[6] Civ. R. 26(B)(6)(b).
[7] Civ. R. 26(D).

- The required supplementation of discovery responses.[8]

Civ. R. 29 supplements Civ. R. 26. It permits parties to alter, by stipulation, the procedures for taking depositions and using other discovery. Civ. R 29, however, emphasizes that the parties' stipulations are subject to override by court order.

B. ***Civ. R. 26(A) - Discovery Policy and Methods***

Civ. R. 26(A) provides two general policies underlying discovery in Ohio courts – discovery in Ohio is broad in order to enable parties to obtain the facts necessary to fully litigate the case, but broad discovery is supplemented by an important policy of protecting attorney work product from discovery.

Civ. R. 26(A) begins by providing policy limits on the scope of discovery that emphasize Ohio's adherence to the work product or trial preparation protection. Civ. R. 26(A)(1) indicates that the policy of the discovery rules is "to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of the case."[9] Civ. R. 26(A)(2) provides a complimentary policy of Ohio's discovery rules – "to prevent an attorney from taking undue advantage of an adversary's industry or efforts."[10]

Civ. R. 26(A), thereafter, indicates that Ohio endorses the broad discovery espoused by the original federal rules of civil procedure. Civ. R. 26(A) does this by indicating that parties may use multiple discovery methods and that the frequency of these methods is not limited, absent court order. Accordingly, the rule provides that discovery may be by (1) depositions upon oral examination; (2) depositions upon written questions, (3) written interrogatories, (4) production of documents, electronically stored information, or things or permission to enter upon land or other property for inspection, (5) physical or mental exam, and (6) request for admissions.[11] Additionally, the Ohio rules provide for perpetuation of testimony and other discovery before an action is initiated or while an appeal is pending.[12]

Thus, Civ. R. 26(A) seeks to lessen the tension inherent in broad discovery – it provides for liberal discovery to permit the deserving party to prevail on the merits, but it recognizes that unlimited discovery may encroach on important systemic values, including the ability of attorneys to prepare their cases without fear that they will be required to turn over their "trial preparation" or "work product" material to opposing attorneys. Thus, Civ. R. 26(A) also emphasizes the importance of protecting the attorney's work product.

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[8] Civ. R. 26(E).
[9] Civ. R. 26(A)(1).
[10] Civ. R. 26(A)(2).
[11] Civ. R. 26(A).
[12] Civ. R. 27(A) and (B).

C. *Civ. R. 26(B) – The Scope of Civil Discovery in Ohio*

Civ. R. 26(B)(1) provides a broad scope for civil discovery. Much of the remainder of Civ. R. 26(B), however, outlines exceptions to the principle of broad discovery.

Civ. R. 26(B)(1) – The Broad Scope of Ohio Discovery. The Ohio Civil Rules adopted the original, broad scope of discovery set forth in the original federal rules of civil procedure. Thus, Civ. R. 26(B)(1) provides that "unless otherwise ordered by the court," the scope of discovery will be as follows:

> Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[13]

Under this broad scope of discovery, parties may obtain discovery regarding any matter relevant to the "subject matter" involved in the pending action. This discovery scope provision also provides a broad, nonexhaustive list of the types of information that may be discoverable. Civ. R. 26(B)(1) concludes by emphasizing that information is discoverable even if it will not admissible at trial, as long as the information appears reasonably calculated to lead to discovery of admissible evidence. Thus, the scope of discovery is broader than what may be admissible at trial.

Civ. R. 26(B)(2) – Insurance Agreements Are Discoverable. Civ. R. 26(B)(2) provides that parties may obtain discovery of insurance agreements under which a person who carries on an insurance business (1) "may be liable to satisfy part or all of a judgment" in a case; or (2) may be liable to indemnify or reimburse others for payments made in satisfaction of a judgment.[14] The rule permits discovery of insurance agreements to facilitate settlement of the cases. Civ. R. 26(B)(2) underscores this purpose by specifically indicating that this provision permitting discovery of insurance agreements does not make the agreements "subject to comment or admissible in evidence at trial.[15]

[13] Civ. R. 26(B)(1).
[14] Civ. R. 26(B)(2).
[15] *Id*.

D. ***Exceptions to Discovery – Civ. R. 26(B)(1) – (B)(5) & Civ. R. 26(C)***

1. *Civ. R. 26(B)(1) – Discovery Exceptions for Privilege and Relevance*.

The scope of discovery provision of the civil rules, Civ. R. 26(B)(1), includes two important limits on civil discovery: The material is not discoverable if it is privileged or if the material sought is not relevant to the "subject matter" of the action.

Privilege. The scope of what is discoverable expressly includes information protected by privilege. This would include the attorney-client privilege, spousal privilege, doctor-patient privilege, and the privilege against self-incrimination.

The scope of what is subject to the attorney-client privilege in Ohio is beyond the scope of this material. Nevertheless, the attorney-client privilege in Ohio is governed by statute, R.C. 2317.02(A) and by common law.[16] R.C. 2317.02(A) prevents attorneys from testifying about communications "made to the attorney in that relation or concerning the attorney's advice to a client" without the express consent of the client.[17] The statutory privilege also protects against providing this material during discovery.[18] The common-law portion of Ohio's attorney-client privilege is broader than the statutory privilege, essentially protecting communications between attorneys and clients if the communication facilitated the attorney's provision of legal services or legal advice.[19]

Additionally, discovery orders that require the production of material that is subject to the attorney-client privilege will generally be immediately appealable. The Ohio Supreme Court indicated in *Burnham v. Cleveland Clinic*, that "the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied by a later appeal" and a "discovery order that is alleged to breach the confidentiality guaranteed by the attorney-client privilege . . . is a final, appealable order that is potentially subject to immediate review" under R.C. 2505.02(B)(4).[20] The Ohio Supreme Court concluded, in *Burnham v. Cleveland Clinic*, that the discovery order was final and appealable because the appellants plausibly alleged that the attorney-client privilege would be breached by disclosure of the requested materials."[21]

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[16] *See e.g.*, Jackson v. Greger, 110 Ohio S. Ct. 3d 488, 489 (2006); Cousino v. Mercy St. Vincent Medical Center, 111 N.E.3d 529, 541-42 (6th Dist. 2018).

[17] *Cousino*, 111 N.E.3d at 542.

[18] *See, e.g.*, Squire Sanders & Dempsey v. Givaudan, 127 Ohio St. 3d 161, 165 (2010); *Jackson v. Greger*, 110 Ohio S. Ct. 3d at 489.

[19] *Cousino*, 111 N.E. 3d at 542 (citing State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth., 121 Ohio St. 3d 537 (2009) (quoting Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 875 (5th Cir. 1991))).

[20] Burnham v. Cleveland Clinic, 151 Ohio St. 3d 356, 361-64 (2016). R.C. 2505(2)(B)(4) permits immediate appeal of a provisional remedy in the following circumstances:

(4) An order that grants or denies a provisional remedy and . . . both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

[21] *Id*.; *see also* Barrow v. The Living Word-Dayton, No. 27935, 2018 WL 6016741 at *3-*4 (2nd Dist. Nov. 16, 2018).

Relevance. Additionally, material sought in discovery must be relevant to the subject matter of the lawsuit. The "subject matter" of a lawsuit is broader than the particular claims and defenses alleged. Nevertheless, relevance to the "subject matter" involved in the suit sets an outer boundary on discovery.

2. *Civ. R. 26(B)(3) – Work Product (or Trial Preparation) Protection*.

Documents, electronically stored information (ESI), and tangible things that a party or a party's representative prepare "in anticipation of litigation" or for trial are generally not discoverable, even if within the general scope of discoverable information.[22] Instead, the Ohio Civil Rules create a qualified protection from discovery for this material, in accord with the policy set out in Civ. R. 26(A), which explicitly provides that one purpose of the Ohio discovery rules is to "preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare . . . thoroughly and to investigate . . . the favorable . . . [and] the unfavorable aspects" of the case.[23]

Civ. R. 26(B)(3) provides that a party may obtain documents, ESI, and other tangible things that are prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's representative" only upon a showing of "good cause."[24] Thus, the work product that is created (1) "in anticipation of litigation or for trial"; (2) by or for a party or by or for the party's representative – including by the party's "attorney, consultant, surety, indemnitor, insurer, or agent" – is not discoverable unless the party seeking discovery of that material establishes good cause.

- Work Done in Anticipation of Litigation. Work product covers material that is created by a party or the party's representative because the party expects litigation or material created during the litigation process and in preparation for trial. This protection covers material created by attorneys as well as other representatives of a party. In general, courts cannot recognize blanket assertions of the work-product protection, but must conduct an in camera review of documents for which the protection is asserted.

- Good Cause. This work-product protection is "qualified," rather than absolute. Pursuant to this qualified protection, a person seeking discovery of work-product protected material may be able to obtain it upon a showing of "good cause" or need for the material, i.e., that the sought-after discovery is "relevant and otherwise unavailable."[25]

Ohio courts have held that, to obtain "fact" work-product, good cause requires a "showing of substantial need, that the information is important in the preparation of the party's case, and

[22] Civ. R. 26(B)(3).
[23] Civ. R. 26(A)(1).
[24] Civ. R. 26(B)(3).
[25] Jackson v. Greger, 110 Ohio S. Ct. 3d 488, 491 (2006).

that there is an inability to obtain the information without undue hardship."[26] Further, a party seeking discovery of fact work-product must establish that its need for the information is more important than the protection afforded by the doctrine,[27] keeping in mind that discovery is to be broad and liberal.[28]

"Opinion" work-product, that is work product that involves mental impressions, legal theories, and conclusions, is discoverable upon an "exceptional showing of need, in rare and extraordinary circumstances, or when necessary to demonstrate that a lawyer or party has engaged in illegal conduct or fraud."[29] Where the opinion work-product is directly at issue in the case, however, it may be obtained on a showing of good cause, that is, when opinion work-product is "directly at issue, the need for the information is compelling, and the evidence cannot be obtained elsewhere."[30]

Prior "Statement" of a Party as an Exception to the "Good Cause" Requirement.

A party may obtain her prior statement concerning the action or the subject matter of the action without a showing of good cause.[31] A "statement" for purposes of Civ. R. 26(B)(3), is defined as (1) a prior written statement that the party signed, adopted or approved; or (2) a "substantially verbatim recital of an oral statement" that the party made and that was recorded contemporaneously or a transcription of the oral statement.[32]

Federal Rule of Civil Procedure 26(b)(3) sets forth an analogous work product protection. The federal rule, however, permits both parties and nonparties to obtain their prior statements without a showing of good cause.

Material Covered by Work Product Protection.

The work product protection set forth in Civ. R. 26(B)(3) applies to documents, ESI, and other tangible things. A common-law work product protection goes further than the Civ. R. 26(B)(3) protection. It ensures that an attorney or other representative need not to testify orally regarding work-product protected materials.[33]

Additionally, the work-product of parties and their representatives, including attorneys, consultants, sureties, indemnitors, insurers, and agent's qualify for work-product protection.

3. Civ. R. 26(B)(4) – Protection for ESI Based on "Undue Burden or Expense"

[26] Grace v. Mastruserio, 912 N.E.2d 608, 615 (1st Dist. 2007) (quoting State v. Hoop, 134 Ohio App. 3d 627 (1999)).
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] Squires, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 127 Ohio St. 3d 161, 175-76 (2010).
[31] Civ. R. 26(B)(3).
[32] Civ. R. 26(B)(3)(a) and (b).
[33] *Squire Sanders*, 127 Ohio St. 3d at 175.

Civ. R. 26(B)(4) provides a means for a party to seek protection from discovery that seeks ESI, if production of the ESI will cause the producing party "undue burden or expense."[34] Civ. R. 26(B)(4) provides that the producing party need not provide ESI in response to a discovery request "when the production imposes undue burden or expense." This assertion triggers a multi-phase process.

If, following an assertion that production of the ESI will cause undue burden or expense, either the requesting party moves to compel production of the ESI or the responding party moves for a protective order, the party from whom the ESI is sought is put to its proof, and the court oversees a two-tiered inquiry. The party from whom the ESI was sought must, first, make a showing that the ESI at issue "is not reasonably accessible because of undue burden or expense."[35]

If the party makes that showing, the court may still order production of the ESI, but the party seeking discovery must show good cause for production of the ESI.[36]

In determining if there is good cause to order production of the ESI, Civ. R. 26(B)(4) provides the court "shall consider" the following factors, many of which weigh the proportionality of the request:

> (1) whether the discovery sought is unreasonably cumulative or duplicative; (2) whether the information sought can be obtained from some other source that is less burdensome, or less expensive; (3) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and (4) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which the electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.[37]

If the judge decides that there is good cause to order production of the ESI, even though the production will cause undue burden or expense, the judge may put conditions in the order including conditions on the format, extent, timing and allocations of expenses.[38]

In many instances, Ohio courts follow the federal lead in e-discovery. A helpful guide for judges, which provides some helpful parallels for Ohio judges, is the following manual prepared by the Federal Judicial Center: *Managing Discovery of Electronic Information: A Pocket Guide for Judges, Third Edition*, *see* https://www.fjc.gov/sites/default/files/2017/Managing_Discovery_of_Electronic_Information_3d_ed.pdf

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[34] Civ. R. 26(B)(4).
[35] *Id*.
[36] *Id*.; *see also* Townsend v. Ohio Dept. of Transp., No. 11AP-672, 10th Dist., Franklin Co., 2012 WL 2467047, at *3-*5 (10th Dist. June 28, 2012).
[37] Civ. R. 26(B)(4)(a)-(d).
[38] Civ. R. 26(B).

4. Civ. R. 26(B)(5) – Discovery from Testifying and Non-Testifying Experts

Rule 26(B)(5) deals with obtaining discovery from expert witnesses. Civ. R. 26(B)(5)(a) and (b) set forth, respectively, (1) the limitations on obtaining discovery from non-testifying experts; and (2) the methods of obtaining discovery from testifying experts. Additionally, 26(B)(5)(c) and (d) clarify the work product protection for drafts of expert reports and for communications between a party's attorney and its expert witnesses. Finally, Civ. R. 26(E)(1) also requires that certain information about experts and expert testimony must be supplemented.

Non-Testifying Experts – Civ. R. 26(B)(5)(a). The civil rules limit the ability of litigants to obtain discovery from non-testifying experts. Civ. R. 26(B)(5)(a) deals with non-testifying experts, that is, experts who will be used only in the pre-trial phase and in preparation for trial. It provides that parties have a limited ability to obtain discovery from experts who are retained in anticipation of litigation – but not as testifying experts. Parties may obtain discovery from these consulting experts only if (1) a party shows that it is "unable without undue hardship to obtain facts and opinions on the same subject by other means"; or (2) if the party shows "exceptional circumstances indicating that denial of discovery would cause manifest injustice."[39] This is an application of the work-product protection to expert witnesses.

In general, these limitations mean that discovery will be available from non-testifying witnesses in very limited instances. In *Stegman v. Nickels*, for example, the court indicated that an example of the exceptional circumstances or undue hardship that would warrant discovery of a consulting experts is if a party's consulting expert "'was the only expert in a particular field.'"[40] The *Stegman* court also hypothesized that undue hardship might exist if there is an "inequality of investigative opportunity" such that a party has "no other viable option" to obtain the information.[41]

The *Stegman* court concluded, on the facts at issue, that a party cannot demonstrate either "undue hardship" or "exceptional circumstances" that establish manifest injustice warranting discovery from a non-testifying expert, if the party, after notice, fails to timely obtain its own consulting expert before the evidence at issue is destroyed. In other words, if a party fails to timely obtain an expert to review evidence, the fact that the evidence later goes out of existence does not justify obtaining discovery from an opposing party's non-testifying expert. The *Stegman* case dealt with the causes of a fire that led to the destruction of a house that the Stegmans had been renting and, thus, the destruction of the Stegmans' personal property.[42] Though the Stegmans were given notice that they had 30 days to retrieve material from the charred remains of the house or have the house inspected, the Stegmans did not have the house inspected or seek delay of the demolition of the house.[43] When the Stegmans later brought suit for negligent maintenance of the property, they sought to obtain the report of the insurance company's expert

[39] Civ. R. 26(B)(5)(a).
[40] Stegman v. Nickels, No. E-05-069, 6th Dist., Erie County, 2006 WL 2709405 at *2-*3 (6th Dist. Sept. 22, 2006) (quoting Civ R. 26 Staff Notes (1994)).
[41] *Id*. at *3 (citing Harpster v. Advanced Elastomer Sys., L.P., 9th Dist. No. 22684 (9th Dist. 2005)).
[42] *Id*. at *1.
[43] *Id*.

who inspected the property.[44] The court concluded that, as long as the expert at issue had acted in anticipation of litigation, the facts did not establish undue hardship or exceptional circumstances that would permit discovery of the opposing consultant's expert report, even though the house had been demolished and the Stegmans could no longer inspect it.[45] Noting that the trial court had failed to conduct an in camera review to determine if the documents at issue were created in anticipation of litigation, the court remanded for the trial court to conduct an in camera review of the documents at issue.[46]

Testifying Experts – Civ. R. 26(B)(5)(b). Civ. R. 26(B)(5)(b) provides for discovery of testifying experts. Parties may obtain, through interrogatories, (1) the identities of each testifying expert the opposing party expects to call as a witness; and (2) the subject matter on which the experts are expected to testify.[47] After such a request through interrogatories, any party may discover from the expert the opinions that are relevant to the subject matter of the lawsuit.[48] The discoverable opinions are limited to opinions previously given to the party by the expert or those to be given on direct examination.[49]

Duty to Supplement Expert Witness Discovery – Civ. R. 26(E)(1)(b). Further, a party who has been asked, through interrogatories, to identify anticipated expert witnesses and the subject of their expected testimony, has a duty to supplement prior responses to identify additional expert witnesses that the party obtains after its response regarding expected expert witnesses and also to provide additional subject matter on which identified witnesses are expected to testify.[50]

Rule 26(E)(1)(b) provides that a party must seasonably supplement prior information provided about the identity of expert witnesses and the subject matter on which they are expected to testify.[51] The purpose of the required supplementation is to prevent trial by ambush and to permit "effective cross-examination" of experts.[52] The broad term "subject matter" of an expert's opinion encompasses much information, however, and parties need not provide detailed information about the expert testimony.[53] Nor must a party provide supplementation regarding "each and every nuance of an expert's opinion."[54]

A court may, however, exclude expert testimony as a sanction for failing to supplement discovery as required in Civ. R. 26(E)(1)(b), and several have, though the decision is made on a

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[44] *Id*.
[45] *Id*. at *4.
[46] *Id*. at *5.
[47] Civ. R. 26(B)(5)(b).
[48] *Id*.
[49] *Id*.
[50] Civ. R. 26(B)(E)(1)(b).
[51] *Id*.
[52] *See, e.g.*, Wright v. Suzuki Motor Corp., No. 03CA2, 03CA3, 03CA4, 4th Dist., Meigs County, 2005 WL 1594850 (4th Dist. June 27, 2005) (citations omitted).
[53] *Id*. (citing Beavercreek Local Schools v. Basic, Inc., 71 Ohio App. 3d 669, 680 (1991) and Faulk v. Int'l Bus. Machines Corp. (Sept. 7, 2001, Hamilton C-765 and C-778)).
[54] *Id*. (citing Tritt v. Judd's Moving & Storage, Inc. 62 Ohio App. 3d 206, 211-12 (1990) and Waste Mgt of Ohio, Inc. v. Mid-America Tire, Inc., 113 Ohio App. 3d 529, 533 (1996)).

case-by-case basis.[55] Courts note, however, that exclusion of testimony is an extreme sanction, particularly since the evidence is often relevant and helpful to the finder of fact. In general, courts consider the following factors when determining whether a failure to provide information about experts or to supplement previously provided information warrants exclusion of the expert testimony: the conduct of the offering party, the prejudice that the opposing party will suffer as a result in the delay in providing information about the expert witness, whether a continuance to permit time to depose the expert and obtain rebuttal testimony might reduce or obviate the prejudice, how close to trial the expert information is provided, and how related any proposed new testimony is to discovery previously provided.[56]

- Fact Witness or Expert Witness. Some witnesses may have the knowledge of an expert but may not be classified as either a testifying or non-testifying expert because they will testify as fact witnesses only. These witnesses are subject to ordinary discovery rules. Such fact-witness "experts" may include emergency room doctors or treating physicians who treat a patient who later brings a lawsuit. Though the emergency room doctor or treating physician has "expert" knowledge, i.e., knowledge that would enable the layperson to better understand the material at issue, the doctor is in the position of a fact witness rather than an expert witness, if the doctor is asked to testify only to the facts. If, however, the doctor (or other witness who has both fact information and expert information) provides expert testimony, the witness will be treated as an expert witness and discovery will proceed as for expert witnesses under Civ. R. 26(B)(5)(b).[57]

Work Product and Expert Draft Reports and Communications with Attorneys. Civ. R. 26(B)(5)(c) and (d) were added in 2012 to provide greater certainty on whether opposing parties may obtain drafts of expert reports or may obtain discovery of communications between a party's attorney and its experts. The Ohio standards mirror those adopted under the Federal Rules of Civil Procedure.[58]

Civ. R. 26(B)(5)(c) provides that the work product doctrine protects draft reports of an expert from discovery.[59]

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[55] On some facts, courts have excluded expert testimony for failure to provide timely information regarding the expert or the subject matter of the testimony, *see, e.g.*, Vaught v. Cleveland Clinic Foundation, 98 Ohio St. 3d 485, 487-89 (2003) (party failed to identify treating physician as an expert witness (thus rendering deposition of treating physician unhelpful as to expert testimony), failed to file a written report, and failed to supplement prior responses to interrogatories seeking expert information); Jones v. Murphy, 12 Ohio St. ed 84, 85 (1984) (party failed to update interrogatory seeking identity and information regarding expert witness). On other facts, the courts have not excluded expert testimony. *See, e.g.*, Wright v. Suzuki Motor Corp., No. 03CA2, 03CA3, 03CA4, 4th Dist., Meigs County, 2005 WL 1594850, *11-*19 (4th Dist. June 27, 2005) (citing and discussing numerous cases).

[56] *Id*. at *12-*19.

[57] *See* Walker v. Holland, 117 Ohio App. 3d 775, 781-82 (2nd Dist. 1997).

[58] *See* Fed. R. Civ. P. 26(b)(5)(c) and (d).

[59] Civ. R. 26(B)(5)(c).

Civ. R. 26(B)(5)(d) provides that communications between a litigant's attorney and testifying witnesses who have been identified under Civ. R. 26(B)(5)(b) are protected as work product, except for communications that fall within the following three categories:

(1) Communications regarding compensating the expert for "study or testimony";
(2) Communications that identify facts or data provided to the expert by the attorney to consider in formulating opinions in the matter; and
(3) Communications regarding any assumptions the attorney provided and the expert relied on in forming opinions that the expert will express.[60]

Court Authority to Require Payment of Expert Fees. The rules provide also that the party seeking to depose a testifying expert may be required to pay a reasonable fee for the time the expert must expend to respond to the discovery.[61] Additionally, in the unusual event that a party is required to produce discovery regarding a non-testifying expert, the judge may order that the requesting party pay "a fair portion of the fees and expenses incurred . . . in obtaining facts and opinions from the expert."[62]

5. Protective Orders – Civ. R. 26(C)

Parties may also, upon motion, seek particularized protective orders that limit discovery in a case or provide other protections for discovery that are tailored to the needs of the case. Parties seeking a protective order must do so by motion to the court and must establish good cause for the order.[63]

A court may then enter any order "that justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense."[64] Civ. R. 26(C) includes a nonexhaustive list of the orders that may be entered, including orders that discovery not be provided on particular issues, that limit the terms or conditions of discovery, that limit the methods of discovery, and that provide conditions or limits on discovery regarding "trade secrets."[65] Additionally, the open-ended nature of Rule 26(C) provides a basis for the court to impose limits on the nature, frequency, and extent of discovery.

Reasonable, Pre-Motion Efforts to Resolve Matter. Importantly, a party seeking a protective order must include with the motion a statement indicating the efforts the party took to attempt to resolve the discovery matter.[66] Indeed, the Ohio Supreme Court has denied a motion for protective order for failing to comply with the Civ. R. 26(C) requirement that the

[60] Civ. R. 26(B)(5)(d)(i)-(iii).
[61] Civ. R. 26(B)(5)(e).
[62] *Id*.
[63] Civ. R. 26(C).
[64] *Id*.
[65] *Id*.
[66] *Id*.

moving party include with its motion a statement regarding pre-motion efforts to resolve the matter.[67]

Fee-Shifting. If the motion for protective order is granted, denied, or granted in part and denied in part, the court will enter any protective order that is warranted and may, after permitting an opportunity for the parties to be heard, permit the prevailing party an award of reasonable expenses, including attorney 's fees.[68] The court should not order shifting of expenses and fees, however, if (1) the movant filed the motion before attempting to resolve the issue in good faith with the opposing party; (2) the opposing party's position was substantially justified, or (3) other circumstances render shifting expenses unjust.[69]

E. *General Discovery Procedures – Civ. R. 26(B)(6) (Privilege Issues), Civ. R. 26(D) (Sequence and Timing Issues), and Civ. R. 26(E) (Supplementing Discovery)*

1. *Civ. R. 26(B)(6) – The Privilege Log and Procedural "Clawback" of Privileged or Work-Product Protected Information*

The "Privilege Log". Civ. R. 26(B)(6) includes a "privilege log" requirement. It requires that, when asserting a claim of privilege or work product, the claim "shall be made expressly" and "shall be supported" by information sufficient to permit a challenge to the claim of privilege or of work-product protection.[70] This is information that a requesting party would need to challenge the accuracy of the claim of privilege or work-product protection. Unlike many federal courts, the Ohio courts do not treat a failure to provide a privilege log as a per se waiver of privilege or work product protection.[71] Instead, because of the harshness of a sanction requiring waiver of privilege or work-product protection, courts will examine factors including unjustified delay in responding to discovery, good faith attempts to comply, and whether the failure involved minor procedural inadequacies in determining whether there has been a waiver.[72]

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[67] *See, e.g.*, Citizens for Open, Responsive & Accountable Government v. Register, 116 Ohio St. 3d 88, 92 (2007).

[68] Civ. R. 26(C) and Civ. R. 37(A)(5).

[69] Civ. R. 26(C) and Civ. R. 37(A)(5).

[70] Civ. R. 26(B)(6)(a). This Section provides as follows:

> When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to context the claim.

[71] *See, e.g.*, Csonka-Cherney v. ArcelorMittal Cleveland, Inc. 9 N.E.3d 515, 520-21 (8th Dist. 2014); Huntington Nat'l Bank v. Dixon, 8th Dist. Cuyahoga, No 93604, 2010 WL 3814180 (2010).

[72] *See, e.g.*, Cousino v. Mercy St. Vincent Medical Center, 111 N.E.3d 529, 542-44 (6th Dist. 2018); Csonka-Cherney v. ArcelorMittal Cleveland, Inc. 9 N.E.3d 515, 520-21 (8th Dist. 2014); Huntington Nat'l Bank v. Dixon, 8th Dist. Cuyahoga, No 93604, 2010 WL 3814180 (2010).

"Clawback" of Privileged Material or Work Product. Civ. R. 26(B)(6)(b) provides a clawback procedure for inadvertently produced privileged information or work-product protected information.[73] The rule provides the procedure to use while the disclosing party seeks a court determination regarding waiver.

The procedure in Civ. R. 26(B)(6)(b) requires the party claiming privilege to tell the receiving party of the claim and the reasons for the claim.[74] Thereafter, the receiving party must "return, sequester, or destroy" the information that is within its "possession, custody, or control," and that party must not use or disclose the material until a decision is made regarding the claim.[75] If the receiving party has already disclosed the information, it is obligated to take "reasonable steps to retrieve it."[76]

The procedure also permits the receiving party to present the information under seal to the court for a ruling on the claim of privilege or work product and requires the producing party to preserve the information until the claim of privilege or work product is resolved.[77]

Civ. R. 26(B)(6)(b) does not provide the substantive standard for ruling on whether privilege or work-product protection has been inadvertently waived. Those standards are provided through case decisions.[78]

2. *Civ. R. 26(A) and (D) -- Sequence and Timing of Discovery*.

Rule 26(A) indicates that the frequency and timing of discovery by the parties is not limited, unless the court enters orders regarding sequence and timing. The rules, in general, provide for party autonomy in discovery, but permit the court to enter orders that limit that autonomy, including pretrial orders for the case issued pursuant to Civ. R. 16.[79]

Civ. R. 26(D) reinforces the parties' broad ability to structure discovery for the needs of the case, emphasizing that the tools of discovery "may be used in any sequence," while indicating that the court retains the ability to structure the discovery process upon motion of a party.[80] Under Civ. R. 26(D), the court may structure discovery upon motion of any party, "for the convenience of the parties and witnesses and in the interests of justice." Civ. R. 26(D).

Furthermore, Civ. R. 16, which facilitates pretrial case management, provides that a court may schedule pretrial conferences to discuss a wide variety of discovery issues (and other pretrial

[73] Civ. R. 26(B)(6)(b).
[74] 26(B)(6)(b).
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *See, e.g.*, Tucker v. CompuDyne Corp., 18 N.E.3d 836, 842-43 (8th Dist. 2014) (indicating that courts generally consider the following five factors to determine if inadvertent disclosure arises to a waiver of privilege: "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (30 the scope of the discovery; (4) the extent of the disclosure; and (5) the 'overriding issue of fairness'").
[79] Civ R. 16(5)-(10).
[80] Civ. R. 26(D).

issues) and may issue orders regarding these issues. Among the discovery issues the court may include in its pretrial orders are orders regarding exchange of expert witness reports, exchange of medical reports and hospital records, limits on the number of expert witnesses, the timing and limitations for electronically stored information, the adoption of agreements for asserting claims of privilege or work product after production, and imposition of discovery sanctions under Rule 37.[81]

3. Civ. R. 26(E) – Required Supplementation of Discovery

The civil rules require parties to update prior discovery, which was complete when provided, in the following three situations:

(1) Responses to questions "directly addressed to" the identity and location of people with knowledge of discoverable matters;
(2) Responses to questions "directly addressed to" the identity of each expected expert witness and the subject matter of the expert witness's expected testimony; and
(3) Responses that a party knows were incorrect when made or a party later learns are incorrect.[82]

Additionally, supplementation of prior discovery may be required by court order, agreement of the parties, or through requests to supplement prior responses.[83]

The extent of the requirement to update responses about expert testimony has led to much litigation, which is discussed on page 9, above.

[81] Civ. R. 16(5)-(10).
[82] Civ. R. 26(E)(1) and (2).
[83] Civ. R. 26(E)(3).

VI. Perpetuation of Testimony Before Trial and Pending Appeal – Civ. R. 27

Civ. R. 27 permits persons who may be subject to a civil action or proceeding, but who are currently unable to bring or defend the action, to file a petition for depositions to preserve testimony.[84] Rule 27 also permits those persons (1) to make Rule 34 requests for production of documents or ESI or to enter property; and (2) to make motions for mental or physical exams.[85]

Rule 27 underscores that petitions to perpetuate testimony are available in a narrow set of instances. These circumstances do not include instances in which a potential litigant is seeking information in order to file a lawsuit, but are, instead, limited to situations in which litigation is expected, it cannot immediately be pursued, and there is a particular need to perpetuate testimony. For example, in *In re Bejarano*, a court granted a petition by the wife of an employee who was injured at work.[86] In the *Bejarano* case, it was unclear whether the injured spouse would survive his injuries and, if he did not survive, the wife asserted that she would have a claim under the workers' compensation statutes.[87] Thus, the wife had a potential future suit, it was not possible to immediately pursue the suit, and there was a need to perpetuate testimony.

A petitioner under Civ. R. 27 must verify the following five items to obtain an order granting the petition to perpetuate:

- the petitioner or her personal representatives, heirs, beneficiaries, successors, or assigns may be parties to an action in a court but they are currently unable to bring or defend that action;[88]
- the expected subject matter of the action and the petitioner's interest in the action;[89]
- The facts to be established by the proposed discovery and the reasons for perpetuating the information;[90]
- The names of persons expected to be adverse parties and their addresses, if known, and, if unknown, a description of the expected adverse parties;[91] and
- The names and addresses of the persons to be examined and the subject matter of the expected testimony.[92]

Notice to Expected Adverse Parties. The petitioner must also provide notice to expected adverse parties, which must include a copy of the petition.[93] The notice must state the court in

[84] Civ. R. 27(A).
[85] Civ. R. 27(A)(3).
[86] In re Bejarano, 64 Ohio App. 3d 202, 204-205 (3d Dist. 1989).
[87] *Id*. at 203.
[88] Civ. R. 27(A)(1)(a).
[89] Civ. R. 27(A)(1)(b).
[90] Civ. R. 27(A)(1)(c).
[91] Civ. R. 27(A)(1)(d).
[92] Civ. R. 27(A)(1)(e).
[93] Civ. R. 27(A)(2).

which the petition will be filed and the time and place that the petition will be filed.[94] Rule 27(A)(2) provides that notice must be given at least 28 days before a hearing on the petition, although the court may permit shorter notice if the petitioner establishes extraordinary circumstances that justify a reduced time frame.[95]

The notice to expected adverse parties must be provided in the manner required for service of a summons or in any manner that provides actual notice as the court may authorize.[96] If it appeals that actual notice cannot be given to a potential adverse party, the court is to appoint an attorney to cross-examine the deponent.[97]

Because the petition for perpetuation is not an action, but is viewed as an ancillary proceeding in the proposed action, personal jurisdiction and venue need not be established.

Issuance of Order to Perpetuate. If the court concludes both (1) that permitting the petition "may prevent a failure or delay of justice;" and (2) that the petitioner is "unable to bring or defend" the anticipated action, the court shall grant the petition, list the people to be deposed as well as the subject of the testimony, and set forth the time and place of the deposition as well as the person before whom the deposition will be taken.[98] The court may also order other discovery, including discovery under Rule 34 document requests and Rule 35 mental and physical examination.[99]

Use of Depositions Taken to Perpetuate Testimony. Depositions taken to perpetuate testimony may be used as testimony in actions later brought in any court if the deposition is that of a party in the action or the issue is one on which an interested party to the proceeding for perpetuation action had the right and opportunity to cross examine and also had an interest and motive similar to that which the adverse party has in the action in which the deposition is offered.[100] Except in the instance in which the deposition is a deposition of a party to the action and it is offered against the party, the deposition may not be used as evidence unless the deponent is unavailable as a witness at trial.[101]

Depositions to Perpetuate Testimony Pending Appeal. Rule 27(B) permits a party to an action to seek perpetuation of testimony when an action is on appeal.[102] Similarly, a party to an action pending appeal may petition for documents and other materials pursuant to Rule 34 or for a mental of physical examination pursuant to Rule 35.

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[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] Civ. R. 27(B).

Filing of Depositions. Depositions permitted under Rule 27 are to be filed in the court where the petition was filed or where the motion is made.[103]

VII. Civ. R. 29 – Stipulations Regarding Discovery Procedure

Civ. R. 29 underscores that the discovery rules create default rules that may be changed by written stipulation of the parties. Thus, Civ. R. 29(1) permits depositions to be taken before any person and upon procedures at variance to the procedures if the parties agree by written stipulation, and Civ. R. 29(2) provides that the parties may by written stipulation change other methods of discovery.[104] Rule 29, however, provides that the broad ability of the parties to create contrary discovery procedures by written stipulation is subject to court order to the contrary.[105]

VIII. Civ. R. 30 – Depositions Upon Oral Examination

A. When Depositions May Be Taken

Civ. R. 30(A) provides that parties may take oral depositions of parties and other persons at ay time after the commencement of the action. A party's attendance at a deposition may be compelled by notice, and nonparties may be compelled to appear by subpoena.

B. General Deposition Information

Civ. R. 30(B) provides a number of general deposition guidelines, including those listed here. First, parties must give reasonable notice to all other parties of the taking of any deposition, which should include the name and address of the deponent, or, if the name is not known, a general description that permits identification of the class or group to which the deponent belongs.[106]

Second, if a party establishes that, when any party was served with notice of the deposition, the party was not able to obtain an attorney for representation at the deposition, the deposition may not be used against that party.[107]

Third, a party desiring to have deposition testimony recorded in a manner other than by stenographic means must specify in the deposition notice how the deposition will be recorded, preserved, and filed. Any party may designate a different method for recording deposition

[103] Civ. R. 27(D).
[104] Civ. R. 29.
[105] *Id*.
[106] Civ. R. 30(B)(1).
[107] Civ. R. 30(B)(2).

testimony other than that in the original deposition notice by giving prior notice to the deponent and all parties.[108]

Rule 30(B)(5) provides for depositions of organizational deponents. For corporations, partnerships, and associations, a party may designate "with reasonable particularity," matters on which the party wishes to obtain information. The organization must then select one or more people within the organization authorized to testify on its behalf.[109]

Parties may also stipulate to take depositions by telephone or other remote means. Depositions take by telephone are deemed to be taken in the county where the deponent testifies.[110]

C. Civ. R. 30(C) – Objections and Written Questions

Civ. R. 30(C) provides details about examination and cross-examination during depositions, recording depositions, oath requirements, objections during depositions, and participating through written questions.

This section discusses only two issues covered under Civ. R. 30(C) – objections during oral examinations and participating in a deposition through submission of written questions.

1. Objections.

Objections must be made during the taking of deposition answers and noted in the record. Objections should be made "concisely in a nonargumentative and nonsuggestive manner."[111] A deponent may be instructed not to answer only in the following situations: (1) to preserve a privilege; (2) to enforce a court order; or (3) to stop the deposition and make a motion to the court under Civ. R. 30(D) to terminate or limit the deposition.[112]

2. Participating Through Written Questions.

Instead of attending a deposition, a party may participate in the deposition by serving the party who noticed the deposition with written questions in a sealed envelope. That party must provide the questions to the officer before whom the deposition is taken. The officer must then ask the questions and record the answers.[113]

D. Civ. R. 30(D) -- Motion to Terminate or Limit Examinations.

Upon motion of a deponent or party and a showing that the deposition is being taken "in bad faith" or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or

[108] Civ. R. 30(B)(3).
[109] Civ. R. 30(B)(5).
[110] Civ. R. 30(B)(6).
[111] Civ. R. 30(C)(2).
[112] *Id*.
[113] Civ. R. 30(C)(3).

party, the court in which an action is pending may order that the exam be terminated or may otherwise limit the scope and method of taking the deposition.[114] Rule 37 applies regarding shifting of expenses incurred in making the motion.[115]

E. Civ. R. 30(E) & 30(F) – Submission to Witness and Certification by Officer

Civ. R. 30(E) and (F) provide guidelines for, inter alia, (1) submission of the transcribed deposition to the deponent for review and signing;[116] and (2) transcription, retention of an archival copy of the deposition, certification, and filing of the deposition.[117]

F. Civ. R. 30(G) – Expenses and Attorney's Fees for Failure to Attend Deposition or Serve Subpoena

If a party notices a deposition but fails to attend and proceed with the deposition, the court may order that party to pay the reasonable expenses, including attorney's fees, incurred by another party who attends in person expecting the deposition to proceed.[118] Similarly, if a party notices a deposition, but fails to serve a subpoena upon the witness and the witness fails to attend, the court may order that the party who noticed the deposition pay the reasonable expenses, including attorney's fees, incurred by another party who attends expecting the deposition to proceed.[119]

IX. Civ. R. 32 – Use of Depositions in Court Proceedings

A. Filing and Use of the Deposition

1. Using Depositions at Trial – Civ. R. 32(A).

To use a deposition in court, a party must file it at least one day before the hearing or trial, unless the court allows the deposition to be filed later upon good cause shown.[120] At a trial or hearing, any or all of the deposition that is admissible in evidence may be used against parties who were present or represented at the deposition or who had reasonable notice of the depositions, if the following requirements are also met:

a. Impeachment. Any deposition may be used against any party for impeachment purposes.[121]

[114] Civ. R. 30(D).
[115] *Id*.
[116] Civ. R. 30(E).
[117] Civ. R. 30(F)(1).
[118] Civ. R. 30(G)(1).
[119] Civ. R. 30(G)(2).
[120] Civ. R. 32(A).
[121] Civ. R. 32(A)(1).

b. Deposition of a Party or a 30(B)(5) Witness. Depositions of parties or organizational witnesses designated under Civ. R. 30(B)(5) may be used by an adverse party for any purpose.[122]

c. Depositions of a Party or Other Witnesses Upon Specific Conditions. Depositions of a party or other witness may be used for any purpose under the following conditions:

   i. the witness has died
   ii. the witness is beyond the subpoena power of the court where the action is filed or resides outside the county where the action is pending, unless the party offering the deposition procured the witness's absence
   iii. age, sickness, infirmity, or imprisonment prevents the witness's appearance in court
   iv. the party offering the witness cannot obtain attendance by subpoena
   v. the witness is an attending physician or medical expert. The use of this subsection to permit introduction of a deposition in lieu of testimony does not preclude any party from calling the deponent who is a physician or medical expert as a witness to appear for in-person testimony.[123]
   vi. oral examination of the witness is not required
   vii. upon application to the court, it is determined that "exceptional circumstances exist . . . that make it desirable, in the interest of justice and with due regard to the importance of presenting . . . testimony of witnesses orally in open court, to allow the deposition to be used.[124]

2. *Only a Portion of Deposition Is Offered in Evidence – Civ. R. 32(A)(4).*

If a party offers into evidence only a portion of a deposition, an opposing party may require that everything relevant to the offered portion also be admitted into evidence.[125] Further, any party may introduce other parts of that deposition.[126]

3. *Objections to Admissibility Under the Rules of Evidence May Be Made at the Trial or Hearing – Civ. R. 32(B)*.

Objections to admissibility of portions of a deposition may be made at the trial or hearing based on the rules of evidence.[127] Upon motion or the court's initiative, issues of admissibility under the rules of evidence may be made before the deposition is read into evidence.[128]

[122] Civ. R. 32(A)(2).
[123] Civ. R. 32(C).
[124] Civ. R. 32(A)(3).
[125] Civ. R. 32(A)(4).
[126] *Id*.
[127] Civ. R. 32(B).
[128] *Id*.

4. *Objections to Errors or Irregularities in a Deposition – Civ. R. 32(D)*

   a. Errors in the Notice. Errors regarding the notice of the deposition are considered "procedural" depositions and are waived unless objection is made in writing stating the ground for the objection promptly after service of the notice.[129]
   b. Disqualification of Officer. Objections regarding disqualification of the officer before whom the deposition is taken are considered "procedural" and are waived unless made before the deposition begins or as soon thereafter as the basis for disqualification becomes known or could have been discovered with reasonable diligence.[130]
   c. Competency of Deponent or Competency, Relevance, or Materiality of Testimony. Objections to (1) the competency of the deponent, (2) the competency, relevance, or materiality of the content of the testimony, or (3) to admissibility under Civ. R. 32(B) are not waived by failure to assert them before or during the deposition, unless the objection "might have been obviated or removed if presented at that time."[131]
   d. Errors in Taking of Deposition, Form of Questions, Oath, and Conduct. Errors at the deposition, including in (1) the manner of taking the deposition, (2) form questions or answers, (3) oath or affirmation. (4) conduct of parties, or (5) other errors that could be remedied if promptly addressed, are waived unless objection is made at the deposition.[132]
   e. Form of Written Questions Under Civ. R. 31. Objections to the form of written questions under Civ. R. 31 are waived unless made in writing and served upon the propounding party within the time authorized for serving the subsequent cross or other questions or within 7 days after the last questions are served.[133]
   f. Errors Regarding transcription, signing, and certification. Errors regarding transcription of the testimony, or preparation, signing, certification, sealing, endorsement, transmittal, filing, or other issues handled by the officer under Civ. R. 30 or 31 are waived unless a motion to suppress all or part of the deposition is made "with reasonable promptness after such defect is, or with due diligence might have been, ascertained."[134]

[129] Civ. R. 32(D)(1).
[130] Civ. R. 32(D)(2).
[131] Civ. R. 32(D)(3)(a).
[132] Civ. R. 32(D)(3)(b).
[133] Civ. R. 32(D)(3)(c).
[134] Civ. R. 32(D)(4).

X. ***Other Discovery Techniques***

Other discovery techniques are discussed in the following rules:

- Rule 33 – Interrogatories
- Rule 34 – Requests for production of documents, ESI, tangible things, and for permission to enter upon land
- Rule 35 – Mental and physical exams
- Rule 36 – Requests for admission

XI. ***Discovery Sanctions – Rule 37***

Rule 37 provides for the motion to compel and for discovery sanctions.

1. ***Motion to Compel***

Under Rule 37(A), a party may make a motion to compel discovery. The party must include a certification that it conferred in good faith or attempted to confer with the opposing party before filing a motion to compel. Civ. R. 37(A)(1).

If the court grants a motion to compel, the court must order, after providing an opportunity to be heard, that the opposing party, the attorney, or both, pay the movant's reasonable expenses, including attorney fees, in making the motion, unless (1) the movant filed with first attempting in good faith to obtain the discovery without court involvement; (2) the opposing party's response was substantially justified; or (3) other circumstances render the ward of expenses unjust. Civ. R. 37(A)(5)(a).

It the court denies the motion, it may issue any protective order it deems appropriate under Civ. R. 26(C), and, after reasonable opportunity to be heard, order the attorney, movant, or both to pay reasonable expenses including attorney fees incurred in opposing the motion unless the motion was substantially justified or such an award would be unjust. Civ. R. 37(A)(5)(b).

2. ***Sanctions for Failing to Comply with a Court Order***

Civ. R. 37(B) lists the sanctions for failing to comply with a court order to provide or permit discovery, including orders to permit mental or physical exams under Rule 35 or orders to provide discovery under 37(A), the court may impose any of a number of fairly severe sanctions, which include the following orders:

- Directing that matters in the order or other facts be taken as established
- Prohibiting the disobedient party from supporting or opposing certain claims or defenses or from introducing specified evidence
- Striking pleadings in whole or in part
- Staying proceedings pending compliance with the order
- Rendering a default judgment

- Treating failure to obey orders as contempt of court

Payment of Expenses. The court may also order the disobedient party, attorney, or both to pay the reasonable expenses, including attorney fees, unless the failure to comply with the order was substantially justified or payment off expenses would otherwise be unjust. Civ. R. 45(B)(3).

3. ***Failure to Supplement Responses or to Admit***

Failure to Supplement or Provide a Witness. If a party fails to provide requested information or to identify a witness, the party may not use the information or witness in support of a motion, at a hearing, or at trial, unless the failure was substantially justified or harmless. Civ. R. 37(C)(1). In addition to the foregoing sanction or instead of it, the court may order payment of reasonable expenses and attorney fees caused by the failure to provide the information, inform the jury of the failure, and may impose other appropriate sanctions under Civ. R. 27(B)(1)(a) through (f).

Failure to Admit. If a party fails to make an admission requested under Civ. R. 36 and the requesting party later establishes that the requested information was true, the requesting party may move for reasonable expenses and attorney fees. Civ. R. 37(C)(2).

4. ***A Party's Failure to Respond to Discovery to Discovery Requests or Attend Deposition***

Sanctions Available. If a party fails to attend its own deposition, serve answer to interrogatories or respond to requests for documents, the court may, following a motion, order sanctions available under Civ. R. 37(B)(1)(a) through (f). Civ. R 27(D)(1) and (3). Instead of or in addition, the court may also order the attorney, party, or both, to pay reasonable expenses, including attorney fees, if warranted. *Id*.

Movant Must Certify That Tried to Obtain Information. When filing a motion under Civ. R. 37(D), a movant must certify that it has conferred or attempted to confer in good faith with the party failing to act, in order to obtain the information.

5. ***No Sanctions for Failing to Provide ESI Lost as a Result of the Routine, Good-Faith Operation of the Electronic Information System***

Civ. R. 37(E) provides that, absent exceptional circumstances, courts should not sanction parties for ESI that is lost as a result of the routine, good faith operation of the party's computer system. The rule provides a number of factors to consider regarding the availability of sanctions, including whether a duty too preserve had been triggered, whether the party attempted to prevent the loss of information, and steps the party took to comply with a court order or agreement regarding preserving information.

XII. ***Subpoenas – Civ. R. 45***

1. *Form and Issuance*.

Civ. R. 45(A) provides information on the form of a subpoena, the manner of issuing the subpoena, and methods of giving notice. In general, subpoenas may only be directed to non-party witnesses, and may direct a party to appear and give testimony, provide documents, or both. Testimony of parties may be obtained by noticing the deposition under Civ. R. 30, and documents, ESI, and other materials are obtained from parties through Civ. R. 34 requests. *See* Civ. R. 45(A)(1).

A subpoena issued under Rule 45 must state the name of the court from which it is issued, the title of the action, and the case number. It must also direct the person subpoenaed to do one or more of the following, at a time specified in the subpoena:

- Attend a trial or hearing to provide testimony, at a place within the state;
- Attend and give deposition testimony at one of the following places: the county where the deponent resides, is employed, transacts business, or another convenient place ordered by the court;
- Produce documents, ESI, or tangible things at a trial, hearing, or deposition;
- Produce and permit inspection and copying, testing, or sampling of documents, ESI, or tangible things within the "possession, custody, or control" of the subpoenaed individual; or
- Permit entry on land or property for purposes designated in Civ. R. 34.

See Civ. R. 45(A)(1).

Issuance. The party's attorney of record may draft and issue subpoenas in the case, or the court may issue signed subpoenas in blank to be completed by the party. The party must serve notice of issuance of the subpoena on all parties to the action.

Service of the Subpoena. Subpoenas may be served by designated court and other officials, by an attorney, or by a person designated by court order, who is not a party to the action and is not less than 18 years old. *See* Civ. R. 45(B).

Service may be effected in one of the following manners: (1) delivering a copy to the designated person; (2) reading it to the designated individual in person; (3) leaving it at the person's "usual place of residence"; and (4) placing the subpoena in a sealed envelope and putting it in the U.S. mail as certified or express mail, with return receipt requested and including the instructions articulated in Civ. R. 45(B). Upon request of a person residing in the county in which the court is located, the fees for one day's attendance and for mileage must be tendered. Such fees must be tendered, without request, to those residing outside the county in which the

court is located. The person serving the subpoena must also file a return of the subpoena in the clerk's office.

2. *Protections for the Person on Whom Subpoena Is Served – Civ. R. 45(C)*.

Civ. R. 45(C) requires measures to avoid "imposing undue burden or expense" on the subpoenaed person. Those measures include the following:

- The subpoenaed person need not be present during inspection of produced documents, unless the person is also commanded in the subpoena to provide testimony at a deposition, hearing or trial, Civ. R. 45(C)(1);
- A person, who must respond to a request for documents, ESI, tangible things, or to enter property to inspect, has 14 days to object to production and, upon objection, need not produce except pursuant to a court order. The party who served the objection may move for an order to compel production, Civ. R. 45(C)(2);
- Upon timely motion, the court must quash or modify a subpoena or order production or testimony under specified conditions, if the subpoena (1) failed to allow reasonable time for compliance; (2) required disclosure or privileged or protected material; (3) requires certain expert information from a person not retained or specially employed by any party as an expert in the matter; or subjects the person to undue burden, Civ. R. 45(C)(3).

Before filing a motion with the court regarding any of the issues in Civ. R. 45(C)(3), the subpoenaed person must first attempt to resolve the issue through discussions with the issuing attorney. Civ. R. 45(C)(4). Motions filed pursuant to the protections of Civ. R. 45(C)(3), must include an affidavit of the subpoenaed person or a certificate of the attorney setting forth the efforts made to resolve the issues. *See* Civ. R. 45(C)(4).

3. *Duties in Responding to a Subpoena – Civ. R. 45(D)*

Rule 45(D) enumerates the responsibilities of the person responding to a subpoena.

General Protections for Persons Providing Documents or ESI. The person responding to a subpoena to produce documents or ESI must make the information available to all parties for inspection and copying. The responding person also has the option to produce the documents as they are kept in the ordinary course of business. *See* Civ. R. 45(D)(1). Unless the form of ESI is set forth in the subpoena, the responding person may provide the ESI in a form or forms in which the ESI is maintained, if the forms are "reasonably usable." *See* Civ. R. 45(D)(2). Unless otherwise ordered or agreed by the parties, the responding party need not produce the same ESI in more than one form. *Id*.

The ESI "Not Reasonably Accessible" Objection. Additionally, persons responding to subpoenas requesting ESI may object to providing the ESI if they indicate that the production will

cause undue burden or expense. *See* Civ. R. 45(D)(3). Upon motion for protective order or to compel, the subpoenaed person must show that the information sought is not reasonably accessible due to undue burden or expense. If that showing is made, the court may order production of the ESI if it finds that there is good cause for the production. If the court orders production, it may specify the format, extent, and timing of the production; it may also shift some or all costs; and it may specify other conditions. *Id*.

Privilege Log Required for Claim of Privilege or Work Product. A person responding to a subpoena, who asserts a claim of privilege or work product, must provide a privilege log. *See* Civ. R. 45(D)(4).

Clawback Protection for Persons Who Produce Privileged or Work Product Protected Material. A person who produces material pursuant to a subpoena, which the person believes is subject to privilege or work-product protection, may notify the party to whom it produced the allegedly privileged or protected material. The receiving party must then return, sequester, or destroy the material. The receiving party also may not disclose the information, and if it has already done so, it must attempt to obtain return of the material. The receiving party may present the material to the court under seal for a determination of whether it is privileged or protected by the work product doctrine. *See* Civ. R. 45(D)(5).

4. *Sanctions*.

Civ. R. 45(E) imposes the following sanctions for infractions of the requirements regarding subpoena requirements:

- *Contempt Power Available*. A person who fails to comply with a subpoena without an adequate excuse may be held in contempt of court.
- *Reasonable Expenses and Attorney Fees Available*. If a subpoenaed person resists complying with a subpoena on a frivolous basis, the court may impose reasonable expenses including attorney fees.
- *Appropriate Sanctions Available for Imposing Undue Burden or Expense*. A party or attorney who imposes undue burden or expense on a subpoenaed person is subject to appropriate sanctions, which may include, but is not limited to, (1) lost earnings; and (2) attorney fees.

PROBATE UPDATES:

Wrongful Death/Personal Injury Releases from Administration

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, 200-2008
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

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
Civil Litigation

TRUMBULL COUNTY PROBATE COURT
WRONGFUL DEATH CHECKLIST
ASBESTOS RELATED CASES

☐ Application to Enter into Contingent Fee Agreement (App. D), including copy of fee agreement, if not previously filed

☐ Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims (SPF 14.0), including application number if applicable

☐ Waiver and Consent – Wrongful Death and Survival Claims (SPF 14.1)

☐ Statement of Subrogation Claims. Include documentation concerning all subrogation claims and/or waivers or settlement of claims.

☐ Narrative statement in support of settlement, including:

- ☐ Dates and facts of exposure, nature of illness, and cause of death
- ☐ Proposed settlement to be received. Where funds are to be paid from different sources, a chart setting forth the name of the defendant, the gross amount received, the amount of attorney fees, the amount of expenses, and net proceeds.
- ☐ Proposed allocation between wrongful death and survival claims
- ☐ Amounts of any funeral, burial, and last illness expenses made part of settlement
- ☐ Proposed distribution of proceeds
- ☐ Timeline concerning any expected future settlements and need for estate to remain open
- ☐ Current location of settlement funds and expected date for release of funds

☐ Identity of all litigation counsel and any fee-split agreements, including percentages (Prof.Cond.R 1.5(e)

☐ Itemized statement of litigation expenses, including receipts, vouchers, and/or other supporting documentation (Loc.R. 57.10)

☐ Proposed Entry Approving Settlement and Distribution of Wrongful Death and Survival Claims (SPF 14.2), including application number if applicable

☐ Filing fee of $71.00

☐ Report of Distribution of Wrongful Death and Survival Claims (SPF 14.3), including application number, if applicable, to be filed with vouchers after settlement has been distributed

Please review documents to ensure all correct boxes are checked and for mathematical errors and consistency of figures.

****The Probate Court accepts payment by cash, check, and money order only. The Court does not accept payment by debit or credit cards.****

TRUMBULL COUNTY PROBATE COURT
WRONGFUL DEATH CHECKLIST
NON-ASBESTOS RELATED CASES

- ☐ Application to Enter into Contingent Fee Agreement (App. D), including copy of fee agreement, if not previously filed
- ☐ Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims (SPF 14.0)
- ☐ Waiver and Consent – Wrongful Death and Survival Claims (SPF 14.1)
- ☐ Statement of Subrogation Claims. Include documentation concerning all subrogation claims and/or waivers or settlement of claims.
- ☐ Narrative statement in support of settlement, including:
    - ☐ Relevant biographic information
    - ☐ Circumstances of occurrence causing death, including:
        - ☐ cause, nature, and extent of injuries
        - ☐ conscious pain and suffering
        - ☐ diagnosis and treatment received, if any
        - ☐ accident/police report, if any
    - ☐ Identification of all insurance coverage and policy limits
    - ☐ Terms of proposed settlement, including:
        - ☐ Amounts of proposed settlement, allocation, and distributions to beneficiaries
        - ☐ Whether settlement is full or partial settlement
        - ☐ Any funeral, burial, and last illness expenses
        - ☐ Identity of all parties to the settlement
        - ☐ Any other proposed or actual litigation or settlements resulting from same occurrence
        - ☐ Where funds are to be paid from different sources, a chart setting forth the names of the defendants, the gross amount received, the amount of attorney fees, the amount of expenses, and net proceeds
        - ☐ Where a structured settlement is proposed, supporting documentation, present-day value, rating of annuity company, rate of return, and language concerning non-assignability of annuity

☐ Current location of settlement funds and expected date for release of funds

☐ Settlement Statement

☐ Identity of all litigation counsel and any fee-split agreements, including percentages (Prof.Cond.R 1.5(e)

☐ Itemized statement of litigation expenses, including receipts, vouchers, and/or other supporting documentation (Loc.R. 57.10)

☐ Copy of proposed release

☐ Proposed Entry Approving Settlement and Distribution of Wrongful Death and Survival Claims (SPF 14.2)

☐ Filing fee of $71.00

☐ Report of Distribution of Wrongful Death and Survival Claims (SPF 14.3) to be filed with vouchers after settlement has been distributed

Please review documents to ensure all correct boxes are checked and for mathematical errors and consistency of figures.

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

ESTATE OF _____, DECEASED

CASE NO. _____

APPLICATION TO APPROVE SETTLEMENT AND DISTRIBUTION OF WRONGFUL DEATH AND SURVIVAL CLAIMS

[R.C. 2117.05, 2125.02, Civ. R. 19.1 and Sup. R. 70]

The fiduciary states:
[Check whichever of the following are applicable, strike inapplicable words, and incorporate all attachments into a single statement.]

☐ There is an offer of (full) (partial) settlement without suit being filed.

☐ There is an offer of (full) (partial) settlement after suit was filed. The style of the case, the court, and case number being _____.

☐ A judgment has been recovered for damages for the decedent's wrongful death (and personal injury and property damage arising out of the same act and which survive the decedent).

☐ The amount of the settlement or judgment is $_____.

☐ There is a partial settlement and therefore the estate must remain open pending final disposition of the claims.

☐ The offer includes, or the judgment sets forth separately, reasonable funeral and burial expenses in the amount of $_____.

☐ Reasonable compensation for the fiduciary for services rendered is $_____ and an itemization of such services is attached.

☐ Outstanding hospital and medical bills in the amount of $_____ and an itemization of such bills is attached.

☐ Outstanding claims to a right of subrogation for the payment of hospital and medical bills in the amount of $_____ and an itemization of such is attached.

☐ A reasonable attorney fee for the attorney's services is $_____ and reimbursement to the attorney for case expenses is $_____. A copy of the attorney's fee contract that (has) (has not) received prior approval of the Court, subject to modification, and itemization of the case expenses are attached.

☐ Other: _____
_____.

☐ The net proceeds of $_____ should be allocated $_____ to the wrongful death action and $_____ to the survival action. A statement in support thereof is attached.

CASE NO. _____

☐ A statement in support of the proffered settlement is attached.

☐ Supplemental forms required by local rule of court are attached.

☐ All of the beneficiaries of the wrongful death action are on equal degree of consanguinity, are adults, and have agreed how the net proceeds allocated to the wrongful death claim are to be distributed.

☐ The beneficiaries of the wrongful death action are not all on equal degree of consanguinity, or one or more of the beneficiaries is a minor, or the beneficiaries have not agreed how the net proceeds are to be distributed.

☐ The surviving spouse, children, and parents of the decedent and the other next of kin who have suffered damages by reason of the wrongful death are as follows and the distribution should be as follows:

Name	Residence Address	Relationship to Decedent	Birthdate of Minor	Amount

☐ The survival claim beneficiaries are as follows:

Name	Residence Address	Relationship to Decedent	Birthdate of Minor	Amount

The fiduciary requests that the Court approve the application and authorize the fiduciary to execute a (complete) (partial) release which upon payment of the settlement shall be a (complete) (partial) discharge of the claim.

_____ _____

Attorney for Fiduciary Fiduciary

Attorney Registration No. _____

ENTRY SETTING HEARING AND ORDERING NOTICE

The Court sets _____ at _____ o'clock _____.m. as the date and time for hearing the above application and orders notice to be given by the fiduciary, as provided in the Rules of Civil Procedure, to the wrongful death and survival claim beneficiaries who have not waived notice.

_____

_____, Probate Judge

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

ESTATE OF _____,DECEASED

CASE NO. _____

WAIVER AND CONSENT
WRONGFUL DEATH AND SURVIVAL CLAIMS

The undersigned waive notice of the hearing and consent to and approve the settlement and distribution as set forth in Form 14.0, Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims, a copy of which I have received.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

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

IN THE MATTER OF: _____

CASE NO. _____

APPLICATION TO ENTER INTO CONTINGENT FEE CONTRACT

The undersigned applies to the Court for authority to enter into the contingent fee contract, attached as Exhibit A, with:

Attorney: _____

Address: _____

_____

Telephone: _____ Fax: _____

The undersigned represents that legal services are necessary as a result of the following described matter:

_____

_____

_____

_____

The undersigned further represents that no fees will be paid until reviewed by the Court and allowed by judgment entry.

_____ _____

Date Signature of Fiduciary

_____

Typed or Printed Name

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

ESTATE OF_____,

DECEASED CASE NO. _____

ENTRY APPROVING SETTLEMENT AND DISTRIBUTION OF WRONGFUL DEATH AND SURVIVAL CLAIMS

Upon hearing the application to approve settlement and distribution of the wrongful death and survival claims, the Court:

☐ Approves the proffered settlement of $ _____.

☐ Orders payment of $ _____ to be applied to decedent's funeral and burial expenses.

☐ Orders payment of $ _____ to the fiduciary for services rendered with respect to the wrongful death and survival claims.

☐ Orders payment of $ _____ to the attorney for reimbursement of case expenses and $ _____ for attorney fees for services rendered with respect to the wrongful death and survival claims.

☐ Orders that the net proceeds of $ _____ be allocated $ _____ to the wrongful death claim and $ _____ to the survival claim. The amount allocated to the survival claim shall be considered an asset of the estate and shall be reflected in the fiduciary's account of the administration of the estate.

☐ Finds all of the beneficiaries of the wrongful death claim are on an equal degree of consanguinity, are adults, and have agreed how the net proceeds allocated to the wrongful death claim are to be distributed.

☐ Orders distribution of the net proceeds allocated to the wrongful death claim to the surviving spouse, children, parents, and other next of kin, in the equitable shares shown below, fixed by the Court having due regard for the injury and loss to each beneficiary resulting from the death and for the age and condition of the beneficiaries.

Name	Residence Address	Relationship to Decedent	Birthdate of Minor	Amount

CASE NO. _____

[Reverse of Form 14.2]

Orders that the share of:

☐ _____a minor(s) be deposited pursuant to R.C. 2111.05.

☐ _____a minor(s) be paid to the guardian of the estate of such minor.

☐ _____a child(ren) be deposited in a trust for the benefit of the child(ren) until twenty-five years of age.

Authorizes the fiduciary to execute a release which, upon payment, shall be a discharge of the claim.

Orders the fiduciary and the attorney to report the distribution of the proceeds within thirty days of the date of this Entry.

Further orders_____

_____

_____

_____

Approved:

_____ _____

Attorney for Fiduciary Probate Judge

Attorney Registration No. _____ _____

Date

PROBATE COURT OF TRUMBULL COUNTY, OHIO

ESTATE OF _____, DECEASED

CASE NO. _____

REPORT OF DISTRIBUTION OF WRONGFUL DEATH AND SURVIVAL CLAIMS

Pursuant to Entry filed _____, _____, the proceeds have been paid as shown below and on the accompanying vouchers.

Gross Proceeds		$ _____
Funeral and burial expenses	$ _____	
Fiduciary fees to _____	$ _____	
Reimbursement of case expenses to _____	$ _____	
Attorney fees to _____	$ _____	
Survival claim to the estate	$ _____	
Total Deductions	$ _____	
Net Proceeds		$ _____
Net proceeds to beneficiaries:		
To: _____	$ _____	
To: _____	$ _____	
To: _____	$ _____	
To: _____	$ _____	
To: _____	$ _____	
To: _____	$ _____	
To: _____	$ _____	
Total payments to beneficiaries		$ _____
	Balance	-0-

☐ The fiduciary states that there are no other assets remaining in the estate.

☐ The fiduciary states that there are assets remaining in the estate.

_____ _____

Attorney for Fiduciary Fiduciary

Attorney Registration No. _____

(Reverse of Form 14.3)

ENTRY

The above report of the distribution of the proceeds is hereby approved.

☐ There being no further assets to administer, the fiduciary and surety, if any, are discharged.

_____ _____

Date JAMES A. FREDERICKA
PROBATE JUDGE

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

IN THE MATTER OF _____

CASE NO. _____

STATEMENT OF SUBROGATION CLAIMS

Upon investigation by reasonable diligence, the undersigned states that:

- ☐ There are no potential subrogation claims against the proposed settlement.
- ☐ Subrogation claims exist and have been settled prior to Application.
- ☐ Subrogation claims exist and will be paid out of the proposed settlement. To be set forth in the Application.
- ☐ The status of potential subrogation claims cannot be determined at this time. The undersigned will provide written status reports concerning the status of potential subrogation claims with the Court every ninety (90) days until such determination has been made.

_____ _____

Attorney for Fiduciary Fiduciary

Attorney Registration No. _____

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

IN THE MATTER OF _____

CASE NO. _____

NOTICE OF LITIGATION

The undersigned represents to the Court that this matter is involved in litigation, being:

Case No.: _____

Name of Court: _____

Style of Case: _____

Nature of Case: _____

Name of Judge: _____

wherein the estate is ☐ Plaintiff ☐ Defendant, was filed on _____. Estate litigation counsel is:

Name: _____ Ohio Supreme Court No. _____

Firm: _____

Address: _____

_____

Telephone No.: _____ Facsimile No.: _____

Email: _____

The undersigned further represents that the Court will be notified within 30 days of the conclusion of the litigation, including Civ.R.41 dismissals, and that a Status of Litigation Report will be filed yearly.

_____	_____
Attorney Signature	Fiduciary Signature
_____	_____
Typed or Printed Name Ohio Supreme Ct. No.	Typed or Printed Name
_____	_____
Address	Address
_____	_____
_____	_____
Telephone No.	Telephone No.

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

ESTATE OF _____, DECEASED

CASE NO. _____

CONTINUATION FORM _____

Name	Residence Address	Relationship to Decedent	Birthdate of Minor	Amount

TRUMBULL COUNTY PROBATE COURT
PERSONAL INJURY SETTLEMENT CHECKLIST

- ☐ Application to Enter into Contingent Fee Agreement (App. D), including copy of fee agreement, if not previously filed
- ☐ Application to Approve Personal Injury Settlement
- ☐ Narrative statement in support of settlement, including:
  - ☐ Relevant biographic information
  - ☐ Circumstances of occurrence, injury, or damage, including:
    - ☐ cause, nature, and extent of injury or damage
    - ☐ duration of treatment
    - ☐ pain and suffering
    - ☐ accident/police report, if any
  - ☐ Identification of all insurance coverage and policy limits
  - ☐ Status of litigation and/or settlement at time of death
  - ☐ Terms of proposed settlement, including:
    - ☐ amounts of proposed settlement
    - ☐ whether settlement is full or partial settlement
    - ☐ identity of all parties to the settlement
    - ☐ any other proposed or actual litigation or settlements resulting from same occurrence
    - ☐ where funds are to be paid from different sources, a chart setting forth the name of the defendant, the gross amount received, the amount of attorney fees, the amount of expenses, and net proceeds
    - ☐ where a structured settlement is proposed, supporting documentation, present-day value, rating of annuity company, rate of return, and language concerning non-assignability of annuity
    - ☐ current location of settlement funds and expected date for release of funds
- ☐ Settlement Statement
- ☐ Waiver and Consent to Settle a Personal Injury Claim

☐ Statement of Subrogation Claims. Include documentation concerning all subrogation claims and/or waivers or settlement of claims.

☐ Identity of all litigation counsel and any fee split agreements, including percentages (Prof.Cond.R 1.5(e)

☐ Itemized statement of litigation expenses, including receipts, vouchers, and/or other supporting documentation. (Loc.R. 57.10)

☐ Copy of proposed release

☐ Proposed Entry Approving Personal Injury Settlement

☐ Filing fee of $5.00

☐ Report of Distribution of Personal Injury Claims, to be filed with vouchers after settlement has been distributed

Please review documents to ensure all correct boxes are checked and for mathematical errors and consistency of figures.

****The Probate Court accepts payment by cash, check, and money order only. The Court does not accept payment by debit or credit cards.****

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

ESTATE OF _____, DECEASED

CASE NO. _____

APPLICATION TO APPROVE PERSONAL INJURY SETTLEMENT

The fiduciary states (Check whichever are applicable, strike inapplicable words, and incorporate all attachments into a single statement.)

☐ Litigation (was)(was not) commenced prior to death. The style of the case, the court, and the case number being _____.

☐ Settlement (was)(was not) reached prior to death.

☐ There is an offer of (full)(partial) settlement in the amount of $_____.

☐ A (full)(partial) judgment has been recovered in the amount of $_____.

☐ Reasonable compensation for the fiduciary's services is $_____, and an itemization of such services is attached.

☐ Unreimbursed medical bills and other expenses in the amount of $_____ have been incurred. An itemization of such expenses and proposed payees, including documentation of claims and any waivers thereof, is attached.

☐ A reasonable attorney fee for the attorney's services is $_____, and reimbursement to the attorney for case expenses is $_____. A copy of the attorney's fee contract that (has)(has not) received prior approval of this Court, subject to modification, and an itemization of case expenses are attached.

☐ The net proceeds of $_____ should be approved. All net proceeds shall be considered an asset of the estate and shall be reflected in the fiduciary's account of the administration of the estate.

☐ Other: _____
_____
_____.

☐ A statement in support of the proffered settlement is attached.

☐ Supplemental forms required by local rule of court are attached.

CASE NO. _____

☐ The beneficiaries of the estate are as follows:

Name	Residence Address	Relationship to Decedent	Birthdate of Minor

The fiduciary requests that the Court approve the application and authorize the fiduciary to execute a (complete)(partial) release which upon payment of the settlement shall be a (complete)(partial) discharge of the claim.

_____ _____

Attorney for Fiduciary Fiduciary

Attorney Registration No. _____

ENTRY SETTING HEARING AND ORDERING NOTICE

The Court sets _____ at _____ o'clock _____.m. as the date and time for hearing the above application and orders notice to be given by the fiduciary, as provided in the Rules of Civil Procedure, to the wrongful death and survival claim beneficiaries who have not waived notice.

_____

JAMES A. FREDERICKA, PROBATE JUDGE

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

ESTATE OF _____, DECEASED

CASE NO. _____

REPORT OF DISTRIBUTION OF PERSONAL INJURY CLAIMS

Pursuant to the entry filed on _____, _____, the proceeds have been paid as shown below and on the accompanying vouchers.

Gross Proceeds		$_____
Medical Expenses	$_____	
Reimbursement of case expenses to _____	$_____	
Attorney fees to _____	$_____	
Other _____	$_____	
Total Deductions	$_____	
Net Proceeds Payable to Estate		$_____
Balance		$_____

☐ The fiduciary states that there are no other assets remaining in the estate.

☐ The fiduciary states that there are assets remaining in the estate.

_____ _____

Attorney for Fiduciary — Fiduciary

Attorney Registration No. _____

ENTRY

The above report of the distribution of the proceeds is hereby approved. All net proceeds shall be considered an asset of the estate and shall be reflected in the fiduciary's account of the administration of the estate.

_____ _____

Date — **JAMES A. FREDERICKA, PROBATE JUDGE**

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

ESTATE OF _____, DECEASED

CASE NO. _____

WAIVER AND CONSENT
PERSONAL INJURY CLAIMS

The undersigned waive notice of the hearing and consent to and approve the settlement and distribution as set forth in Application to Approve Personal Injury Settlement, a copy of which I have received.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

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

ESTATE OF _____, DECEASED

CASE NO. _____

ENTRY APPROVING PERSONAL INJURY SETTLEMENT

Upon hearing the application to approve settlement and distribution of the wrongful death and survival claims, the Court:

☐ Approves the proffered settlement of $_____.

☐ Orders payment of $_____ to the fiduciary for services rendered with respect to the personal injury claims.

☐ Orders payment of $_____ to the attorney for reimbursement of case expenses and $_____ for attorney fees for services rendered with respect to the wrongful death and survival claims.

☐ Orders payment of medical bills and other expenses, as follows:_____
_____
_____
_____

☐ Authorizes the applicant to execute a release which shall be effective upon payment of the settlement.

☐ Orders that the net proceeds of $_____ be deposited into the estate account.

☐ Orders the fiduciary and the attorney to report the distribution of the proceeds within thirty (30) days of this Entry.

☐ Further orders: _____
_____
_____.

_____ _____
DATE **JAMES A. FREDERICKA, PROBATE JUDGE**

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

ESTATE OF _____, DECEASED
CASE NO. _____

RELEASE FROM ADMINISTRATION: REAL PROPERTY ONLY

[O.R.C. 2113.61(D)]

Now comes _____, who resides at _____ _____ and whose telephone number is _____, having been first duly sworn, states:

1. Applicant's relationship to the Decedent is _____.
2. The Decedent's legal residence at the time of death was _____ _____.
3. The Decedent's date of death was _____.
4. The Decedent _____ had a will ____ did not have a will (File Form 2.0 and the will if the Decedent died with a will)
5. The decedent's sole asset was a _____ percent interest in real property located in _____ County, Ohio and known as Permanent Parcel Number _____.
6. The value of the Decedent's interest in the real property at the time of death was $_____ (attach SPF 3.0 Appointment of Appraiser and a copy of either the appraisal or the county auditor's valuation).
7. The Decedent is not subject to Medicaid estate recovery.
8. The Decedent's funeral bill has been paid in full. Documentation showing that the funeral bill has been paid in full is attached.
9. Attached is a list of surviving spouse, next of kin, legatees, and devisees of the Decedent (SPF 1.0).
10. It has been more than 6 months since the Decedent's death.
11. No administration has been had on an estate for the decedent and no administration is contemplated.
12. Attached is an Application for Certificate of Transfer.

_____
Signature of Applicant

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

_____
Notary Public

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

ESTATE OF _____, DECEASED

CASE NO. _____

APPLICATION FOR SHORT FORM RELEASE FROM ADMINISTRATION

Now comes _____, who resides at _____ _____ and whose telephone number is _____, having been first duly sworn, states:

1. Applicant's relationship to the Decedent is _____.
2. The Decedent's legal residence at the time of death was _____ _____, and the Decedent's date of death was _____.
3. The Decedent ___had a will ___ did not have a will (File Form 2.0 and the will if they did)
4. The Decedent's assets consist of the following assets (assets and probable value):

   _____

   _____

   _____

   _____

5. The Decedent's unpaid debts consist of the following (list of creditors and amount of debt):

   _____

   _____

   _____

6. Amount of Decedent's funeral expenses: $ _____ and burial expenses: $_____
7. _____ paid $_____ toward the Decedent's funeral and burial expenses.
8. $_____ is still owed toward the Decedent's funeral and burial expenses. That amount is owed to _____.
9. Attached is a list of surviving spouse, next of kin, legatees, and devisees, known to the Applicant (Standard Probate Form 1.0).
10. The Applicant requests that the Court issue an order directing and authorizing the Applicant to collect the assets of the decedent and to distribute them as directed by the Court.

_____
Signature of Applicant

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

_____
Notary Public

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

ESTATE OF _____, DECEASED

CASE NO. _____

APPLICATION FOR SUMMARY RELEASE FROM ADMINISTRATION [R.C. 2113.031]

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

[Check one of the following]

☐ The applicant is decedent's surviving spouse entitled to one hundred percent of the allowance for support and decedent's funeral and burial expenses have been prepaid or the surviving spouse has paid or is obligated in writing to pay decedent's funeral and burial expenses and the value of the assets does not exceed the $40,000 allowance for support under R.C. 2106.13(B) plus an amount not exceeding $5,000 for decedent's funeral and burial expenses.

☐ The applicant, who is not the surviving spouse, has paid or is obligated in writing to pay decedent's funeral and burial expenses and the value of the assets is the lesser of $5,000 or the amount of decedent's funeral and burial expenses.

Attached hereto is a receipt, contract or other document that confirms the applicant's payment or obligation to pay decedent's funeral and burial expenses or if the applicant is the surviving spouse, the prepayment receipt, if applicable.

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

Applicant states that there are no pending proceedings for the administration of decedent's estate or relief of decedent's estate from administration under R.C. 2113.03.

All known assets with date of death values of the estate are as follows:

☐ Motor Vehicles (include year, make, model, body type, manufacturer's vehicle identification number and Certificate of Title number)

_____ $_____
_____ $_____

CASE NO._____

☐ Accounts maintained by a Financial Institution (include financial institution name and the account's complete identifying number):

_____ $_____
_____ $_____

☐ Stocks and Bonds (include for each stock or bond its serial number, the name of its issuer, the name and address of its transfer agent, and the total number of shares of stocks or bonds):

_____ $_____
_____ $_____

☐ Real estate described in accompanying Form 12.0 Application for Certificate of Transfer and Form 12.1 Certificate of Transfer and date of death value. **[Attach verification of value.]** $_____

☐ Other assets and date of death values

_____ $_____

Total Assets $_____

Applicant requests an order granting summary release.

_____	_____
Attorney for Applicant	Applicant's Signature
_____	_____
Typed or Printed Name	Applicant's Typed or Printed Name
_____	_____
Street Address	Street Address
_____	_____
City State Zip Code	City State Zip Code
_____	_____
Phone Number (include area code)	Phone Number (include area code)

Attorney Registration No. _____

Signed and acknowledged by the applicant in my presence this _____ day of _____, _____.

_____
NotaryPublic/DeputyClerk

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

ESTATE OF _____, **DECEASED**

CASE NO. _____

APPLICATION TO RELIEVE ESTATE FROM ADMINISTRATION

[R.C. 2113.03]

Applicant states that the decedent died on _____

Decedent's domicile was _____
Street Address

_____
City or Village, or Township if unincorporated area County

_____
Post Office State Zip Code

[Check one of the following]

Decedent's will has been admitted to probate in this Court.

To applicant's knowledge, decedent did not leave a will.

[Check one of the following]

The assets are $15,000 or less and decedent died on or after January 1, 1976.

The assets are $25,000 or less and decedent died on or after October 20, 1987.

The assets are $35,000 or less and decedent died on or after November 9, 1994.

The assets are $50,000 or less; the surviving spouse is entitled to all of the assets and the decedent died on or after April 16, 1993.

The assets are $85,000 or less; the surviving spouse is entitled to all of the assets and the decedent died on or after September 14, 1993.

The assets are $100,000 or less; the surviving spouse is entitled to all of the assets and the decedent died on or after march 18, 1999.

[Check, if applicable]

Decedent was fifty-five years of age or older at the time of death and was a recipient of medical assistance under Chapter 5111 of the Revised Code. SPF 7.0 Notice to Administrator of Estate Recovery Program has been filed.

Applicant asks that the estate be relieved from administration because the assets do not exceed the statutory limits. A statement of the assets and liabilities of the estate is listed on the attached Form 5.1.

The decedent's surviving spouse, next of kin, legatees and devisees known to applicant, are listed on attached form 1.0.

_____
Attorney for Applicant

_____
Typed or Printed Name

_____
Street Address

_____
City State Zip Code

_____
Phone Number (include area code)

Attorney Registration No. _____

_____
Applicant's Signature

_____
Applicant's Typed or Printed Name

_____
Street Address

_____
City State Zip Code

_____
Phone Number (include area code)

Case No. _____

WAIVER OF NOTICE

The undersigned surviving spouse, heirs at law, legatees, devisees, and other persons entitled to notice of the filing of the application to relieve decedent's estate from administration, waive such notice.

_____ _____

_____ _____

_____ _____

_____ _____

ENTRY SETTING HEARING AND ORDERING NOTICE

The Court sets _____, at _____o'clock ___. M. , as the date and time for hearing the application to relieve decedent's estate from administration.

[Check on of the following]

All notice is dispensed with as unnecessary.

Notice by publication to interested parties is dispensed with as unnecessary. Written notice shall be given, as provided by law and the Rules of Civil Procedure, to those persons entitled to notice, who have not waived notice.

Written notice is dispensed with as unnecessary. Notice by publication shall be given to interested parties as provided by law and the Rules of Civil Procedure.

Written notice shall be given to those persons entitled to notice, who have not waived notice, and notice by publication shall be given to interested parties, as provided by law and the Rules of Civil Procedure.

_____ _____

Date JAMES A. FREDERICKA
PROBATE JUDGE

ALTERNATIVE DISPUTE RESOLUTION IN THE PROBATE COURT

William D. Dowling, Esq.
Dowling Mediation

William D. Dowling

Phone: (330) 607-5144
Email: wdowling@dowlingmediation.com

EDUCATION

Yale University, New Haven, CT

- J.D. 1980

The Ohio State University, Columbus, OH

- M.Ed. 1977 – Philosophy and History of Education
- B.A., Education, *summa cum laude*, 1974

EMPLOYMENT

Dowling Mediation, 2012 - present

- Mediation of litigated and non-litigated matters
- Mediator for Summit County Probate Court
- Arbitration (AAA Commercial Panel)

The University of Akron School of Law, 2015 – 2018

- Visiting Assistant Professor, Practitioner-in-Residence
- Formerly adjunct professor
- Courses taught: Pretrial Advocacy, Alternative Dispute Resolution, Negotiation, Mediation, Externship supervision

Buckingham, Doolittle & Burroughs

- Of counsel, 2012 – present
- Associate and partner, 1983 – 1994 and 2007 – 2012
- Chair of Litigation Department 2008 - 2009

Oldham & Dowling, 1994 - 2007

- Co-founder and managing partner

Squire, Sanders & Dempsey, 1980 – 1983

- Associate attorney

Southwestern City Schools, 1974 – 1977

- Elementary schoolteacher

PROFESSIONAL ACCOMPLISHMENTS AND EXPERTISE

- Mediation or arbitration of over 200 disputes for lawyers, private colleges, businesses, individuals and political subdivisions.
    - Attended Pepperdine University School of Law, Straus Institute for Dispute Resolution, 2008.
    - Member of American Arbitration Association Commercial Arbitration and Mediation panels
    - Mediator for Summit County, Ohio Probate Court
- Broad litigation experience for individuals and corporations in matters involving professional liability, product liability, wrongful death, general negligence, insurance, employment and business disputes.
    - Admitted to practice in Ohio and various federal courts.
    - Over 100 cases tried to juries.
- Frequent presenter at continuing legal education seminars on litigation, ADR and legal ethics.
- Recognized as one of Ohio's Super Lawyers, 2007 – present.
- Martindale Hubbell rating of AV

PROFESSIONAL SERVICE AND AWARDS

Akron Bar Association

- President 2006 – 2007
- Board of Trustees, 2004-2007
- Past Chair of Judicial Evaluation Committee
- Past Chair of Judicial Campaign Oversight Committee
- Past Chair of Pro Bono Committee
- Past Chair of Grievance Committee
- Founder of Driver's License Restoration Clinic

Ohio State Bar Association

- Past Chair of Access to Justice Committee
- Member, Council of Delegates

American Bar Association

- Member, Alternative Dispute Resolution Section

Ohio Legal Assistance Foundation

- Board member 2011 – present
- Chair of Program Committee
- Past Chair, Revenue Enhancement Committee

Recipient of 2018 Ohio State Bar Association John and Ginny Elam Pro Bono Award

Member, Ohio Supreme Court Application Review Committee for Civil Justice Program Fund

Coach of Akron Law & Leadership Trial Team, 2014 - 2016

Western Reserve Legal Services (now Community Legal Aid Services)

- Board member and past-president of Board of Trustees
- Co-chair Justice for All fundraising campaign

American Board of Trial Advocacy, past member

Inns of Court, past member

Liberty Bell Award for Exemplary Community Service from Akron Bar Association

Proclamation for Outstanding Community Service from Ohio Senate

COMMUNITY SERVICE AND AFFILIATIONS

Greater Akron Musical Arts Association (Akron Symphony), Board of Trustees, past member

Summit County Children's Services, Board of Trustees, past member

Interfaith Hospitality Network, Board of Trustees, past member

Western Reserve Girl Scout Council, past member

United Way of Summit County

- Account Executive, past
- Torch Club member
- Recognized as outstanding community volunteer

Bath Township Board of Zoning Appeals, past member

Bath United Church of Christ, past moderator

PERSONAL

Married 43 years to Lynne

Two children, four grandchildren

William D. Dowling
Dowling Mediation
www.dowlingmediation.com

MEDIATION IN THE PROBATE COURT

"The entire legal profession - lawyers, judges, law teachers - has become so mesmerized with the stimulation of the courtroom that we tend to forget that we ought to be healers - healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence, because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?"

"For some disputes, trials will be the only means, but for many claims, trial by adversarial contest must go the way of the ancient trial by battle and blood. Our trials are too costly, too painful, too destructive, too inefficient for a truly civilized people."

Chief Justice Warren E. Burger
Address to American Bar Association (1984)

Ten Tips for Effective Mediation in Probate Court

1. Talk honestly with your clients about what they want. What are their real *interests?*

2. Mediate early in the dispute.

3. Explain the process clearly to your clients and explore the risks of their cases. Encourage realistic expectations.

4. Develop a negotiation strategy. Have a realistic goal.

5. Take *reasoned* positions.

6. Listen.

7. Let your client talk.

8. Exchange information.

9. Talk to the other party.

10. Be honest with the mediator. Make the mediator an asset to you and listen to her advice.

"Making peace, I have found, is much harder than making war."

Gerry Adams, Sinn Fein

FIDUCIARY INCOME TAX

Karen S. Cohen, CPA
Home Savings

Karen S. Cohen, CPA
Vice President and Trust Officer, Home Savings Bank
4137 Boardman-Canfield Road, Suite 101
Canfield, OH 44406
(330) 286-2872 kcohen@homesavings.com

Karen launched her career after graduating from Youngstown State University with a bachelor's degree in accounting and a master's in business administration. She spent the next 27 years working with Packer Thomas CPA's, where she would become a Principal in 2006. Throughout her time as a tax professional at Packer Thomas, she was frequently published, mostly on the topics of tax and estate planning and compliance, as well as fiduciary income tax. Known for research and consulting for high wealth individuals, passthrough entities, exempt organizations, and merger/acquisition structuring, she joined Home Savings Bank 2-1/2 years ago, when it established a local wealth management division.

Community involvement has always been a central part of Karen's professional focus. She is a trustee of the Mahoning-Shenango Valley Estate Planning Council. She is also immediate past Board Chair for Mercy Health Foundation and Vice Chair of the Community Foundation of the Mahoning Valley. She chairs the Children's Hope Ambassador Committee for Akron Children's Hospital, and was recently named to the board of Eastern Ohio Education Partnership.

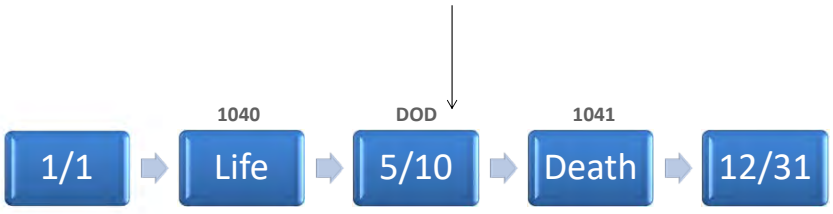
In addition to these commitments, Karen has spent the last seven years teaching Estate Planning and Taxation during fall semesters at the Williamson College of Business at YSU. She received the 2008 Athena Award, which recognizes professional development, community service, and mentoring. Karen resides with her husband Jim in East Palestine, Ohio.

39th Annual Probate Practice Seminar
Fiduciary Income Tax

HOME SAVINGS BANK

Karen S. Cohen, CPA, MBA
Vice President, Trust Officer
Home Savings Bank
4137 Boardman-Canfield Road, Suite 101, Canfield, OH 44406
330.286.2872 | KCohen@homesavings.com

Life & Death



Individual vs. Fiduciary Tax Rates

Ordinary:
Top rate 37% at $510,300
Top rate 37% at $12,750

Capital gains:
Top rate 20% at $434,550
Top rate 20% at $12,950

Net investment income tax:
Rate 3.8% at $200,000
Rate 3.8% at $12,750

Example 1 | Managing tax brackets

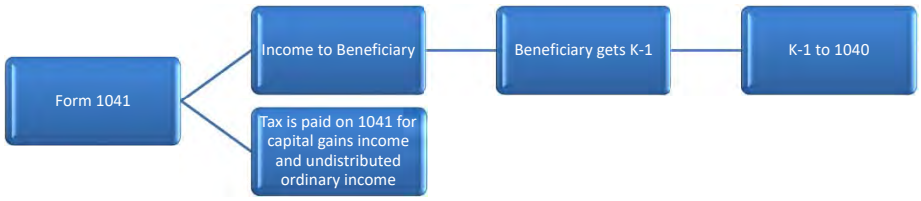
- Dad's estate is the beneficiary of $200,000 IRA
- IRA will be cashed in the estate
- Executor plans to hold back $50,000 from the beneficiary distributions to pay $40,000 federal tax and $10,000 Ohio tax
- The taxability of the income follows the money

Managing tax brackets (continued)

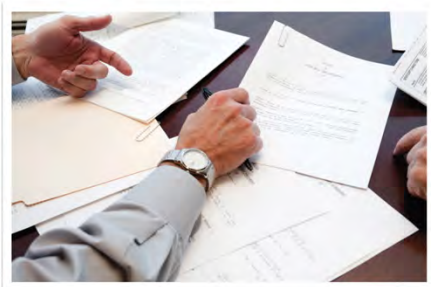
- Bracket compression on Form 1041 will result in more tax if distributions are not made
- There is likely a beneficiary in a lower bracket than 37%
- Executor has 65 days after the end of the estate's year to make distributions that count as a current year distribution
- Estates can use a fiscal year end, which may defer the tax an extra year

Estates are Taxed Like Complex Trusts

- AKA Decedent's Estate
  - All income is NOT required to be distributed
  - This generally refers to "ordinary" income
  - Capital gains are generally taxed to 1041
  - May have a fiscal year end (trusts cannot)
  - Executor will file Form 1041 if income threshold is exceeded



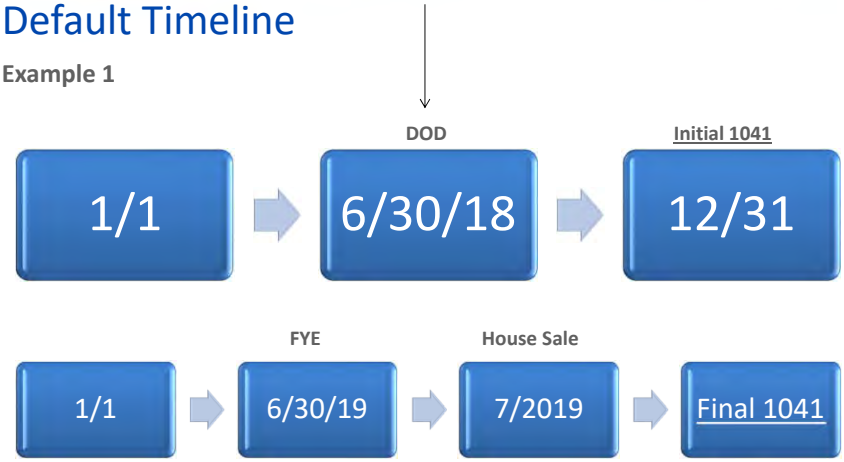
Example 2 | Fiscal Year End



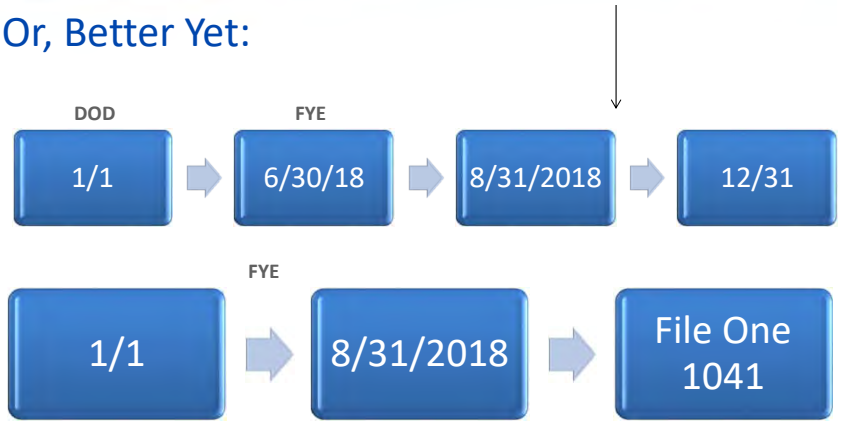
- Woman passed away on June 30, 2018
- She was a Pennsylvania resident
- Estate received $50,000 taxable income in late 2018
- We find out about this client on August 21, 2019
- Six residual beneficiaries, 5 of whom live in PA
- Last asset, the house, was sold in July 2019
- Legal fees were deducted on PA inheritance tax return

Default Timeline

Example 1

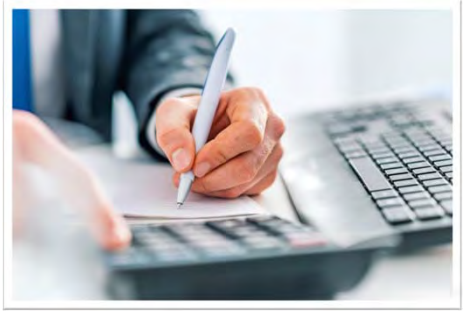


Or, Better Yet:



Solving the Problem

- Start by using a fiscal year end
- Try to prepare only one initial/final return
- Beneficiaries are never blindsided when a fiscal year is used
- Can result in deferral of tax to the following year

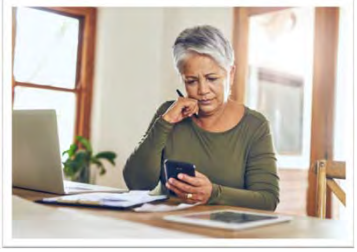


Solving the Problem (continued)

- There is never federal tax on a final return
- Deduct every possible expense
- The 65-day rule
- Fiscal year ends may require some estimated figures

Example 3 | Combining Estate and Trust Income

- Estates can have a calendar or fiscal year end
- Trusts can only have a calendar year end
- File Form 8855 to elect to include the activity of a trust with the activity of an estate, to effectively gain a fiscal year end for the trust
- There need not be any probate assets to make such an election



Why do we like this?

- Prepare one return instead of two
- Combines the loss on estate 1041 and taxable income on trust 1041
- Not necessary to obtain an EIN for the estate if there are no probate assets
  - Just use the trust's EIN and file as "Filing Trustee"
  - If an executor is appointed, must obtain an EIN

Example 4 | Executor Fees

- Used to save federal estate tax on Form 706
- Today, we only use it to allocate income between residual beneficiaries.
- Total taxable income does not change

Example 5 | Personal Residence

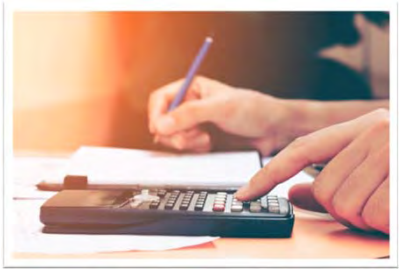
- No longer eligible for Sec. 121 gain exclusion
- Not needed due to step up in basis anyway
- House sale usually generates capital loss
- Deduct everything
- Beneficiaries will get the benefit of any loss

Example 6 | Charitable Beneficiary

- Quit paying tax on the income
- Quit issuing K-1's to the charity
- Estates use a charitable set aside
- Trusts can use Sec. 642(c) election

Example 7 | Tax Payments

- No federal tax estimated payments are needed for the first two years after DOD
- States often do not have this exception
- Use Form 1041-T when you have paid estimates unnecessarily



Example 8 | Excess Deductions on Termination

- Don't let deductions exceed income on a non-final return
- On a final return, they will carry out on the K-1's to the beneficiaries
- Consider using the accrual basis for filing

39th Annual Probate Practice Seminar
Fiduciary Income Tax
October 4, 2019

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Income through DOD is reported on 1040; after DOD is reported on 1041.

1040		DOD		1041	
1/1	Life	5/10		Death	12/31

Example 1 – Managing tax brackets

Dad passed away and his $200,000 IRA was his only probate asset. (His deceased wife was still the designated beneficiary on the account; no contingent beneficiary had been named.) The 4 children are the beneficiaries of Dad's estate.

The IRA administrator won't cut checks directly to the children—the executor has already asked. The proceeds have to be paid to the estate.

The executor plans to immediately distribute the funds out of the estate to the 4 children, but hold back $50,000 for tax--$40,000 federal tax and $10,000 Ohio tax---WRONG.

The taxability of the income follows the money. If the money is distributed, the beneficiaries will receive K-1's from the estate and will report the income on their personal returns. There won't be anything taxed on the Form 1041. This will undoubtedly save tax.

Example 2 – Fiscal year end

Default timeline:

DOD Initial 1041

1/1----------6/30/18----------12/31

FYE house sale

1/1---------- 6/30/19-----7/2019 Final 1041

OR, better yet:

DOD FYE

1/1----------6/30/18----------8/31/18----------12/31

FYE File one 1041

1/1----------8/31/19

Woman, a PA resident, passed away June 30, 2018. Her estate received $50,000 of income in late 2018. We first learned of the client on August 21, 2019. There are 6 residual beneficiaries, of whom 5 live in PA. Final asset, the house, was sold in July 2019.

Accountant thinks we are dealing with a late return for 2018, that we will have to prepare 2 returns: 2018 and 2019. She thinks we can't deduct the legal fees on Form 1041 because they were already deducted on the PA Inheritance tax return.

1) **An estate can have a calendar or a fiscal year end. When someone passes away on the last day of the month, say June 30, 2018, their estate fiscal year end can be as long as from July 1 to June 30, 2019 for the first year. If they pass away, as is more common, on some other day of the month, say June 29, the fiscal year end can be June 29 through May 31 of the**

following year. A fiscal year can end in any month, has to end on the last day of the month, and cannot exceed one year.

2) **I always assume we will file one return that is marked both initial and final. There was no income earned in the first two months after the woman passed away. We can use an August 31, 2018 year end and file no return, as the $600 gross receipts threshold has not been exceeded. The return we are going to file is for September 1, 2018 through August 31, 2019. It will include everything, all income, expenses, and distributions.**

3) **I always assume we will use a fiscal year, as that gets the work out of tax season and the K-1's get into the hands of the beneficiaries in plenty of time to file their own returns. In our case, with an August year end, the return will be due December 15. The beneficiaries will not have to delay the filing of their 1040's at all and there will be no surprises.**

4) **The return will be prepared on a 2018 form, as is proper, as the fiscal year begins in 2018. The K-1's will affect the 2019 returns of the beneficiaries which, in some situations, will defer income that occurred in the prior calendar year into the next year. In our case, there was a $50,000 payment received in late 2018.**

5) **The act of marking a return final will push out all income, gains, losses, and excess deductions onto the K-1's. There is never any federal tax on a final 1041. There is no tax on a final state 1041 either, except to the extent there is any backup withholding needed for out-of-state beneficiaries.**

6) **We can deduct the legal fees on this 1041, as well as the tax preparation fees. It is nice when they have been physically paid by fiscal year end. However, we can accrue them onto the tax return if we have not set a precedent for being a cash-basis filer in an earlier 1041. That's another reason to try to file only one 1041.**

7) **The 65th day is actually October 4. I am always happy when there have been distributions, or when most everything has been distributed quickly. However, as long as we get down to an amount of cash that will not generate more than $600 of taxable gross receipts in future, I am happy to mark a return final.**

8) **When you use a fiscal year end, you are often working without the benefit of 1099's. In this case, we would have any 1099's for 2018, but not 2019 when we file our return. For example, if a 1099S is issued for the sale of the real estate, we may not have it yet. I have never had a problem with this timing issue. We have the HUD-1 statement to show the details of the house sale.**

Example 3 – Combining estate and trust income

Client had excellent planning advice and, therefore, no probate assets when she passed away. Everything was titled to her trust. The trust will go outright/be split into subtrusts when all can be arranged.

Although estates can have a fiscal year end, trusts are always calendar year entities. However, we can use a Sec. 645 election to pull the trust activity onto a fiscal decedent's estate income tax return, Form 1041. The election can be submitted on Form 8855, signed by both the executor and trustee (often the same individual) at the filing of the return. We can prepare a combined return for a minimum of a couple of years, which is usually sufficient. This prevents situations where there is a loss on an estate 1041 and taxable income on a trust 1041. When we push the two returns together, the income is offset by the loss.

This technique also saves the family the cost of the preparation of separate returns, whereby the estate K-1 would flow to the trust anyway.

If there is no executor appointed, because there are no probate assets, the trustee would still mark the return as being a decedent's estate and refer to himself as the filing trustee. If an executor is appointed, an estate EIN must be obtained and used for the return; otherwise, the trust's EIN can be used.

Example 4 – Executor fees

This is becoming less common, except as a tool to tease more assets from one sibling to another. We generally don't need deductions for Form 706. The executor fee is deductible on Form 1041. Say we have $15,000 of income and $10,000 paid to the executor. The executor is also one of two 50/50 residual beneficiaries. The net income on the 1041 is $5,000, of which $2,500 is taxable to the executor/beneficiary. He is also taxed on the $10,000 executor fee. So, he received $12,500 and it is fully taxable to him. Sibling received $2,500 that is fully taxable to her. This is how that would look:

If no executor fee is paid: $15,000 income

$7,500 to Bene 1	**$7,500 to Bene 2**
$7,500 total income	**$7,500 total income**

If executor fee is paid: $15,000 - $10,000 = $5,000 net income

$ 2,500 to Bene 1	
$10,000 to Bene 1	**$2,500 to Bene 2**
$12,500 total	**$2,500 total**

Executor fees are not reportable on Form 1099MISC as they are not being paid in the ordinary course of a trade or business. The receipt of executor fees is not self-employment taxable, as our executor does not hold himself out as a professional executor and is not in the trade or business of being an executor.

Example 5 – Personal residence as capital asset

There was a personal residence in the estate. It sold at its appraised value.

I have always contended that, when someone passes away, their former home is no longer a personal residence. It is a capital asset of the estate. Any expense to maintain or repair the home is deductible on the 1041. Mowing, snow removal, utilities, minor repairs, etc. are all costs that would be denied as personal expenses before death, but are deductible after death.

Major repairs, fixing up expenses, realtor commissions and the use of the date of death value as the starting point for basis often lead to a long-term capital loss on the sale of the house. This loss will be passed out to the beneficiaries on the final 1041 for use on their personal returns. It can be used to offset their capital gains, plus a net deduction of $3,000 per year, and will carry forward indefinitely.

Example 6 – Charitable beneficiary

The decedent's assets will all be distributed to charity, according to her Will and trust, after all expenses and debts are paid. Meanwhile, they are earning income. Will the income be taxed? If so, it doesn't seem fair.

No, a charity never gets a K-1 from an estate or trust. We have two tools to cope with income earned before assets are distributed in full to a charity.

1) **Charitable set aside. Probate assets that will ultimately go to charity from an estate can be "set aside" for an indefinite period of time. Page 2 of Form 1041 says "amounts paid or permanently set aside for charitable purposes" are deductible against the income earned on the 1041. We can completely offset any income or capital gains incurred in a decedent's estate with a charitable deduction.**

2) **In a trust, we must elect to pay over to the charity by the end of the following year the amount we have deducted as a charitable deduction but have not yet physically transferred to charity. Details for making the Sec. 642(c) election appear in the 1041 instructions.**

Example 7 – Tax payments

We forgot to make quarterly estimated tax payments for the estate Form 1041. OR, we made payments and now we find that we will be able to file a final return this year (and we all now know there is no tax on a final 1041).

It is not necessary to make federal quarterly estimates for the first two years that an estate is in existence. This is another reason we want to make the Sec. 645 election. However, if the trust at hand is one out of which we are required to pay any debts and expenses for the decedent, it can skip the estimated tax payments for two years, too.

States often do NOT have this exception.

If quarterly estimates were inadvertently made, they can be allocated to the beneficiaries by filing Form 1041-T within 65 days after the end of the tax year. This can help you with quarterly estimates, but not backup withholding. However, backup withholding can be allocated to the beneficiaries on their Schedule K-1's.

Example 8 – Excess deductions on termination

I recall being warned not to let deductions exceed income on a non-final 1041, but that it was okay to have net deductions on a final return, as they would be passed out to beneficiaries as "excess deductions on termination." Is that still true?

Well, yes, no, and maybe.

You should avoid a situation where deductions exceed income on a 1041 that is not final. Those deductions would be wasted and they do not carry forward. One way to avoid this is to report on the accrual basis, accruing more income onto the return to offset the expenses. Alternatively, monitor the timing of the payment of expenses so you don't get stuck in this situation.

Excess deductions on termination are miscellaneous itemized deductions subject to the 2% floor. Miscellaneous itemized deductions subject to the 2% floor are no longer deductible by individuals. However, the Form 1041 instructions and K-1 form for 2018 still contain instructions for this deduction. Form 1040 instructions do not mention the ability to deduct excess deductions on termination. Commentators are saying this deduction can be taken on Line 16 of Schedule A as an "other" deduction; the omission from Form 1040 instructions appears to be inadvertent.

Example 9 – Miscellaneous

Indignant daughter called the accountant to say her mother's personal return is WRONG. It seems the earnings on her mother's intentionally defective grantor trust (sometimes known as a MIDGT, used for Medicaid planning) were reported on the mother's personal Form 1040. Daughter, who has no particular qualification to make such a declaration, insists that because the trust is irrevocable, the income should have been taxed on a trust income tax return. The attorney who employed the MIDGT in this situation knew the grantor was in a nursing home, incurring plenty of medical expense that could be used to offset any income generated by the trust.

We also get this question on The Ohio Legacy Trust. At our bank, we call them DAPT's (domestic asset protection trusts). The answer is the same—it's a grantor trust for income tax purposes.

Income Tax Rates for 2019
For Individuals and Estates/Trusts
October 4, 2019

ORDINARY INCOME TAX

	Single Individuals				Estates and Trusts	
Tax Rate				Tax Rate		
10%	of the amount over	$ -		10%	of the amount over	$ -
12%	of the amount over	$ 9,700				
22%	of the amount over	$ 39,475				
24%	of the amount over	$ 84,200		24%	of the amount over	$ 2,600
32%	of the amount over	$ 160,725				
35%	of the amount over	$ 204,100		35%	of the amount over	$ 9,300
37%	of the amount over	$ 510,300		37%	of the amount over	$ 12,750

CAPITAL GAINS

	Single Individuals				Estates and Trusts	
Tax Rate				Tax Rate		
0%	of the amount over	$ -		0%	of the amount over	$ -
15%	of the amount over	$ 39,375		15%	of the amount over	$ 2,650
20%	of the amount over	$ 434,550		20%	of the amount over	$ 12,950

Net Investment Income Tax at 3.8% is also levied on investment income when modified adjusted gross income exceeds:

		$ 200,000			$ 12,750

THE DISCIPLINARY PROCESS
PROFESSIONAL CONDUCT

Kimberly Vanover Riley, Esq.
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Kimberly Vanover Riley

Kim Riley is a partner with the law firm of Montgomery Jonson LLP 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 has previously served as the Chair of the Ethics and Professionalism Committee of the Cleveland Metropolitan Bar Association and the Chair of 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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The Disciplinary Process

(More Than You Ever Hope to Learn Firsthand)

October 4, 2019

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Rule V of the Rules for the Government of the Bar

- Governs allegations of violations of:
  - Code of Professional Responsibility (former rules);
  - Rules of Professional Conduct (current);
  - Code of Judicial Conduct
- All formal complaints are heard by the Board of Professional Conduct
- Complaints get initiated by
  - Office of Disciplinary Counsel (ODC); or
  - Certified Grievance Committee (CGC)
    - Most likely CGCs here: Mahoning County, Trumbull County, Cleveland Metro, Akron, OSBA

Board of Professional Conduct

- 17 Attorneys—appointed by Justices in proportion to size of appellate districts
- 7 Judges or Retired Judges—appointed by Justices from different appellate districts
- 4 Laypeople—appointed by Justices from different appellate districts

Board Membership

- 3 year terms, not to exceed 2 consecutive terms
- Apolitical—no donations to judicial campaigns
- Oversee
  - attorney/judicial misconduct & discipline
  - attorney/judicial mental fitness
  - Reinstatements
  - (Nonbinding advisory opinions)

Who prosecutes these matters?

- Office of Disciplinary Counsel
  - Appointed by Board, approved by SCT
  - Starting 10/27/19, term of 4 years
  - Apolitical
  - Full staff appointed by ODC
    - Assistant attorneys may not practice law
    - Investigators (2 FT/2 PT), office staff
- Certified Grievance Committees (CGCs)
  - OSBA—statewide (only CGC that may prosecute judges)
  - 32 Local Bar Association CGCs
  - Local attorneys working as a service to the bar
  - Jurisdiction=respondent resides or maintains office there OR misconduct occurred there (exception for OSBA, judges, and conflicts)

Certified Grievance Committees

- At least 15 members, including Chair (subject to 2-year term limit)
- No more than 20% / 5 attorneys (whichever is less) from the same firm or government office
- Biennial training requirement

- 32 local CGCs with local jurisdiction
- 1 statewide CGC (OSBA) with statewide jurisdiction

The Disciplinary Process

- Grievance (or Self-Report / Other triggering event)
- Intake / Preliminary Assessment
- Preliminary Dismissal or Investigation
- Probable Cause
- Certification & Filing → **First Public Event**
  - **Disclosing the existence of a grievance at any time prior to this point is a standalone disciplinary violation.**
- Answer
- Panel Appointment
- Discovery
- Panel Hearing / Findings of Fact and Conclusions of Law
- Full Board Decision
- Show Cause / Objections
- Supreme Court Decision

The Exceptions to this Process

- Impairment-Related Suspensions (Gov Bar V, Sec. 15)
  - Mental Illness (ORC 5122.01)
  - Drug/alcohol treatment (ORC 5119.90)
  - Board finding of Mental Illness/Alcohol or Drug abuse / disorder substantially limiting ability to practice law
- Interim Felony Suspensions or Default Under Child Support Order (Gov Bar V, Sec. 18)
  - Conviction of a felony or equivalent in another jurisdiction
  - Final/enforceable determination pursuant to ORC 3123 that attorney/judge is in default under a child support order.
- Interim Remedial Suspensions (Gov Bar V, Sec. 19)
  - Substantial, credible evidence demonstrating that judge/attorney has committed a violation and poses a substantial threat of serious harm to the public.

Grievance (or similar event)

- Disciplinary matters can start in one of several ways:
  - Grievance
    - Formal / signed
    - Informal / anonymous
  - Phone call, newspaper clipping sent to ODC/CGC
  - Self-Report
    - The unintuitive reasons to consider a self-report
  - Anything else that comes to the attention of ODC/CGC (e.g., newspaper article, persistent community complaints, etc.
- **IT DOESN'T MATTER IF EVERYBODY'S HAPPY!**

Grievance--Confidentiality

- If you file a grievance, it is confidential.
- Breaching this confidentiality is an ethical violation.
- Exceptions:
  - Waiver (Loose lips sink ships!)
  - OLAP-type concerns
  - Criminal concerns
  - Inter-agency exchanges of info (ODC/CGC)

Intake / Preliminary Assessment

- Sometimes, you have the best/worst moment of your career, all in the same letter.
- About 60% of the 4,000 or so grievances that come in are dismissed at the intake stage. The practice of ODC (and presumably all CGCs) is to advise the recipient upon dismissal.

Investigation

- In the other half, it can vary widely:
  - Letter of inquiry (one or multiple); 14 day minimum
    - Always seek more time if you need it.
    - Grievance will typically be attached
    - If anonymous/something that came to their attention, they may just ask questions / ask for an explanation
  - Request for documents
  - Interviews of witnesses (live, telephonic, affidavits)
  - Forensic evaluations (of computers, etc.)
  - Sworn testimony (e.g., depositions)

Investigation--Confidentiality

- All investigatory materials are confidential prior to a probable cause determination.
- Witnesses won't be advised who is being investigated (although it may sometimes be apparent).
- Revealing the existence of a disciplinary grievance is an ethical violation.

Investigation Timeline

- Typically, within 60 days; decision within 30 more days.
  - Extensions available for up to 150 days
  - Additional extensions for up to one year
  - Anything beyond one year—still no SOL; just the ability to argue a rebuttable presumption of prejudice
    - But if the delay is your fault, nobody will care.
    - *Consider waiver of time!*
  - All matters involving litigation get stayed (tolled) until the litigation is over.
- Timelines NOT jurisdictional.

Duty to Cooperate / Practical Tips

- Failing to respond = terrible idea; may invite a deposition when a letter would have been all they wanted.
- Check with malpractice carrier—you may have coverage for counsel. (Even if you don't, consider counsel; a bad response can cost you far more money than crafting a DIY response that prolongs the investigation.)
- *Very* counterintuitive posture:
  - Fight your instincts to play "close to the vest"; being adversarial, evasive = bad approach. Not like typical litigation
  - ODC/CGC must honor your request to abstain from sharing your response with the grievant (but they will summarize it for them)
  - Often capable of being resolved, even with the existence of a violation
  - **Consider objective of the Professional Conduct Rules!** Consider how this affects what ODC/CGC is looking for.

No Probable Cause and/or No Pursuit

- ODC/CGC may send a termination letter, indicating it is not pursuing the grievance/investigation.
- This is usually—not always—because they found no probable cause.
- Sometimes, it merely announces their notice of intent not to file (even if they found wrongdoing).
  - May include a long explanation (or admonition)—might be for your benefit, for the grievant's, or in anticipation of an appeal to ODC.
  - Be aware you may have a "strike" on your back for some time to follow.
- Decision NOT to pursue a grievance by a CGC may be appealed to ODC within 14 days (abuse of discretion/error of law)
  - ODC's determinations aren't appealable.
  - In at least one recent case, CGC dismissed; ODC picked up subsequent grievance of same behavior—SCT said OK

Pursuit of Probable Cause

- If ODC/CGC find probable cause and elect to prosecute, they will inform the respondent in a letter, sending a draft complaint they intend to file with the Board.
  - Serve notice of intent to file upon Respondent
  - Respondent then has second opportunity to respond.
    - 1st chance: LOI to ODC/CGC
    - 2nd chance: Additional response to BCGD (via ODC/CGC)
      - Not a rubber stamp

Probable Cause Certification & Filing

- Probable Cause Committees Meet Monthly.
  - Why is this important? They can only certify complaints when they meet.
  - A 3-member probable cause panel (that's separate from any ultimate hearing panel) reviews materials and votes whether to certify all, some, or none of the draft complaint.
  - Standard: Substantial, credible evidence
- If PC is not found, complaint is not certified. (The PC Committee's decision may be appealed for review by the Full Board.) Confidentiality is preserved.
- If PC is found, complaint (in whole or part) is certified and filed
  - First public event.
  - Not publicly searchable, but becoming more widely disseminated.

Answer, Panel Appointment & Discovery

- Matter proceeds almost like a regular civil trial after the complaint is filed.
  - Answer within 20 days of complaint
    - If no answer, default proceedings
    - ***Significant*** ramifications for default
  - 3-Member Panel appointed
    - Different jurisdiction than the Respondent
    - No more than one non-attorney
    - Panel chair works out discovery disputes, timing, etc.
  - Very tight timeline—hearing usually within 150 days
  - Discovery includes the usual drill:
    - Depositions
    - Written discovery
    - STRONG ENCOURAGEMENT TO STIPULATE TO FACTS/VIOLATIONS

Odd Procedural Anomaly

- Each count of a certified complaint must pass probable cause to proceed.
- However, after a case is active, the complaint may be amended to add new counts merely with a motion to the Panel for leave to amend.

Default Proceedings

- If you don't answer a disciplinary complaint:
  - Notice of Intent to Respondent
  - 30 days to respond
  - If no response, Board certifies the default to the Court
  - Show cause order from the Court
  - Interim default suspension; indefinite suspension.

Consent to Discipline

- Gov Bar V, Section 16
- Akin to a plea deal
- Very short window in early portion of the case to resolve:
  - 60 days from panel appointment
  - Must request and be granted an extension to get 90 days.
  - NO EXTENSION beyond 90 days.
- Very hard-and-fast procedural requirements; whole thing will be thrown out for non-compliance if fails timeliness, substantive requirements.
- Must be accepted by both Board & SCT

Consent to Discipline Requirements

- Agreement must be complete:
  - Agreement of parties, including stipulated facts; rule violations; address any dismissals
  - Applicable aggravating/mitigating
  - Recommended sanction with case law
  - Restitution, if applicable
  - Respondent's affidavit (which includes admission of misconduct and that grounds exist for the sanction; admission of the truth of material facts; agreement to recommended sanction; freely/voluntarily given; acknowledgement of SCT authority).

Consent to Discipline Pros/Cons

- Pros:
  - Faster
  - Cheaper
  - "Style Points" with ODC/CGC (sometimes)
  - About 70% get accepted
    - When CTD is rejected, about ½ get the same/lesser sanction.
- Cons:
  - May have to stipulate to a higher sanction than you might obtain at hearing.
  - Possibility of rejection by Panel, Board, OR Court (but admissions not admissible in hearing/Court later)

Panel Hearing

- Works very much like a regular trial
  - Opening, witnesses (direct & cross), closing
  - Rules of Evidence apply
  - Time can range from hours to weeks.
    - Panelists are all volunteers (and, sometimes, Relator's counsel are, too)—so hearing dates are scheduled at their convenience.
    - Not unusual to have a 5-day hearing to be spread across weeks or months.

Panel Setting

- Formal—usually in one of the mural rooms at the Ohio Supreme Court
- Some informalities
  - Questions by panel directly to witnesses
  - Stipulations of fact and law
  - Agreements to submit written closing arguments

Hearing Resolution

- Panel may dismiss a count at the end of Relator's case, either immediately or in their later ruling.
- Panel works on a volunteer basis, often away from home.
- Biggest difference: Clear & convincing evidence

Hearings are open to the public.

Four main determinations at hearing

- Facts – what happened?
  - Credibility contests
- Rules – were they violated? Which ones?
- Aggravating / Mitigating Factors?
- Proposed Sanction

Aggravating / Mitigating Factors

- Prior Disciplinary Offenses*
- Dishonest/Selfish Motives
- Pattern of Misconduct
- Multiple Offenses
- Lack of Cooperation in the Disciplinary Process
- Submission of false evidence, statements, or other deception during the process
- Refusal to acknowledge misconduct
- Vulnerability of/harm to victims
- Failure to Make Restitution

AGGRAVATING

- No prior discipline*
- No dishonest/selfish motive
- Timely, good faith effort to make restitution/rectify misconduct
- Full and free disclosure to Board/cooperative toward proceedings
- Good character/reputation
- Imposition of other penalties/sanctions
- Disorder that contributed to misconduct (e.g., alcohol or chemical dependency; other addiction; mental illness)
- Other interim rehabilitation

MITIGATING

*CLE Suspensions are considered prior discipline!

Board Decision

- Panel completes the hearing (often in parts)
- Panel certifies its findings to the Board.
- Board meets bi-monthly (usually).
- Board recommends:
  - Dismissal
  - Public Reprimand
  - Suspension (6, 12, 18, or 24 month—all or stayed, in whole or in part, with or without Probation)
    - Conditions of Probation may exist, including restitution, treatment, re-taking the MPRE
  - Indefinite suspension—24 months, then may reapply
  - Disbarment

Show Cause

- The Supreme Court issues Respondent an Order to Show Cause why the Board's Report should not be confirmed & Order entered.
  - Either side may object within 20 days
  - Then gets briefed/argued before SCT.
  - If no one objects, SCT will enter an order as it deems proper.
    - They have the benefit of the full record below. (And they read it—every word.)
    - Odds of outcome changing at SCT stage—historically, varied.

Supreme Court

- Supreme Court decision is the last step.
  - Suspensions become effective upon entry (which can represent varied timelines).
- Most truly public & easily searchable step. Plus,
  - Listed on OSCT's website
  - Case with a citation
  - 3 x Publication made in the local newspaper having the largest general circulation in the county/counties designated by the Board.
- Final order will include all Costs of proceedings, payable on short timeframe.
  - Greater if prosecuted by a CGC than ODC.
  - Will go to collections (OAG) if unpaid.
  - *Payment of these costs is a prerequisite to reentry.*

Statewide Statistics (2017)

- 3,500 grievances filed in 2017; 2,300 with ODC and 1,200 with CGCs
- 40% dismissed on intake; 60% investigated.
- 75 formal complaints filed with the Board.

ODC Disciplinary Statistics (2018)

- 2,693 Grievances Received
- 2,401 matters dismissed on Intake or After Investigation

- 642 matters still pending at year-end
- 40 Formal Complaints Filed
  - 1 Public Reprimand
  - 5 Six-month suspensions
  - 3 One-year suspensions
  - 7 Two-year suspensions
  - 7 Indefinite Suspensions
  - 5 Interim Default Suspensions
  - 5 Interim Felony Suspensions
  - 1 Interim Remedial Suspensions
  - 2 Disbarments

  - 10 Reciprocal Disciplines
  - 14 Resignations with Disciplinary Action Pending
  - 21 Retirements

Top Disciplinary Offenses in 2018

1. Neglect / failure to protect client's interest – 248 (255 in 2017; 262 in 2016; 211 in 2015)
2. Failure to maintain funds in trust 246 (182 in 2017; 180 in 2016; 256 in 2015)
3. Trial Misconduct – 91 (112 in 2017; 101 in 2016; 72 in 2015)
4. Excessive Fees – 67 (69 in 2017; 66 in 2016; 61 in 2016)
5. Personal Misconduct – 67 (51 in 2017; 65 in 2016; 80 in 2015)
6. Misrepresentation/False Statement/Concealment – 53 (17 in 2017; 31 in 2016; 15 in 2015)

How can I prevent all this?

- Ask for help
  - Bar association's ethics hotline
  - Ohio Board of Professional Conduct: 614-387-9370
  - Office of Disciplinary Counsel
  - Private counsel (best for retroactive questions)
- Keep Informed
  - Ethics CLEs only get you so far.
  - Ohio Board of PC Advisory Opinions
  - Blogs
    - Ohiolegalethics.com
    - Legalethicsforum.com
    - Mojolaw.com/blog

Overview of the Disciplinary Process

November 16, 2015

Kimberly Vanover Riley, Esq.
Montgomery, Rennie & Jonson Co., L.P.A.
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The Disciplinary Process

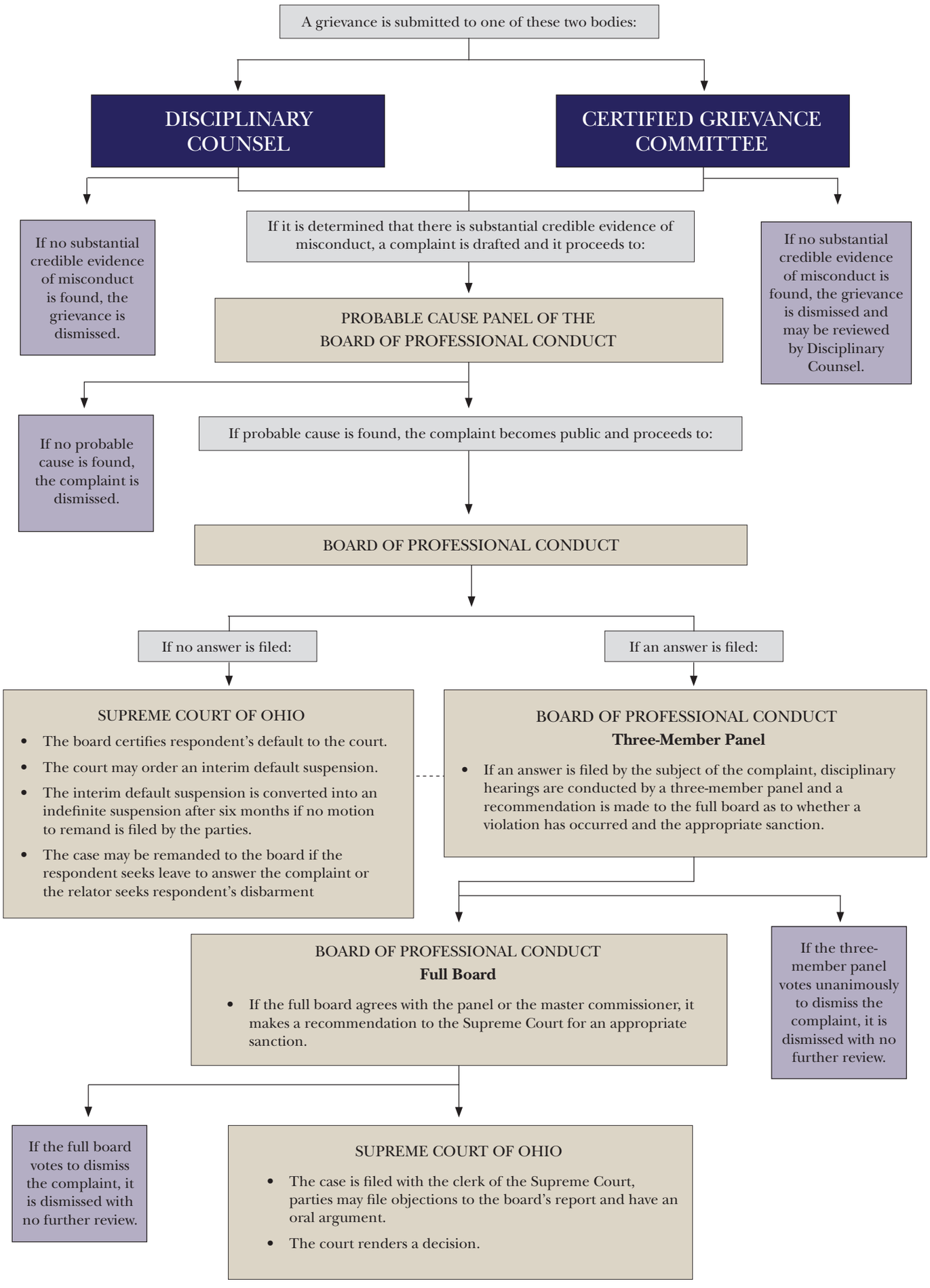
(More Than You Ever Hope to Learn Firsthand)

October 4, 2019

Kimberly Vanover Riley, Esq.
Montgomery Jonson LLP
kriley@mojolaw.com
(440) 779-7978

DISCIPLINARY PROCESS

A grievance against a judge or attorney may be submitted to the Disciplinary Counsel or a certified grievance committee of a local bar association. If either of those bodies determines that substantial credible evidence of professional misconduct exists, a formal complaint is drafted. It then moves to a probable cause panel of the Board of Professional Conduct, which determines if there is probable cause. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board of Professional Conduct. Hearings are then conducted by the board and if it finds a violation, a recommendation is made to the Supreme Court of Ohio. The Supreme Court of Ohio makes the final decision as to findings of misconduct, and issues an appropriate sanction.



CURRENT TOPICS IN PROBATE
PANEL DISCUSSION

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

Hon. Mark J. Bartolotta
Judge, Lake County Probate Court

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

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 MARK J. BARTOLOTTA is a 1985 graduate of The University of Akron with a Bachelor of Science degree in Business Administration and a major in Finance. After graduation, he worked for the Allstate and Prudential Insurance Companies in their claims departments. He also obtained his NASD Series 7 securities broker's license, as well as his Ohio Life and Health Insurance licenses.

Judge Bartolotta enrolled in law school at the Cleveland-Marshall College of Law in 1989. During law school, he clerked for Judge Robert J. Grogan at the Lyndhurst Municipal Court. He graduated from Cleveland- Marshall in 1992 with his Juris Doctorate degree. In the fall of 1992, Judge Bartolotta was hired by the then Lake County Prosecutor Steve LaTourette and worked as a trial attorney in the civil, juvenile, and criminal divisions of the prosecutor's office for over twenty years. During the last ten years of his service, Judge Bartolotta was the Major Felony Prosecutor. In February 2013 Judge Bartolotta was hired in Geauga County to run the Criminal Division as Chief Assistant Prosecutor.

When then Governor John Kasich needed to fill the open seat on the bench of the Lake County Probate Court in the Fall of 2013, he turned to Judge Bartolotta for the appointment. In 2014, Judge Bartolotta was elected by the voters of Lake County to retain his position on the Probate Court bench, where he still currently presides.

ROBERT W. (BOB) BERGER

Resides in Ravenna, Ohio, Wife Patty Berger and son Colin K. Berger

1968 - Graduate of Theodore Roosevelt High School

1972 - Graduate of KSU (BS in Education)

1972-1974 - U.S. Army

1977 - Graduate of University of Baltimore Law School

Am Jur Awards (Family Law And Trial Advocacy)

1978-1980 - Solo Practice

1980-2007 - Giulitto & Dickinson, Giulitto & Berger

2007-2015 - Magistrate Portage County Court of Common Pleas (General Div)
Judge Laurie Pittman

2015 – Present – Judge Portage County Probate & Juvenile Courts

Pro Bono Attorney of the Year 1992

President of Portage County Bar Association 2007-2008

Norman Sandvoss Humanitarian Award 2010

CASE LAW UPDATE
2019

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

CASELAW UPDATE
Ohio Association of Probate Judges Conference
Hon. Elinore Marsh Stormer
Summit County Probate Court
June 11, 2019

JUDGE JAMES A. FREDERICKA
Trumbull County Probate Court
161 High Street, NW, 1st Floor
WARREN, OHIO 44481
Telephone: (330) 675-2520
Facsimile: (330) 675-2524

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, Warren, Ohio (1971); University of Notre Dame (B.A., 1975, Economics, graduated Summa Cum Laude - 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, 40 years; Children - Gina Marie (Graduate, St. Mary's College 2013, Graduate, Kent State University, B.S.N. 2016, Nurse); Michael James (Graduate, University of Notre Dame 2015, University of Akron, School of Law, J.D. 2018, Attorney at Law).

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 Seminars, Trumbull County Bar Association Seminars

CREDITOR'S RIGHTS & CLAIMS

TOPIC: **A creditor must present its claim for unpaid necessaries to the decedent's estate under R.C. 2117.06 before it can pursue a claim individually against the surviving spouse under R.C. 3103.03.**

TITLE: **Embassy Healthcare v. Bell, 2018-Ohio-4912**
COURT: **Supreme Court of Ohio**
COUNTY: **Warren County**
DATE: **December 12, 2018**

Embassy operated the nursing facility in which Robert, the decedent, stayed prior to his death. Robert entered into an agreement with Embassy that stated that Robert, as the resident, was responsible for payment in full of all amounts due to the facility. Robert's wife, Cora, signed the agreement as the "responsible party" making her liable for services rendered to the resident, to the extent to which she had access to the resident's income.

Six months and three days after Robert's death, Embassy sent a notice to Cora that it was seeking payment from Robert's estate for an outstanding balance of $1,678. At that time, no estate had been opened for Robert, and Embassy did not seek to have an estate administrator appointed for the purpose of presenting a claim to Robert's estate.

Seven months after sending the letter, Embassy filed a complaint in municipal court naming Cora as the defendant and seeking payment from her under R.C. 3103.03.

R.C. 3103.03 codifies the common law necessaries doctrine. Under the common law doctrine, a husband was liable to third parties for necessaries, i.e. food, shelter, clothing and medical services, that those third parties provided to his wife. Under the statute, if a person neglects to support their spouse, any third party may supply the spouse with necessaries and recover the reasonable value of those necessaries from the person who neglected to support their spouse.

Cora moved for summary judgment, arguing that Embassy was unable to prove all of the necessary elements for a R.C. 3103.03 claim, and she argued that the six-month statute of limitations for presenting claims to a decedent's estate under R.C. 2117.06 had run, barring Embassy's claim.

R.C. 2117.06 states that all creditors having claims against an estate shall present their claims within six months after the death of the decedent. A claim that is not presented within six months after the death of the decedent shall be forever barred.

The trial court overruled Embassy's objections and granted summary judgment in favor of Cora. The court concluded that Robert's debt to Embassy became a debt of his estate by operation of law and that Cora was not jointly and severally liable for the debt. Embassy was therefore required to seek payment from the estate under R.C. 2117.06 before pursuing its claim against Cora under R.C. 3103.03. Because Embassy failed to present its claim to the estate within the six-month statute of limitations, Embassy's claim was time barred.

A divided panel of the twelfth district reversed the trial court's ruling, holding that R.C. 3103.03 creates a claim against a debtor's spouse that can be pursued independently from a claim against the estate under R.C. 2117.06. Cora appealed.

On appeal to the Supreme Court, Cora argued that the plain language of R.C. 2117.06 mandates that a claim under R.C. 3103.03 for necessaries be presented to the estate, and failure to do so bars the claim against both the estate and the spouse.

The Supreme Court agreed, holding that a creditor must present its claim for unpaid necessaries to the decedent's estate under R.C. 2117.06 before it can pursue a claim individually against the surviving spouse under R.C. 3103.03.

First, the court found that Robert was the debtor and that his estate remained primarily responsible for his liabilities. Embassy was therefore required to seek recourse first against Robert's estate before seeking it from his wife.

R.C. 3103.03 does not impose joint liability on a married person for the debts of his spouse. Instead, the nondebtor spouse becomes liable only if the debtor spouse does not have the assets to pay for his necessaries. Therefore, the creditor must first make a showing that the debtor spouse does not have the assets necessary to pay for the liabilities.

Embassy conceded that it was required to make a showing that Robert, as the debtor spouse, was unable to pay for the necessaries that Embassy provided to him. However, Embassy argued that it could make that showing in an action under R.C. 3103.03, without first presenting a claim against the decedent's estate under R.C. 2117.06.

On this point, the Supreme Court disagreed with Embassy, holding that Embassy, as the creditor, was required to first present a claim to Robert's estate under R.C. 2117.06 before it could pursue action against Robert's wife under R.C. 3103.03.

The court explained that R.C. 2117.06 states that all creditors having claims against an estate, including claims arising out of contract, shall present their claims in accordance with the statute. Therefore, as a creditor with a contractual claim against Robert, Embassy should have presented its claim to Robert's estate in accordance with the statute.

Finally, the court explained that it made no difference that an estate had not been opened, or that an administrator had not been appointed for Robert's estate. It was incumbent upon the creditor, to open an estate for the purpose of bringing a claim.

TOPIC: **Co-operation with Medicaid is not equated with a successful outcome.**

TITLE: **HCF of Findlay v. Bishop, 2019 Ohio 319**
COURT: **Court of Appeals of Ohio, Third District**
COUNTY: **Hancock County**
DATE: **February 4, 2019**

HCF, operator of a LTCF, filed a breach of contract complaint against Bishop, executor of the Weber estate. Weber had been a resident of a LTCF operated by HCF and owed HCF money for room and board. Bishop was Weber's Authorized Representative in applying for Medicaid as well as applying for admission to the LTCF. HCF alleges that Bishop failed to cooperate with the Medicaid application process as required by their contract because the initial Medicaid application was denied. Weber's income exceeded the statutory income limitation and Weber was thus denied immediate eligibility. Bishop never applied to have a QIT established until after the denial was issued.

The contract required Bishop to cooperate in the Medicaid eligibility or redetermination process. The contract did not define cooperate as ensuring that the initial application be approved be in the Medicaid eligibility process. Bishop timely made a full and complete disclosure of Weber's financial resources and income during the Medicaid application process. After the initial application was denied, Bishop cooperated in the Medicaid redetermination process in the manner described in the contract. Bishop took the necessary action to appropriately reduce Weber's assets to allowable limits to be eligible for Medicaid benefits.

The fact that Medicaid eligibility was not determined immediately did not put Bishop in a breach of contract situation. The Court chastised the plaintiff by stating; "… we caution Fox Run Manor's zealous pursuit of damages in breach of contract actions where it has broadly drafted its contract by including such terms as 'cooperating', while minimizing a relatively narrow window of time concerning governmental benefit determinations."

TOPIC: **Six month Statute of Limitations for creditor claims**

TITLE: **Smith v. Estate of Knight, 2019 Ohio 560**
COURT: **Court of Appeals of Ohio, Tenth District**
COUNTY: **Franklin County**
DATE: **February 14, 2019**

On January 27, 2017, Smith filed a complaint grounded in tort against Charles Knight. On March 1, 2017, the clerk of courts issued a failure of service notice. On October 12, 2017 Smith died. On April 19, 2018, Smith requested ordinary mail service on Knight's estate. On April 23, 2019, the clerk of courts filed proof of service by ordinary mail. (Eleven days beyond the six months statute of limitations.) On May 2, 2018, the estate filed a motion to dismiss for failure to state a claim for relief based upon failure to serve the complaint within six months of the date of death. On June 7, 2018, the trial court granted the estate's motion to dismiss. The court stated that the Smith had failed to timely serve the estate within six months of the date of death and thus Smith claims against the estate were time-barred by R.C. 2117.06.

The court cited *Wilson v. Lawrence* and noted that the Ohio legislature's commands in the statutory scheme were intended to be met with strict compliance. The court explained that requirements of R.C. 2117.06 are not arbitrary ones that elevate form over substance. The court rejected that substantial compliance with R.C. 2117.06 should be permitted. In *Wilson* the court held that R.C. 2117.06 is a clear and unequivocal command that "all creditors… shall present their claims… to the executor or industry in writing."

The import of the decision in *Wilson* as applied to the present case is clear: Smith was required to actually serve the complaint on the executor of Knight's estate. Failure to do so within six months of the date of death is fatal to her claim against the estate. Court also cited the *Fortelka v. Meifert* case where it held that the commencement of a personal injury action against the administrator of the tortfeasor's estate, accompanied by proper and timely service of the

summons and complaint upon the administrator, constituted valid presentment of the claim to the estate administrator and satisfy the requirements of R.C. 2117.06. R.C. 2117.06 requires a claim against an estate be received by the executor in writing with this within six months of the decedent's death.

Query: R.C. 2117.06(G) Nothing in this section or in section 2117.07 of the Revised Code shall be construed to reduce the periods of limitation or periods prior to repose in section 2125.02 or Chapter 2305. of the Revised Code, provided that no portion of any recovery on a claim brought pursuant to that section or any section in that chapter shall come from the assets of an estate unless the claim has been presented against the estate in accordance with Chapter 2117. of the Revised Code.

TOPIC: Claim of fiduciary is not bound by six month statute of Limitations

TITLE: Estate of Joseph Curc, Jr. 2019 Ohio 416
COURT: Court of Appeals of Ohio, Eleventh District
COUNTY: Trumbull County
DATE: 2019

Joseph Curc died testate on June 25, 1987. On July 19, 2017, 30 years later, an Application to Relieve the estate from administration was filed. On September 21, 2017, the case was converted from a Release to a full estate and an executor was appointed on that date. On November 14, 2017, the fiduciary filed a claim against the estate for funeral expenses, real estate taxes, utility bills.(Taxes and utility bills going back 30 years!) The fiduciary was a one half owner with the decedent in real estate where the taxes any utility bills were incurred. A hearing was conducted in front of the probate magistrate who rendered a decision denying the fiduciary claim because the claim was not timely presented as required by R.C. 2117.06.

The Magistrate's decision was affirmed by the probate judge and the fiduciary appealed. The Court of Appeals determined that R.C. 2117.01 through 2117.04 provides the exclusive method for presentation and allowance of claims by fiduciaries against the estate which he represents. The Court of Appeals held that R.C. 2117.06 governs claims by creditors, not claims by fiduciaries. The Court of Appeals went on to say "… these are two specific groups of people and thus each statute is specific to a particular class of individuals." The Appellate Court further opined that if R.C. 2117.06 governs all claims and all parties without regard to who the creditor is or the nature of the creditor's claim, such reading would make R.C. 2117.02 inconsequential.

The Appellate Court stated that R.C. 2117.02 grants additional privileges to a party appointed as fiduciary, privileges that may have long been extinguished to an ordinary creditor by operation of R.C. 2117.06. The Court of Appeals overruled the trial court and remanded the trial Court to hold a hearing on the appellant's presentation and determine what, if any, claims were properly presented against the estate consistent with R.C. 2117.02.

Judge Grendell, dissenting, cited R.C. 2117.06 that a claim not presented within six months after the death of the decedent shall be forever barred as to all parties. The dissent went on to state that the claims for funeral expenses and for maintenance of the property are not debts of the decedent but expenses incurred after the death of the decedent and as such are not proper claims against the estate.

QUERY: 1987 version of ORC R.C. 2117.06 provides "…all claims shall be presented within three months after the date of the appointment of the executor or administrator…"

TOPIC: **Substantial compliance with R.C. 2117.06 is not permitted. If no administrator has been appointed, a creditor must procure the appointment of an administrator against whom he can proceed.**

TITLE: **Shepherd of the Valley Lutheran Retirement Servs., Inc. v. Cesta, 2019-Ohio-415**
COURT: **Court of Appeals, Eleventh District**
COUNTY: **Trumbull County**
DATE: **February 8, 2019**

Rose Cesta died on May 15, 2016. Prior to death, Rose was a resident of a long-term care facility. On November 14, 2016 one day prior to the expiration of the six-month statute of limitations, an attorney for the LTCF filed an Application to be appointed special administrator. Contemporaneously, the attorney filed a claim with the probate court regarding a balance due the nursing home. Although he applied to be special administrator on November 14, 2016, he was not appointed by the probate court until November 21, 2016. Once the executor named in Rose's will was appointed, the court terminated the special administrator's appointment. The executor rejected the claim as not been timely filed.

On August 31, 2017, Shepherd of the Valley filed a Complaint against Richard Cesta, Executor of the Estate of Rose Cesta. The complaint asserted that at the time of Rose Cesta's

death on May 15, 2016, she was indebted to Shepherd of the Valley in the principal amount of $24,867. On January 18, 2018, Cesta filed a Motion for Summary Judgment.

The trial court granted summary judgment to Cesta because the claim was untimely. Under R.C. 2117.06(C), Shepherd of the Valley was required to file the claim within six months of Rose's death, by November 15, 2016.

Shepherd of the Valley appealed, arguing that the claim was timely because the special administrator was not actually appointed by November 15, 2016. When a special administrator's appointment is not granted until after the six months has passed, a creditor loses a property interest without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution. Appellants also claimed the result is not compelled by existing case law, favors an unequitable gamesmanship, and undermines the legislative purpose behind R.C. 2117.06.

The Court of Appeals held that Shepherd of the Valley did not act with due diligence required to comply with the procedural requirements under R.C. 2117.06. A claim against an estate must be timely presented in writing to the executor or administrator of the estate in order to meet the mandatory requirements of § 2117.06(A)(1)(a). Substantial compliance is not permitted.

If no administrator has been appointed, the creditor must procure the appointment of an administrator against whom he can proceed. The court held that if a creditor "fails through indifference, carelessness, delay, or lack of diligence to identify the administrator or executor, or to procure the appointment of one so that a claim can be presented, the law should not come to the creditor's aid."

The court dismissed the Due Process Clause of the Fourteenth Amendment claim because R.C. 2117.06 has been described as a "self-executing" non-claim statute to which the due process requirements do not apply. The Open Courts and Right-to-Remedy provisions of Article I, Section 16 of the Ohio Constitution claim was dismissed based on the Shepherd of the Valley's failure to present a timely claim.

ACCOUNTING

TOPIC: A presumptive heir and/or named beneficiary has the right to demand an accounting from a power of attorney during the life of the principal.

TITLE: **Colburn v. Cooper, 2018-Ohio-5190**
COURT: **Court of Appeals of Ohio, Eleventh District**
COUNTY: **Lake County**
DATE: **December 21, 2018**

Cheryl Colburn appealed from a judgment dismissing her complaint for an accounting from her brother, appellee Michael Cooper, in his capacity as economic power of attorney for their mother.

Cheryl filed a complaint against Michael and his wife, pertaining to the alleged misuse and mismanagement of assets belonging to their mother during his tenure as their mother's economic power of attorney from 2008 until 2016. In 2016, their mother was placed under guardianship.

Michael moved to dismiss the complaint arguing that Cheryl lacked standing, as only the mother, by way of her guardian, could ask for an accounting. Cheryl claimed standing in her capacity as a presumptive heir and a named beneficiary under the mother's will.

The probate court found for Michael, dismissing the complaint without explanation. Cheryl asserted that she had standing to request an accounting pursuant to R.C. 1337.36 because she was a presumptive heir, and a named beneficiary. Michael argued that Cheryl did not have standing because, the rights of a presumptive heir or named beneficiary under the statue vest only upon the death of the principal.

The court disagreed with Michael, finding that there was nothing to support his position that a principal must be deceased before a presumptive heir or a designated beneficiary has the right to seek an accounting.

ADOPTION

TOPIC: **A trial court has discretion to determine whether the payments made by the contesting parent constitute "maintenance and support" thus requiring parental consent for adoption.**

TITLE: **In re Adoption of A.C.B, 2018-Ohio-3081**
COURT: **Court of Appeals of Ohio, Sixth District**
COUNTY: **Lucas County**
DATE: **August 3, 2018**

In 2010, appellant married A.C., the biological mother of his son A.C.B., who was born in 2011. Appellant and his wife separated in 2012 and the divorce was finalized in 2013. As part of the settlement agreement, full custody of A.C.B was awarded to the mother and the father agreed to pay $85 a week in child support.

In 2013, the appellant father moved to Kosovo and has not returned to the United States since. However, he had communicated with his son via Skype.

In 2015, the biological mother married appellee, and in 2017, appellee petitioned to adopt the child. Appellee alleged that the father's consent was not required pursuant to R.C. 3107.07(A), because the child's father had failed, without justifiable cause, to provide for the child for a period of at least one year proceeding the filing of the adoption petition.

Two days before the adoption petition was filed, in 2017, appellant made one child support payment of $200. Prior to that payment, the last child support payment made by appellant was $100 in 2016. The custody agreement required Appellant to pay $85 per week in child support.

In 2018, the trial court held a hearing on whether biological father's consent was required for the adoption. The trial court concluded that the father's consent was not required for the adoption because he had failed to provide for the support of the child as required by judicial decree, and his failure was not justifiable.

On appeal, the father argued that the court abused its discretion by not recognizing controlling precedent when construing the meaning of maintenance and support under R.C. 3107.07(A). Specifically, he cited to C*elestino v. Schneider*, 84 Ohio App.3d 192 (6th Dist. 1992), where the sixth district held that "any contribution toward child support, no matter how meager, satisfies the maintenance and support requirements of the statute."

The court cited several Ohio District Court cases, which showed that the Ohio districts are split on the issue of whether any contribution, no matter how small, satisfies the statutory requirement. The court then pointed to a 2012 Ohio Supreme Court case, *In re Adoption of M.B.,* and held that the Supreme Court case was broad enough to implicitly overrule the ruling in *Celestino.*

In keeping with the Supreme Court's holding in *In re Adoption of M.B*, the court held that a trial court has discretion to determine whether the payments made by the contesting parent

constitute maintenance and support under the statute, and that the trial court's determination shall not be disturbed absent an abuse of discretion.

Here, the court found that there was no abuse of discretion, and the trial court's ruling, that the two payments were not enough to satisfy the requirements of the statue, was upheld.

TOPIC: **Mother's failure to provide support to the child for the year preceding the adoption petition was justified because a prior order of the court explicitly excused her from providing such support or maintenance. Her consent to adopt was required.**

TITLE: **In re Adoption of H.J.C.**
COURT: **Common Pleas, Probate Division**
COUNTY: **Clark County**
DATE: **September 25, 2018**

H.J.C., is the child of Mother, H.S. and Father, M.C., who were never married. In 2007, Father married D.C., the petitioner. In 2017, D.C. filed a petition to adopt H.J.C. Petitioner claimed that Mother's consent was not required due to her failure to support H.J.C. for the year preceding the adoption petition.

In 2007, Mother and Father entered into a shared parenting plan. In 2009, this plan was amended to name Father as the residential parent of the child. The plan stated "no exchange of child support is ordered per express agreement of the parties." From 2009 until 2018, Mother has had very little contact with the child and provided no financial assistance, maintenance, or support.

Per R.C. 3107.07, a parent who 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 preceding the filing of the adoption petition forfeits his right to withhold consent to such a petition."

Here, the petition was filed in 2017 and Mother failed during the one year period to provide for the maintenance and support of the child. The question before the probate court was whether that failure was justified.

The court ruled that Mother's failure to support the child was in fact justified because it was explicitly stated in the shared parenting plan that she was not responsible for supporting the child.

The court explained, that although common law requires a parent to support his or her child, the judicial decree here excused Mother from that parental requirement. The court went on to say that because Mother relied on that judicial decree, it would be unfair for the court to fault her for following that order.

As a result, Mother's failure to support H.J.C. for the year preceding the adoption petition was in fact justified and therefore her consent was required for the adoption to move forward.

TOPIC: **Mother's statement to father to "not come back" did not foreclose all opportunities for father to contact his children and did not constitute justifiable cause for his failure to contact his children in the year preceding the adoption petitions; his consent to the adoption was not required.**

TITLE: **In re Adoption of L.L.L., 2018-Ohio-4556**
COURT: **Court of Appeals of Ohio, Twelfth District**
COUNTY: **Preble County**
DATE: **November 13, 2018**

The biological father, appellant, and the children's mother divorced in 2012. In the settlement agreement, the mother was named residential and custodial parent of the couple's two children. The court granted the Father supervised visits, which were to be scheduled between the parties. After a few visits, the mother stopped scheduling the visits and left initiating visits up to the father. As a result, no subsequent visits were scheduled and the father had not seen the children since 2014. The mother remarried in 2015.

In 2017, the stepfather filed petitions to adopt the children. The petitions alleged that the father's consent was not required because he had failed to have contact with the children in the year preceding the petition.

At a hearing on the consent issue, the father admitted that he had not had contact with the children for several years, but he claimed it was not his choice. He testified that the last time he attempted to see his children, the police were called, and he was told not to come back in the future. He claims he could not have attempted to see his children by visiting them at their home because their mother would not allow it.

The probate court determined that the father's consent to the adoption was not required because he had failed without justifiable cause to provide more than *de minimis* contact with the

children for at least one year immediately preceding filing of the adoption petition. The father appealed.

Ohio law requires parental consent to an adoption unless a court finds, by clear and convincing evidence, that in the year preceding the adoption petition, the parent failed, without justifiable cause, to have more than *de minimis* contact with the child.

The court held that based on the testimony, the trial court correctly ruled that there was no justifiable cause for the father's failure to contact his children in the year preceding the adoption petition. Even though the mother told the father not to come back, that did not foreclose all opportunities for the father to maintain contact with his children (i.e. phone calls, cards, or other communication). Further, the father failed to file anything with the court to attempt to "force the mother's hand" when it came to the visitation agreement.

TOPIC: **Court construed "willful" where pursuant to R.C. 3107.07, putative father's consent is not required in an adoption where he "willfully" failed to care for and support the minor child.**

TITLE: **In re V.R.K., 2018-Ohio-4881**
COURT: **Court of Appeals of Ohio, Second District**
COUNTY: **Greene County**
DATE: **December 7, 2018**

After finding out she was pregnant, V.R.K.'s mother, J.C. voluntarily broke off her relationship with the putative father, C.H. There is no evidence that the putative father ever provided any support for the mother. He did not pay any portion of the mother's medical expenses during the pregnancy and did not pay anything toward the child's care and support after her birth.

Days after the child's birth, J.C. voluntarily gave the child to a private adoption agency. The agency promptly placed the child with appellees, who filed a petition to adopt. The petition alleged that the putative father, C.H.'s consent was not required under R.C. 3107.07(B)(2)(b). The matter proceeded to a hearing to resolve the need for C.H.'s consent.

At the hearing, the court found C.H.'s consent to be unnecessary because C.H. had failed to care for and support the minor

The court looked to R.C. 3107.07(B)(2) which provides that consent is unnecessary if any of the following apply: "(a) The putative father is not the father of the minor; (b) The putative

father has willfully abandoned or failed to care for and support the minor; (c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor."

The court made findings that C.H. was in fact that biological father, and that the evidence presented at the hearing did not establish that C.H. had willfully abandoned the child or the mother. Instead, the court looked to R.C. 3107.07(B)(2)(b), and the words "failed to care for and support the minor," and found that C.H. had never actually provided any care or support for the child.

The court explained that the clear message of R.C. 3107.07(B) is that a putative father cannot sit back and do nothing while others care for and support his child, and then claim he deserves to get custody of the child. The father had several weeks between the child's birth and the date the adoption petition was filed in which to take legal action to formally establish his parentage. He did nothing. Therefore, C.H's consent was unnecessary because he had failed to care for and support the minor child.

The father appealed the ruling and argued that the trial court erred in failing to consider whether his failure to care for and support the child was willful. He pointed to the words of the statute which are "the putative father has *willfully* abandoned or failed to care for and support the minor."

The issue was whether "willfully" only modified "abandoned" or whether it also modified "failed to care for or support." The court had previously held that it modifies both.

The court then looked to whether the evidence presented at the hearing established that the father's lack of support was willful. The court found that the analysis at the lower court level was enough to establish that his failure to support the child was willful. The court sustained the ruling of the lower court.

TOPIC: **A court must consider the evidence of the paternal grandparents' involvement with the child when determining whether a father's consent to adoption is required based on his failure to provide maintenance or support for the child during the one-year look-back period.**

TITLE: **<u>In re Adoption of A.V.H.</u>, 2019-Ohio-369**
COURT: **Court of Appeals, Ninth District**
COUNTY: **Summit County**
DATE: **February 6, 2019**

Father appealed the judgment of the Summit County Court of Common Pleas, Probate Division, holding that his consent was not required for adoption of his minor child by the child's Stepfather. The stepfather did not present clear and convincing evidence that the Father failed to provide maintenance or support for the child during the one-year look-back period.

Father and Mother were divorced in September 2015. Father was granted companionship time and was ordered to pay $50 per month in child support. The divorce decree provided that if Father was "unavailable or absent from the Akron area his parents shall have companionship time with [A.V.H.] in his place."

Stepfather filed a petition to adopt A.V.H. on February 14, 2017. He alleged that Father's consent was not required because Father had failed without justifiable cause to communicate with or provide for the maintenance and support of the child for at least one-year immediately preceding the filing of the petition, as required under R.C. 3107.07.

Father was incarcerated on a felony conviction two months after the divorce. His parents ("Grandparents") took over his companionship time with A.V.H. during his incarceration. They provided for all of her needs during her regular companionship time at their home, including food, clothing, toys, entertainment, and childcare. During the one-year look-back period, A.V.H. spent at least 93 days with her Grandparents. Father only paid $12.23 in child support during the one-year look-back period.

The Court of Appeals stated that it was the Stepfather's burden to prove, by clear and convincing evidence, both (1) that Father had failed to provide maintenance or support to the child for the requisite one-year look-back period, and (2) that his failure was without justifiable cause. The Court also noted that several appellate districts have held that a non-custodial parent who visits the child and provides for their needs has supplied sufficient maintenance and support during the one-year look-back period.

The trial court focused on the $12.23 child support payment during the one-year look-back period, without considering the contribution made by the Grandparents during this time, to find Father had not satisfied the requirements of R.C. 3107.07.

The Court of Appeals reversed, holding that it was the Stepfather's burden to prove, by clear and convincing evidence, that the support given to A.V.H. by the Grandparents was

insufficient to prove that Father had failed to communicate or provide for the maintenance and support of the child for at least one-year immediately preceding the adoption petition.

TOPIC: **A natural father does not have a duty to provide child support separate from a judicial decree of support.**

TITLE: **In Re Adoption of B.I., 2017-Ohio-9116**
COURT: **Court of Appeals of Ohio, First District**
COUNTY: **Hamilton County**
DATE: **December 20, 2017**

Stepfather filed a petition to adopt his stepson with the consent of stepson's mother. The Court of Common Pleas, Hamilton County, Probate Division dismissed the petition. The Probate Court held that the Father's consent to the adoption was required because Stepfather had not proven that Father failed to meet the requirements of R.C. 3107.07(A). The Stepfather appealed.

Father was incarcerated in 2009. Father and Father's mother had repeatedly requested that Mother terminate the Father's child-support order, otherwise, Father would be incarcerated again on child-support arrearages upon release from prison. Mother agreed to an order that set Father's support obligation and arrearage at zero. Mother never requested any support nor did Father offer any support during the one-year look-back period.

The Court discussed whether a zero child-support order excuses a parent's failure to support the child. Under R.C. 3107.07(A) parental consent to an adoption is not required when the petitioner alleges, and the court finds, by clear and convincing evidence, that the parent has failed without justifiable cause to provide the child maintenance and support "required by law or judicial decree." The Court held that where a court has ordered a parent to pay no child support or zero child support, that court order of support supersedes any other duty of support required by law. A parent cannot fail without justifiable cause to provide maintenance and support for the child when there is no child support payment required.

The Court of Appeals affirmed the Probate Court's decision that the stepfather did not meet his burden to show by clear and convincing evidence that Father failed without justifiable cause to provide maintenance and support to B.I. as required by law or judicial decree. The Court affirmed the probate court's decision dismissing the stepfather's adoption petition.

This case is pending with the Supreme Court of Ohio.

ATTORNEY FEES - EXTRAORDINARY FEES

TOPIC: **Probate court abused its discretion by summarily denying a motion for extraordinary fees and not engaging in a complete review of the need for them. Court must elucidate reasonable and ordinary fees before dismissing request for extraordinary fees.**

TITLE: **Estate of Brunger, 2018-Ohio-4474**
COURT: **Court of Appeals of Ohio, Eleventh District**
COUNTY: **Portage County**
DATE: **November 5, 2018**

In 2017, appellant filed a motion for extraordinary attorney fees and an application for estate attorney fees. Attached to the motion and application was an itemized fee bill detailing the dates and types of services provided to the estate and the hourly rate for those services. Simultaneously, each beneficiary of the estate filed a "consent to payment of attorney fees outside court guidelines." Accompanying these documents was a final account, receipts, and disbursements.

The probate court summarily denied the appellant's motion for extraordinary fees, without holding a hearing, finding that the attorney's fees as requested were not extraordinary. Appellant appealed the ruling.

On appeal, appellant argued that the probate court abused its discretion by denying her motion without first holding a hearing. Appellant pointed to the Portage County Probate Court Local Rules which, she argued, required the court to hold a hearing on her request for extraordinary fees.

The court did not agree, explaining that, when read together, the local rules simply provide that it is within the probate court's discretion to hold a hearing on any application for attorney fees, even when the beneficiaries have given consent. Here, even though the beneficiaries had all given their consent, the probate court still had discretion to determine whether to hold a hearing on the matter.

The appellate court explained that the trial court's decision not to hold a hearing would be reversible error only if it constituted an abuse of its discretion. The court held that the probate court's decision was not an abuse of discretion namely because the appellant did not request a hearing in her motion for extraordinary fees.

Appellant also argued that the probate court's denial of her motion, based on its determination that the requested fees were not extraordinary, constituted an abuse of discretion because the court did not determine whether those fees were necessary and reasonable.

On this point, the court agreed, holding that the denial of appellant's motion without determining the reasonable value of legal services provided by appellant to the estate was an abuse of discretion.

The court explained, that when a request for extraordinary fees is made, the court must review both ordinary and extraordinary services claimed to have been rendered and determine if the fees payable exceed the reasonable value of ordinary services rendered such to necessitate an adjustment for allowances made for extraordinary services.

Here, the probate court summarily denied the request for extraordinary fees, stating, without analysis or discussion, that "the fees requested are not extraordinary." Because of the court's lack of analysis, it was impossible to determine whether the court had actually engaged in such a review. Because it was impossible to make such a determination, the trial court's denial of the motion, without explanation, constituted an abuse of discretion.

CHARITABLE TRUSTS - CY PRES

TOPIC: **Court ordered trust distribution to a not for profit versus a for profit successor hospital. A court may apply the doctrine of *cy pres* when a charitable trust must be modified in order to distribute the funds in accordance with the donor's charitable intent.**

TITLE: **FirstMerit Bank, N.A. v. Akron General Medical Center, 2018-Ohio-2689**
COURT: **Court of Appeals of Ohio, Fifth District**
COUNTY: **Stark County**
DATE: **July 9, 2018**

Before her death, the donor established a trust and named "Massillon Community Hospital, its successors or assigns" as a beneficiary. At the time she established the trust, Massillon Community Hospital was being operated as a not for profit hospital. First Merit Bank was named as the trustee of the trust.

Prior to the income being disbursed, Akron General Medical Center bought Massillon Community Hospital and began running a for-profit hospital. Upon the death of the donor, First Merit filed an action seeking a declaratory judgment as to whom the disbursement should be

made. Akron General Hospital, argued that the trust left the money to Massillon Community Hospital's successor, which they were, so they were entitled to the trust income.

The trustee argued that because at the time the donor established the trust, Massillon Community Hospital was a not for profit hospital it would be inappropriate to now disburse the money to a for profit hospital. It argued that because the donor's charitable intent could no longer be carried out, the court should apply the doctrine of *cy pres* and order that the proceeds of the trust be distributed to another charitable organization.

The *cy pres* doctrine is a rule of construction by which charitable gifts are preserved for the public benefit. It is used by courts of equity to effectuate the intention of a charitable donor when it has become impossible to give literal effect to the donor's intention.

The common-law doctrine of *cy pres* has been codified at R.C. 5804.13 which provides, that if a charitable purpose becomes impossible to achieve, the trust does not fail, the trust property does not revert to the settlor, and the court may apply *cy pres* to modify the trust and direct that the trust property be distributed in a manner consistent with the settlor's charitable purposes. The official comment to the statue states that the statue presumes the settlor had a general charitable intent.

The probate court agreed with the trustee, and awarded the proceeds of the trust to the Health Foundation of Greater Massillon and the Massillon Rotary Foundation Trust. Akron General appealed the probate court's ruling, and argued that the probate court should not have applied the *cy pres* doctrine.

Looking at the trust language, the appellate court agreed with the probate court and found that the donor had a charitable intent that could no longer be carried out and that the probate court did not err in applying the doctrine of *cy pres* to distribute the trust property in accordance with the donor's intention.

TOPIC: **When there exists a fiduciary relationship, even as between a father and daughter, the court should apply a presumption of undue influence, rather than the family gift presumption on transfers of property.**

TITLE: **Martin v. Steiner, 2018-Ohio-3928**
COURT: **Court of Appeals of Ohio, Ninth District**
COUNTY: **Wayne County**
DATE: **September 28, 2018**

In 1998, the father of both parties signed a power of attorney appointing the daughter, Sandra Steiner, appellee, as his attorney in fact. Before his death, the father signed a survivorship deed conveying his farm to himself and his daughter for their joint lives, with the remainder to the survivor of them. After the father passed away, Sandra was named fiduciary of the estate. Later, she executed a deed conveying the farm to herself and her husband.

Her brother, William Martin, appellant, filed a complaint for declaratory judgment, seeking to have both of the deeds declared void based on lack of consideration, undue influence, violation of fiduciary duty, and because the deed was not prepared by the grantor.

At the lower court level, the court applied the family gift presumption to the transfer of property. On appeal, William argued that the trial court erred by failing to find that the daughter had a fiduciary relationship with the father. He argued that the trial court should have applied a presumption of undue influence because, by virtue of the power of attorney, a fiduciary duty was created.

The appeals court agreed with William, finding that the trial court erred in applying the family gift presumption rather than a presumption of undue influence.

The court explained that although there is a general presumption that the transfer of assets between family members is a gift, where the family members are also in a fiduciary relationship, the family gift presumption yields to the more specific presumption of undue influence that arises in fiduciary relationships.

The power of attorney created a fiduciary relationship between the principal, in this case the father and the attorney in fact, in this case the daughter. Consequently, any transfer of property from the father to the daughter should be viewed with some suspicion that there may have been undue influence. The burden was therefore on the daughter to show, by a preponderance of the evidence, that the gift was free from undue influence.

The court held that the trial court erred in failing to apply this presumption of undue influence, and failing to require the daughter to meet the requisite burden of proof.

ESTATES

TOPIC: **A never divorced spouse cannot claim to be spouse in an estate when she waived property rights in a prior marriage and divorce case. Trial Court abused its discretion by entering a judgement which would allow for an impermissible collateral attack on a prior divorce decree.**

TITLE: **In re Estate of Lewis, 2018-Ohio-3832**
COURT: **Court of Appeals of Ohio, Ninth District**
COUNTY: **Medina County**
DATE: **September 24, 2018**

Michael Lewis died on December 10, 2015. Mr. Lewis executed a will in 2014, which provided that all of his property should pass to "my wife, Christina Lewis."

Three days after Lewis' death, an attorney filed an application for authority to administer his estate that listed an Ellen McCoy as the surviving spouse and stated that Mr. Lewis died intestate. Six months later, Christina Lewis filed an application to admit Lewis' will to probate with her as surviving spouse.

The trial court set the matter for a hearing to determine the identity of Lewis' surviving spouse. Christina testified that she married Lewis in 2008 and remained married to him until his death. She also testified that Lewis had subsequently married a Carolyn Lewis, but that they were divorced.

Ms. McCoy testified that she married to Lewis in 2008 and that she had never initiated divorce proceedings against him. She further testified that she was aware of the subsequent Carolyn Lewis marriage and divorce but had not done more than provide an affidavit that she did not divorce Lewis.

The Magistrate found that since Ms. McCoy had never initiated divorce proceedings against Lewis, the subsequent marriage to Christina was invalid. The trial court adopted the Magistrate's decision and concluded that Ms. McCoy was Lewis' surviving spouse.

Christina argues that the trial court abused its discretion by determining that Ms. McCoy is Lewis' surviving spouse because the effect of the trial court's judgment is to permit Ms. McCoy to mount a collateral attack against the divorce decree between Lewis and Carolyn Lewis. A collateral attack against a divorce decree cannot be made by challenging a party's status as surviving spouse in the context of a probate action.

Ms. McCoy testified that at the time of Lewis' divorce from Carolyn, she did not want to participate in the divorce action, and she did not think that she was entitled to any of the assets at issue. Ms. McCoy, therefore, effectively disclaimed her property rights as Lewis' spouse by failing to assert them in the divorce action despite having notice of those proceedings.

The Court concluded that Ms. McCoy's attempt upon Lewis' death to assert rights as a surviving spouse constituted an impermissible collateral attack on the judgment of divorce between Lewis and Carolyn. The trial court abused its discretion by concluding that Ms. McCoy is Lewis' surviving spouse.

GUARDIANSHIP

TOPIC: **Probate Court had jurisdiction over a proposed ward because the ward had established a legal settlement in the county when he traveled to Ohio on a one-way ticket, changed the address on his federal social security benefits, and granted his daughter rights under a durable power of attorney.**

TITLE: **In re Guardianship of Chieu, 2018-Ohio-4937**
COURT: **Court of Appeals of Ohio, Twelfth District**
COUNTY: **Butler County**
DATE: **December 10, 2018**

Chieu entered a Buddhist temple in Seattle, Washington, where he planned to live until his death. However, he was diagnosed with dementia and his health began to decline.

Nguyen, Chieu's daughter, traveled to Seattle to visit her father. During that visit, Chieu named her his agent and guardian through a durable Power of Attorney. Chieu then moved to West Chester, Ohio into his daughter's home so that she could care for him. She obtained social security benefits for him in Ohio.

Nguyen then moved for guardianship of Chieu. A court investigator interviewed Chieu regarding the petition, and issued a report indicating that Chieu did in fact reside in West Chester, that he consented to the guardianship, and that he was incompetent based on his dementia. The court accepted the petition and granted guardianship to Nguyen.

Several months later, other members of Chieu's family filed a motion to dismiss the appointment of Nguyen as guardian for lack of jurisdiction. The court appointed Chieu counsel and his counsel also moved the court to dismiss for lack of jurisdiction. The court denied both motions. Chieu appealed.

Chieu argued that the probate court lacked subject matter and personal jurisdiction to appoint Nguyen guardian. Pursuant to R.C. 2111.02(A), a probate court may appoint a guardian provided the person for whom the guardian is to be appointed is a resident of the county or has a

legal settlement in the county. Residence requires the actual physical presence at some abode coupled with an intent to remain at that place for some period of time. A legal settlement connotes living in an area with some degree of permanency greater than a visit lasting a few days or weeks.

The record indicated that at the time Nguyen was appointed guardian, Chieu had left Seattle on a one way plane ticket, and settled in his daughter's home in a manner that resembled an ongoing stay, rather than just a short visit.

The court, therefore, found in favor of the appointment and upheld the ruling of the lower court.

TOPIC: **Designation as a financial power of attorney alone does not entitle one to notice of hearing on a guardianship application.**

TITLE: **In re Guardianship of Rosenberger, 2018-Ohio-3533**
COURT: **Court of Appeals of Ohio, Eleventh District**
COUNTY: **Lake County**
DATE: **September 4, 2018**

In 2016, Susan Doudican filed an Application for Appointment of Guardian of Alleged Incompetent on behalf of her half-sister, Norma Rosenberger. In 2017, a magistrate's decision was issued finding that Norma Rosenberger was mentally impaired and incapable of independently caring for her person and safeguarding her income and assets. The magistrate recommended that Doudican be appointed the guardian of the person and the guardian of the estate of Norma Rosenberger. The probate court adopted the magistrate's decision.

During the hearing on the guardianship, the evidence established that in early 2016, Ms. Rosenberger's mental stability began to decline while she was living alone in Washington State. During that time, Ms. Rosenberger hired Northwest Trustee and Management Service for financial services naming them as agent under a durable general power of attorney agreement. After the probate court adopted the magistrate's decision, Northwest Trustee and Management Service filed a Motion to Intervene.

Northwest argued that in her financial durable power of attorney, Ms. Rosenberger named Northwest as agent, and instructed any court that acted upon a guardianship application to deny the application as long as the agent was acting under the power of attorney. But if she needed a guardian another part of that agreement, nominated Northwest to serve as a guardian.

Further, Northwest argued that they were an interested party, necessary for the adjudication of Ms. Rosenberger's rights, and they had not received proper notice of the guardianship application, or the hearing, and were therefore deprived of the opportunity to assert their rights. The probate court denied Northwest's motion to intervene. Northwest appealed.

Northwest claimed it was entitled to intervene as an interested party and by not receiving notice of the guardianship proceedings its right to due process was violated. The court agreed that Northwest's status as Ms. Rosenberger's power of attorney did make them an interested party, until the POA was expressly terminated, however the court went on to hold that that status did not entitle Northwest to notice of the hearing under R.C. 2111.04.

R.C. 2111.04 requires notice to be served "upon the person for whom appointment is sought, and upon the next of kin" and no one else.

TOPIC: **Where claims arise before the establishment of a guardianship, RC 2101.24 does not vest the probate court with exclusive jurisdiction over claims made against a ward.**

TITLE: **Sosnoswsky v. Koscianski, 2018-Ohio-3045**
COURT: **Court of Appeals of Ohio, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **August 2, 2018**

Sosnoswsky, the plaintiff, filed two virtually identical complaints at the same time, one in the probate division and one in the general division. Each alleged that due to a trustee's fraudulent conveyance of trust funds, the plaintiff never received the trust money to which she was entitled,

The trustee was the plaintiff's mother who was also a ward of the probate court. The complaints did not name the mother trustee as a party, but did name the trustee's guardian, Koscianski, as the defendant.

The allegations in the complaints dealt solely with the ward's actions which took place prior to the guardianship. The complaint did not call into question the conduct of the defendant, as the guardian.

The general division granted the guardian's motion to dismiss for lack of subject matter jurisdiction, holding that the probate court had exclusive jurisdiction for all matters arising under R.C. 2101.24. Sosnoswsky appealed the general division's ruling.

The appellate court found for Sosnoswsky, holding that R.C. 2101.24 does not provide for jurisdiction over claims made against a ward for conduct occurring prior to the guardianship. The court explained, the probate court only has exclusive jurisdiction to direct and control the conduct and settle the accounts of executors, guardians, conservators, testamentary trustees, and fiduciaries. The probate court, under the statute, does not have exclusive jurisdiction over actions perpetrated by the ward.

Because this case involved actions taken by the ward prior to the appointment of a guardian, the probate court did not have exclusive jurisdiction and the general division was incorrect in dismissing the case for lack of jurisdiction.

TOPIC: **R.C. 2111.04 prohibits gifts by an alleged incompetent during the pendency of a guardianship proceeding. However it does not prohibit gifts made by the alleged incompetent of trust assets, in his role as trustee,**

TITLE: **Weinberg v. Weinberg, 2018-Ohio-2862**
COURT: **Court of Appeals of Ohio, Second District**
COUNTY: **Montgomery County**
DATE: **July 20, 2018**

An attorney applied to be appointed as guardian of Weinberg. The application included a statement of expert evaluation, which indicated that Mr. Weinberg was suffering from Alzheimer's type dementia and concluded that his condition would not improve.

Prior to his dementia, Weinberg executed a trust for the benefit of his spouse and children He served as trustee until his death. While the application for guardianship was still pending, Mr. Weinberg, as trustee, executed a series of four assignments on behalf of the trust, by which the trust's interests in four Michigan based limited partnerships were to transfer to his daughter upon his death.

The son filed a complaint challenging the validity of those assignments. The son challenged the assignments on three grounds, the most relevant here being that the assignments were invalid as a matter of law pursuant to R.C. 2111.04(D). The probate court dismissed the son's cause of action and he appealed.

On appeal, the son argued that because the daughter had notice of her father's impending guardianship proceeding during the time that the assignments were executed, they were per se invalid under R.C. 2111.04(D). The court disagreed.

R.C. 2111.04(D) prohibits gifts to be made by an alleged incompetent during the pendency of a hearing for competency. In this case, the assignment stated "for value received the Sylvan Weinberg Revocable Trust does hereby sell, assign, and transfer unto Appellee a certain interest in one of four Michigan based limited partnerships."

The court held that because the assignments were for partnership interests that were not in the name of the alleged incompetent, but rather were in the name of the trust, the prohibition in R.C. 2111.04(D) did not apply. Because the interests central to this action were not owned by the alleged incompetent, the gifts were valid.

INTER-VIVOS GIFT

TOPIC: **Husband deeding one half interest in property to his wife, as trustee of her own individual trust, for the purpose of pooling assets, constitutes donative intent such to sustain a finding that the transfer was an inter vivos gift.**

TITLE: **Nethers v. Nethers, 2018-Ohio-4085**
COURT: **Court of Appeals of Ohio, Fifth District**
COUNTY: **Guernsey County**
DATE: **October 05, 2018**

In 2012, husband and wife each executed a revocable living trust. Husband is the settlor and trustee of his trust, wife is the settlor and trustee of her trust. The initial funding of each trust included an undivided one-half interest in three properties. The husband executed warranty deeds in 2012, transferring an undivided one-half interest in the real properties to wife as trustee of her trust.

The parties filed for divorce in 2017. At the divorce hearing, the Magistrate granted the divorce, divided the parties' assets and liabilities, and ordered the parties to revoke their trusts to facilitate the division of the assets.

On appeal, the husband argued that the trial court was incorrect to classify the property transfer as an inter vivos gift. The husband explained that the property transfer was part of an estate plan, with the intention being to pool their marital assets and avoid probate upon their death. The court held that the Husband relinquished ownership and control over the property interest given to his wife, and by conveying a present possessory interest in the property it was in fact an inter vivos gift.

The court explained that while part of the intent of the transfer was for estate planning reasons, specifically to "avoid probate," the other intent of the transfer was to make a gift presently in order to "pool assets." Because of this donative intention and the present relinquishment of ownership, the transfer was correctly classified as a inter vivos gift.

PROCEDURE

TOPIC: **Notification by publication is proper when reasonable due diligence is employed to attempt to perfect service by certified mail. Whether a party's efforts constitute reasonable due diligence will depend on the facts of the case. Reasonable due diligence found when Appellees conducted an exhaustive public records search for heirs.**

TITLE: **Sharp v. Miller, 2018-Ohio-4740**
COURT: **Court of Appeals of Ohio, Seventh District**
COUNTY: **Jefferson County**
DATE: **November 26, 2018**

This appeal is from an oil and gas case and involved the ownership of mineral interests in Springfield Township, Jefferson County. The property at issue here was originally owned by Poole and Smith (original owners). In 1944, they transferred the rights to the surface, while retaining mineral interests in the property using language in the deed.

In 2014, the Millers, appellees, filed a notice of intent to declare the mineral interest abandoned because they could not locate the names or addresses of any of the original owners, or their heirs. They filed the notice by publication. The Sharps, appellants, argued that the Millers did not use reasonable diligence when researching potential heirs, making service by publication improper.

The Dormant Mineral Act (R.C. 5301.56) allows notice by publication when notice cannot be completed through certified mail. An attempt to provide notice by certified mail is unnecessary where a reasonable search fails to reveal the names or addresses of potential heirs who must be served.

The Sharps asked the court to determine the extent of the efforts required to satisfy reasonable due diligence in locating heirs before service by publication is proper. The court held that whether a party's efforts constitute due diligence depends on the facts and circumstances of each individual case.

In this case, the Millers searched probate and deed records, and were unable to locate any heirs. In fact, the original owner's probate records did not refer to the mineral interests. A title report also failed to reveal any potential heirs. Finally, they conducted an online search using paid subscription services, like ancestry.com, world vital records, and MyHeritage.com and visited the Carroll County Genealogical Society. Still, they were unable to locate any heirs.

Due to these facts, the court found that their exhaustive public record search constituted reasonable due diligence such that notice by publication was proper.

FINAL APPEALABLE ORDER

TOPIC: **Entry overruling a motion for reconsideration for payment of funeral bill does not constitute a final appealable order such to vest jurisdiction with the appeals court.**

TITLE: **Estate of Weaver, 2018-Ohio-4204**
COURT: **Court of Appeals of Ohio, Fourth District**
COUNTY: **Pickaway County**
DATE: **October 15, 2018**

Mr. Weaver died in 2017 and an estate was opened naming Mr. Williams as the executor. Mr. Lovensheimer filed a claim against the estate for costs associated with the funeral.

Mr. Williams filed a motion to strike the claim against the estate, arguing that the claim had previously been presented and rejected by the estate thereby requiring Mr. Lovensheimer to bring an action in the court of common pleas. Mr. Williams argued that because Mr. Lovensheimer had not filed the action against the estate within two months of the claim being rejected, the claim should be stricken from the record.

The probate court issued an entry overruling the motion to strike the claim. The court quoted a letter from counsel to Mr. Lovensheimer and found that there was no plain and unequivocal statement that the claim was rejected.

Mr. Williams filed a motion for reconsideration. The court issued an entry overruling the motion for reconsideration, which included the language "there is no just cause for delay." Mr. Williams appealed the entry overruling the motion for reconsideration.

Before addressing the merits of the appeal, the appeals court directed Mr. Williams to brief the issue of whether the entry overruling the motion for reconsideration constituted a final appealable order such to vest jurisdiction in the appeals court.

Probate court matters, or matters related to estate administration, are typically characterized as special proceedings. Substantial right is a right that is protected by the law. An order that affects a substantial right is one which, if not immediately appealable, appropriate relief would be foreclosed in the future. There must be virtually no future opportunity to provide relief from the prejudicial order.

The court found that none of the entries at issue in this case affects a substantial right of Mr. Williams, or the estate, in that they did not determine whether the estate was liable. As a result, the court did not have jurisdiction to hear the case and it was remanded.

TOPIC: **A default judgment, which removed an individual as trustee immediately, but deferred the determination of attorney fees and required an accounting at a later date, was not a final appealable order because it did not determine the action and left unresolved issues.**

TITLE: **Ford v. Chamberlin, 2018-Ohio-4007**
COURT: **Court of Appeals of Ohio, Fourth District**
COUNTY: **Scioto County**
DATE: **September 26, 2018**

Appellee, Victoria Ford filed a complaint for declaratory judgment to remove Appellant, Brian Chamberlin as trustee of an inter vivos trust created by her mother. Ford alleged that Chamberlin had violated his fiduciary duties, and she sought an order removing him as trustee, and to require Chamberlin to provide an accounting of the trust assets.

Chamberlin failed to answer the complaint, so Ford filed a motion for default judgment. The court granted default judgment, finding that Chamberlin had been properly served but failed to answer. The order granted a default judgment to Ford, ordered Chamberlin to file a full and

complete accounting within 30 days, and enjoined him from acting as trustee. Appellant Brian Chamberlin appealed this judgement.

Before addressing the merits of the appeal, the court ordered Chamberlin to address whether the trial court had in fact entered a final appealable order. Chamberlin argued that the order was final and appealable under R.C. 2505.02(B)(1) because it affected a substantial right and that it in effect, determined the action and prevented a future judgment. Ford argued that the order was not final because the court ordered an accounting and deferred the determination of attorney fees, leaving unresolved issues. The court agreed with Ford, finding that because the order left unresolved issues, and because it did not affect a substantial right, the order was not a final and appealable order and the appeals court lacked jurisdiction to hear it.

The court explained, an order is a final appealable order only if the requirements of R.C. 2505.02 are met. Under the statute, an order is final and appealable only if it affects a substantial right during a special proceeding and it determines the action and prevents a future judgement.

The court noted that while probate court matters are typically characterized as special proceedings, the order in this case did not satisfy the other requirements of the statute. Namely, it failed to determine the action. The order did not resolve all claims against all parties and left unresolved issues (i.e. the accounting and the fees). In addition, the entry did not affect a substantial right.

Chamberlin had substantial rights to exercise his general powers as trustee, however he failed to demonstrate that those rights were affected. He failed to show that in the absence of immediate review, he would be foreclosed from being reappointed as trustee after a successful appeal from a final judgement.

HEARING REQUIRED

TOPIC: **Court is required to hold a hearing on competing motions for guardianship and administration of estate. The court's appointment of an administrator and guardian of the estate of several minor children was void because of the court's failure to hold required evidentiary hearing on the dueling applications.**

TITLE: **<u>In re Guardianship of J.C</u>, 2018-Ohio-4833**
COURT: **Court of Appeals of Ohio, Fifth District**
COUNTY: **Perry County**
DATE: **December 4, 2018**

Appellant's four children were in a car accident, three were injured, and one died. Appellant, the mother, filed an application to administer the estate of the deceased child and an application for appointment as guardian of the estates of the living children. The children's paternal grandmother, appellee in this action, filed a competing application for appointment.

The court instructed the parties to file briefs on the legal issues prior to conducting a hearing. The parties did so and, without conducting a hearing, the trial court appointed the grandmother as administrator of the estate of the deceased child, and guardian of the estates of the remaining children. The mother appealed the ruling.

On appeal, the mother argued that the trial court's failure to hold an evidentiary hearing prior to making its ruling was a violation of the applicable statutes and her constitutional rights. The court agreed with the mother, holding that the trial court erred when it appointed the grandmother as administrator without first holding an evidentiary hearing to determine the suitability of the mother.

R.C. 2111.02(C) obligates a trial court to conduct an evidentiary hearing prior to appointing a guardian. However, no hearing was scheduled and instead the court issued a ruling without conducting one.

In her second assignment of error, the mother argued that the lack of a hearing also rendered the trial court's appointment of the grandmother as administrator of the estate of the deceased child void. The court agreed with the mother, finding that the appointment of the grandmother was void.

R.C. 2113.06(A)(2) states that administration of the estate of an intestate shall be granted to the next of kin of the deceased. Here, the parties agree that the mother is next of kin to the decedent, with priority for appointment as administrator. R.C. 2113.06(C) states that if no next of kin is found suitable, the court shall commit the administration to some suitable person. However, the characterization of any applicant as suitable or unsuitable cannot occur without an evidentiary hearing.

Because the court failed to hold such an evidentiary hearing, any order appointing someone that is not the next of kin as administrator is void.

JUDICIAL NOTICE

TOPIC: **The court improperly took judicial notice of a divorce docket in order to establish the amount of child support owed to the decedent's surviving ex-spouse. Judicial notice of another case's docket is only proper when it is used to establish the existence of the other case.**

TITLE: **Pollard v. Elber, 2018-Ohio-4538**
COURT: **Court of Appeals of Ohio, Sixth District**
COUNTY: **Erie County**
DATE: **November 9, 2018**

After the decedent's death, Pollard presented a claim to his estate for costs associated with unpaid child support and fraud related to the transfer of real estate. The estate rejected the claim in full.

Pollard filed a complaint in the trial court alleging that the estate owed her money based on child support that the decedent failed to pay while he was alive. Attached to the complaint were two judgment entries from the Domestic Relations court that were issued in the divorce case in 1974.

Pollard stated in her complaint that she had not received any child support payments from the date of the child support order until the present.

Elber, the executor, filed a motion for summary judgment based on laches, speculative damages, and waiver. In her memorandum of opposition, Pollard argued that Elber's claim of laches was not supported by the facts of the case, that Pollard could calculate her damages and that Elber's waiver argument misconstrued the law.

In her reply, Elber reiterated her original arguments, and asked the court to take judicial notice of the records in the divorce litigation. She also attached five additional judgment entries from the divorce litigation. Pollard objected to the court taking judicial notice of the divorce litigation file.

The trial court granted summary judgment in Elber's favor. The court stated that after taking judicial notice of the filings contained in the divorce proceedings, as well as the docket, Pollard's complaint was barred by laches. Pollard appealed.

On appeal, Pollard argued that the trial court improperly took judicial notice of the file from the divorce litigation. Elber responded that the court did not have to take judicial notice of the divorce litigation because the case was already reopened, which put the divorce case before

the court. Alternatively, Elber contended that the trial court properly took notice of the divorce litigation docket. The court agreed with Pollard.

Judicial notice allows a court to accept for purposes of convenience and without requiring a party's proof, a well-known and indisputable fact. A court is not permitted to take judicial notice of proceedings in another case, even a prior proceeding before the same court involving the same parties. A trial court can only take judicial notice of a docket to establish the fact that such litigation exists and is ongoing. Instead, the court used the information contained in the docket sheet to prove the truth of the matters asserted in the probate case pending before it, namely the amount of child support owed to Pollard.

Because the lower court improperly took judicial notice of information from the divorce docket, the court held that the trial court's decision was based on improper evidence.

COURTS OF APPEAL/TRIAL COURT OPINIONS

ADOPTION

PATERNITY

TOPIC: **When an unmarried woman gives birth to a child, a father who appears on the birth certificate when he has voluntarily acknowledged paternity in writing cannot also claim to be a putative father.**

TITLE: **In re Adoption of B.G.F., 2018-Ohio-5063**
COURT: **Court of Appeals, Third District**
COUNTY: **Shelby County**
DATE: **December 17, 2018**

Mother and Father lived together when B.G.F. was born in Indiana in 2014. In 2017, Mother married Step-father in Ohio. Step-father filed a Petition for Adoption alleging Father's consent to the adoption was not required because he failed without justifiable cause to provide more than de minimis contact with B.G.F. or provide support and maintenance for the child for a period of at least one year immediately preceding the filing of the adoption petition. The trial court found that Father's consent was not required for the adoption.

On appeal, Father argued inter alia that the trial court erred in failing to apply the consent requirements of R.C. 3107.07(B). Although Father was the natural Father of B.G.F., he argued that he was the "putative father." As the putative father, the evidentiary standard for whether Father's consent is needed is different under R.C. 3107.07(B).

The Court of Appeals held that he was not the "putative father" because his name was on the child's birth certificate and the child was given Father's last name. Under Ohio law when an unmarried woman gives birth to a child, the father's name appears on the birth certificate only when he has voluntarily acknowledged paternity in writing. In Indiana, a man's execution of a paternity affidavit conclusively establishes that the man is the child's natural father, without any further judicial ratification through a court proceeding.

R.C. 3107.07(A) requires consent of the natural parent unless there was a failure without justifiable cause to provide *either* more than de minimis contact with the minor or maintenance and support for the one-year time period prior to the adoption. If a probate court makes a finding that the parent failed to support or contact the children, the court proceeds to the second step of the analysis and determines whether justifiable cause for the failure has been proven by clear and convincing evidence.

R. C. 3107.07(B) requires consent of a putative father unless:

> **(1)** The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 of the Revised Code not later than fifteen days after the minor's birth;

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(a) The putative father is not the father of the minor;

(b) The putative father has willfully abandoned or failed to care for and support the minor;

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

The probate court held that Step-Father proved no contact. Maternal Grandparents, who resided next door to Mother and B.G.F., remained willing to host Father at his convenience so that he could build a relationship with B.G.F., which Father chose not to do. The Father claimed he paid for gifts given to the child by the Paternal Grandmother. However, de minimis monetary gifts from a biological parent to a minor child do not constitute maintenance and support, because they are not payments as required by law or judicial decree as R.C. 3107.07(A) requires. The Father never filed for custody rights or made support payments for the child.

CONTACT BY PARENT

TOPIC: **The trial court must consider all of the domestic relations court evidence and the issue of justifiable cause for a father's failure to communicate when determining whether a father's consent is required for the adoption of his child by a stepfather.**

TITLE: **In re M.G.B.-E., 2019-Ohio-753 (On remand from Ohio Supreme Court)**
COURT: **Court of Appeals of Ohio, Twelfth District**
COUNTY: **Clinton County**
DATE: **March 4, 2019**

Father and Mother divorced in 2004. The domestic relations court awarded Mother custody of their two children and Father visitation rights. Mother stopped allowing visitation and made allegations of abuse against Father and his relatives. The domestic relations court issued an order for Father's parenting time to resume after the Father and children engaged in therapy to help the children transition back to spending time with their father. Father did not participate in counseling and his visitation time did not resume. Mother changed the children's last names, moved several times, and remarried.

Father filed a motion to reestablish parenting time on May 14, 2015. Shortly after, Stepfather filed a petition to adopt the children and claimed Father's consent was not necessary because Father had failed, without justifiable cause, to have more than de minimis contact with the children in the year preceding the petition to adopt per R.C. 3107.07.

The probate court found that Father's consent was not required for the adoption and the court of appeals affirmed. However, the Ohio Supreme Court held the probate court had erred in

failing to consider the Father's pending parenting proceedings in domestic relations court and remanded the case for the probate court to consider those proceedings in determining whether the Father failed to have contact with his children.

On remand, the probate court determined that it should only consider domestic relations court filings up to the date of the original hearing on the adoption petition. The probate court further stated that it had considered those domestic relations court's filings and had again determined that Father's consent to the adoption was not required.

The Court of Appeals reversed finding probate court erred in finding no consent requirement without considering all the relevant domestic relations court evidence *as of the time of the remand hearing*. The probate court was not restricted to considering only evidence arising during the one-year look-back period under the statute. There was no indication that the probate court considered whether the mother interfered with or impeded the father's attempts to communicate with the children.

TOPIC: **The fact that police forced Father to leave Mother's property during a visit is not a justifiable cause for not contacting his children during the one-year look back period.**

TITLE: **In re Adoption of L.L.L., 2018-Ohio-4556**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Preble County**
DATE: **November 13, 2018**

Mother was residential and custodial parent of the couple's two children when they divorced in 2012. Father was given visitation rights, which were to be supervised and scheduled between the parties. Father visited his children several times after the divorce, but missed scheduled visitations, was late, and police were called during the last visit. Father was under the impression that he was not allowed back on the Mother's property.

Mother remarried in July 2015. The children's Stepfather filed petitions for adoption in November 2017. At the consent hearing, Father admitted that he had not seen the children in several years. He claimed he had tried to send them cards and letters, and had also attempted to contact the mother through family and friends. The Mother and Stepfather both testified that there was no contact at all from the Father. Mother testified that she lived at the same address from 2011 until 2016 and worked at the same job since the time visitation ended.

The trial court held that Father's consent to the adoption was not required because he had failed without justifiable cause to provide more than de minimis contact. Father appealed, claiming the probate court erred by: 1) continuing the consent hearing without Father's attorney present and 2) finding Father had no justifiable cause for failing to see his children.

The Court of Appeals upheld the probate court's decision. There was no evidence in the record that Father's attorney was supposed to attend the hearing, or that Father requested a

continuance. Father's due process rights were not violated because he participated in the hearing, testified on his own behalf, and cross-examined the Mother and Stepfather.

Father argued that the court could not review Mother's testimony because she was not properly sworn in during the hearing. The court found this to be incorrect, based on the record. During the hearing, the court discussed that all three persons present would be testifying and had them all swear in together. Although Mother's affirmative answer to the swearing in was not audible on the transcript, there was no indication that she was not properly sworn in.

Finally, Father argued the evidence of his failure to visit with the children was not clear and convincing. He claimed that because the police were called during his last visit and he was told not to come back, he had no opportunity to visit the children. However, the Court held that this did not foreclose all of his opportunities to see the children. He could have filed a motion for visitation and requested that the court order some other method of visitation. He also could have called the children, sent cards, or engaged in other communication. The court deferred to the trial judge's determination of credibility of the witnesses.

TOPIC: **A judgment entry of the juvenile court suspending appellant's contact with the child until further order of the court provided justification for appellant's failure to contact the child.**

TITLE: **<u>In re Adoption of B.V.K.M.,</u> 2019-Ohio-1173**
COURT: **Court of Appeals, Sixth District**
COUNTY: **Lucas County**
DATE: **March 29, 2019**

Father had visitation rights and a judicial decree of zero child support. On July 13, 2016, the Father lost his visitation rights until further order of the court because of mental health and substance abuse issues. Stepfather filed to adopt the child on October 6, 2017. Stepfather alleged Father's consent was not required because Father failed without justifiable cause to provide more than de minimis contact with the child and failed to provide for the maintenance and support of the child for at least a year before the adoption petition was filed. On October 10, 2017, Father filed a motion to modify with the juvenile court, seeking supervised visits with the child.

The probate court found that the zero support order obviated the maintenance and support issue. However, the court also held that Father failed without justifiable cause to have more than de minimis contact with the child for the year before the adoption petition was filed. Therefore, Father's consent was not required. Father appealed.

The Court of Appeals reversed, finding that the judgment entry of the juvenile court suspending appellant's contact with the child until further order of the court provided justification for appellant's failure to contact the child.

TOPIC: **Father's ignorance of the legal impact of the protection order that he and his counsel had signed did not provide justification for his failure to contact the children.**

TITLE: **In re J.L., 2019-Ohio-366**
COURT: **Court of Appeals, First District**
COUNTY: **Hamilton County**
DATE: **February 6, 2019**

Father and Mother had two children and divorced in 2013. Father did not participate in the divorce proceedings. The divorce decree designated Mother as the residential parent and the legal custodian of the children. It noted that since Father had not attended the court-mandated parenting class, the domestic relations court declined to issue any specific parenting-time orders. Therefore, Father's visits with the children were at Mother's discretion.

From 2013 to 2016, Father visited the children three or four times a year. In June 2016, Father and his girlfriend took the children for a two-week vacation, which consisted of visits to the girlfriend's and Father's parents' homes. The vacation ended early, after an alcohol related argument between the Father and girlfriend.

In August 2016, Father's now former girlfriend told Mother that Father made serious threats against the children, Mother, and Stepfather. Mother sought and received an order of protection from the domestic relations court. On September 27, 2016, Father entered a Consent Agreement and Domestic Violence Civil Protection Order. The terms of the consent agreement required Father to refrain from any contact with Mother and Stepfather for five-years. The order did not identify the children as parties and the section concerning Father's parental rights and visitation was left blank.

One year after the order of protection, Stepfather petitioned to adopt the children. He alleged that Father had not supported or contacted his children in the prior year and thus his consent was not required. Father, Mother, Stepfather, the children's paternal grandmother, and Father's former girlfriend testified at the February 2018 consent hearing.

Father admitted that he had last seen his children in July 2016, and that he had last texted the older child in August 2016. Father admitted knowing, during the entire period at issue, where Mother and the children lived.

Father denied threatening Mother or her family. He stated that he had signed the consent agreement on the advice of his attorney. Although it did not list the children as protected parties, Father testified that he thought that any contact with the children would violate the order. He acknowledged that he had no contact with the children during the one-year look back period.

The magistrate concluded that it was "uncontroverted" that Father had no contact with the children since the beginning of the look-back period. She noted that the initial ex parte order had identified the children as protected parties, thus proscribing contact with them. However, this was only for approximately 40 days. During the period of the consent agreement, Father did not

visit the children or send cards or letters. While father had the email address of the older child, he sent no emails during the period. Father took no steps to complete the domestic relations court's parenting class and had not filed post-decree motions seeking modification of the custody or parenting-time orders. Father's ignorance of the legal impact of the protection order did not justify his failure to contact the children.

The trial court affirmed and Father appealed, claiming error in determining that Father's consent for adoption was not required when he had been prohibited from contacting the children during the ex parte order-of-protection period.

The Court of Appeals found the probate court's conclusion that father Failed to have any contact, much less de minimis contact, with his children during the look-back period was amply supported in the record. The ex parte protection period was only 11% of the look back period. Father willingly signed the consent agreement and his claimed ignorance of the legal impact of the agreement did not relieve him from his obligation to contact his children.

TOPIC: The fact that a father was in prison during the one-year look back period for is not justifiable cause for not contacting his children.

TITLE: <u>In re Adoption of A.C.M.C.,</u> 2019-Ohio-879
COURT: Court of Appeals, Seventh District
COUNTY: Belmont County
DATE: March 13, 2019

Father was in prison for multiple offenses involving the sexual abuse of Mother's daughter from a previous relationship, at the time of A.C.M.C.'s birth in 2010. Father and Mother divorced in 2011. The divorce decree stated that Father had to petition the court for visitation of A.C.M.C., which he never did. Father was released from prison in May 2018.

Mother married Stepfather in September 2013. In March 2018, Stepfather filed a petition to adopt A.C.M.C. Father contested the adoption. The Belmont County Probate Court found that Father's consent to the adoption was not necessary because he failed, without justifiable cause, to provide more than de minimis contact with A.C.M.C. during the year preceding the adoption petition. Father appealed.

The Court of Appeals upheld the probate court's decision. The fact that Father was in prison was not construed as justifiable cause for no contact. Father had no contact whatsoever with A.C.M.C. during her entire life. Although he was in prison, he did have contact with his other daughter. He sent her cards, letters, and gifts and contacted her by phone. Father never attempted any similar communication with A.C.M.C. and did not contact Mother. Father claimed that he did not have Mother's contact information. However, her phone number and grandmother's address were available to Father on the divorce decree. Father also claimed that he was not allowed to contact his victim, Mother's older daughter, which prevented him from calling Mother's home. The court also discredited this excuse because the older daughter only lived with Mother half of each week.

MAINTENANCE AND SUPPORT OF CHILD

TOPIC: **A court must consider evidence of the paternal grandparents' involvement when determining whether a father's consent to adoption is required based on his failure to provide maintenance or support for the child during the one-year look-back period when the DR order substitutes grandparents for father for visitation.**

TITLE: **In re Adoption of A.V.H., 2019-Ohio-369**
COURT: **Court of Appeals, Ninth District**
COUNTY: **Summit County**
DATE: **February 6, 2019**

Father and Mother were divorced in September 2015. Father was granted companionship time and was ordered to pay $50 per month in child support. The divorce decree provided that if Father was "unavailable or absent from the Akron area his parents shall have companionship time with [A.V.H.] in his place."

Father was incarcerated on a felony conviction two months after the divorce. His parents ("Grandparents") took over his companionship time with A.V.H. during his incarceration. They provided for all of her needs during her regular companionship time at their home, including food, clothing, toys, entertainment, and childcare. During the one-year look-back period, A.V.H. spent at least 93 days with her Grandparents. Father only paid $12.23 in child support during the one-year look-back period.

Stepfather filed a petition to adopt A.V.H. on February 14, 2017. He alleged that Father's consent was not required because Father had failed without justifiable cause to communicate with or provide for the maintenance and support of the child for at least one-year immediately preceding the filing of the petition, as required under R.C. 3107.07.

Father appealed the judgment of the Summit County Court of Common Pleas, Probate Division. The Court of appeals reversed. The trial court focused on the $12.23 child support payment during the look back period and the fact that Father was receiving money in prison, but not paying support. It did not consider any contribution made by the Grandparents during this time.

The Court of Appeals held that the support given by the Grandparents must be considered in evaluating whether Father had failed to provide for the maintenance and support of the child for at least one-year immediately preceding the adoption petition.

The Ohio Supreme Court declined to accept the case on appeal.

TOPIC: **A natural father does not have a duty to provide child support separate from a judicial decree of support.**

TITLE: **In Re Adoption of B.I., Slip Opinion No. 2019-Ohio-2450**
COURT: **Supreme Court of Ohio**
DATE: **June 25, 2019**

Father was incarcerated in 2009. During his incarceration, Father and Paternal Grandmother repeatedly requested that Mother terminate the Father's child-support order. Unless the child support order was terminated, Father would be incarcerated again on child-support arrearages upon release from prison. Mother agreed to an order that set Father's support obligation and arrearage at zero. Mother never requested any support nor did Father offer any support during the one-year look-back period.

Stepfather filed a petition to adopt his stepson. The Hamilton County Probate Magistrate found that even though Father was not subject to a child-support order, he still had a parental obligation to support his child. The probate judge overruled the magistrate, holding that a valid zero-support order provides justifiable cause for failure to prove maintenance and support pursuant to R.C. 3107.07(A). The Probate Court held that the Father's consent to the adoption was required and dismissed the petition. The Stepfather appealed.

The First District Court of Appeals held that where a court has ordered a parent to pay no child support or zero child support, that court order of support supersedes any other duty of support required by law. A parent cannot fail without justifiable cause to provide maintenance and support for the child when there is no child support payment required.

The Ohio Supreme Court accepted the case as a certified conflict and between the First District and the Fifth District and upheld the First District Court of Appeals ruling. In a 4-3 opinion authored by Justice Kennedy and joined by Justices French, DeWine and Donnelly, the Supreme Court held that a parent with a zero child support order does not give up the right to contest the adoption of his child for failure to provide maintenance and support. In the majority opinion, Justice Kennedy stated that Ohio parents are subject to a general legal obligation to support their children, but when there are court orders for child support, those orders establish the parents' obligation of support. Justice Kennedy went on to state "Every day, families rely on court orders to define parents' lawful obligations. They structure their lives around what the court has ordered. Our decision today ensures that the judgment of the court with the jurisdiction to set child-support levels can be relied upon,"

Justice Fischer's dissent stated that a judicial decree that relieves a parent of a child-support obligation is not dispositive of all maintenance-and-support obligations relevant to R.C. 3107.07(A). Justice Stewart's dissent stated that that a court's order terminating a parent's judicially ordered child-support obligation does not, as a matter of law, relieve that parent of his duty to provide maintenance and support for his child under R.C. 3103.03(A) and the common law. Chief Justice O'Connor also wrote a brief dissent, stating that the majority creates a legal fiction with the term 'no-support order' and incorrectly uses that term to describe three factually

distinct scenarios: 'orders terminating previously ordered support, zero-support orders, and orders modifying a previously ordered support amount to zero,...'

RIGHT TO COUNSEL

TOPIC: **There is no presumption of a right to counsel in private adoption cases because the parent will not lose his/her personal freedom of physical liberty if he/she is unsuccessful and there is no state action**.

TITLE: **In re Adoption of M.M.F., 2019-Ohio-448**
In re Adoption of Y.E.F., 2019-Ohio-449
COURT: **Court of Appeals, 5th District**
COUNTY: **Delaware County**
DATE: **February 8, 2019**

In September 2016, the trial court awarded Appellees legal custody of twin children and granted biological parents parenting time. On April 4, 2018, Appellees filed a petition for adoption alleging that consent of the biological parents was not required because the parents had each failed, without justifiable cause, to provide more than de minimis contact with the children or had failed to provide for the maintenance and support of the children for at least one year prior to the adoption petition.

Appellant, the biological mother, filed an affidavit of indigency and a request for appointment of counsel. She requested an attorney because her household gross income is below the federal poverty level and she needed assistance to understand the court procedures, rules of evidence, legal issues, and possible defenses. She included in her motion a 2006 decision by the Franklin County Probate Court finding indigent parents in contested adoption cases are entitled to appointed counsel.

The trial court denied Appellant's request for appointment of counsel. The court found that the case law cited by Appellant was not mandatory authority in this case.

The Court of Appeals held that there are no due process or equal protection violations in a privately initiated adoption proceeding because there is no state action. The Ohio Supreme Court has held that Chapter 3107 of the Revised Code, containing procedures for adoption cases, adequately protects biological parents' constitutionally protected rights. There is no presumption of a right to counsel in adoption cases because the parent will not lose his/her person freedom of physical liberty if he/she is unsuccessful.

TOPIC: An indigent parent does not have a constitutional due process right to appointed counsel in a private adoption hearing.

TITLE: In re L.C.C., 2018-Ohio-4617
COURT: Court of Appeals, Tenth District
COUNTY: Franklin County
DATE: November 15, 2018

Mother gave birth on December 12, 2012. In January, 2013, Franklin County Children Services ("FCCS") learned that appellant had tested positive for oxycodone on seven occasions during her pregnancy, twice for marijuana and that she continued to use illegal drugs while breastfeeding. Father's identity was unknown.

On February 25, 2013, FCCS filed a neglect and dependency complaint, pursuant to R.C. 2151.03(A)(2) and 2151.04(C), in the Franklin County Juvenile Court. On May 3, 2013, the child was placed with Appellee and her husband. Appellee is Mother's maternal aunt. The child has lived with Appellee ever since.

Mother traveled to Florida to enter a drug treatment program. She returned briefly in February 2014 for a hearing in the juvenile court case for custody of the child. On October 7, 2014, the juvenile court issued an order, pursuant to R.C. 2151.42(B), awarding legal custody of L.C.C. to Appellee and Appellee's husband. Mother did not object, and went back to Florida. She admitted that she did not complete the Florida drug treatment program and continued to use illegal drugs. In December 2015, a Franklin County Grand Jury indicted Mother for heroin possession, a felony of the third degree.

On July 27, 2016, Appellee filed her petition for adoption, pursuant to R.C. 3107.05, in the Franklin County Probate Court. Appellant received notice of the petition while at the Franklin County jail. Mother filed her *pro se* objection on November 10, 2016. On receipt of appellant's objection, the probate court sent Mother a letter advising her to speak with an attorney regarding her parental rights.

The magistrate found by clear and convincing evidence that Mother failed without justifiable cause to provide more than de minimis maintenance and support to the child for a period of one year immediately preceding the filing of the adoption petition. The magistrate recommended that Mother's consent to the adoption was not required, but also found that it was not in the best interest of the child to grant the adoption petition. Appellee filed objections to the magistrate's decision. Mother filed a response and her own supplemental objections.

At the hearing on the objections, the court questioned Mother about her lack of counsel. Mother claimed that she had attempted to find counsel but could not. The court granted her an additional 60 days to find counsel and prepare for the hearing.

The trial court sustained Appellee's objection to the magistrate's decision and granted the petition for adoption. The court reviewed the relevant factors outlined in R.C. 3107.161(B) for

the best-interest determination. The trial court found that appellee had proven by clear and convincing evidence that the adoption was in the best interest of the child.

Mother appealed, asserting the trial court erred in not providing her with counsel. She claimed her constitutional equal protection and due process rights required that the trial court provide her with the assistance of counsel during the adoption proceedings that terminated her parental rights. She asserted the trial court committed structural error by denying her constitutional right to counsel. Additionally, she claimed the trial court committed plain error by finding that her consent was not required in the adoption proceedings and that the trial court abused its discretion by granting the adoption to Appellee.

The Court of Appeals dismissed all of Mother's assignments of error. The different treatment among indigent parents in private adoption proceedings and in state-initiated parental rights termination proceedings does not violate equal protection principles. The trial court did not deprive the mother of a constitutional due process right to appointed counsel in adoption proceeding, because no such right existed. The trial court gave the mother every opportunity to obtain counsel, including granting continuances. The Court noted that although the Ohio Supreme Court has recognized structural error occurs when an indigent defendant is completely denied legal counsel in a criminal case, no court has recognized structural error arising out of the alleged denial of counsel in a civil action. Finally, the Court upheld the probate court's finding that adoption by Appellee was in the best interest of the child.

PROCEDURE

TOPIC: **A request for a reasonable continuance should be granted when an attorney only gains access to the file the day of the consent hearing.**

TITLE: **In re Adoption of A.R.M.R., 2019-Ohio-2450**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **January 24, 2019**

Mother appealed the probate court's determination that the adoption of her minor child by the stepmother did not require her consent because she failed to support the child without justifiable cause for the one-year preceding the adoption petition.

Stepmother filed a petition to adopt child on November 21, 2017. Mother was subject to an order of the juvenile court that required her to pay $95 per month, plus a two percent processing fee, in child support. The Cuyahoga County Child Support Enforcement Agency (CSEA) provided a certified copy of Mother's child support history. The report indicated that she had not made any child support payments from November 1, 2016 to November 14, 2017.

Mother was employed until November 30, 2016, when she voluntarily quit her job because she began attending school to become a dental assistant. During the next year, she claimed to have applied for "ten to six jobs a day" (sic) but could not find employment. She graduated from the dental assistant program in July 2017 but did not start working until November 2017. At the time of the hearing, Mother was working three part-time jobs – at a snack bar in a bowling alley, at a McDonald's, and as a dental assistant. Mother owed approximately $1,360.91 in outstanding child support.

The hearing was originally scheduled for January 4, 2018 and Mother appeared *pro se*. The trial court granted her leave to file written objections, which she submitted the same day. The next day, the court sent Mother notice of the new hearing on February 12, 2018. On January 22, 2018, Mother contacted counsel to represent her in connection with the adoption petition. At the February hearing, Mother's counsel requested a reasonable continuance. Counsel said that she had just gained access to the file and was under the impression that the hearing was "just a pretrial hearing." The court denied the motion for a continuance because Mother had already been granted a continuance and the hearing was clearly not a pretrial.

Mother appealed the trial court's decision that she had failed without justifiable cause to meet her child support obligations. Mother argued that the trial court abused its discretion in denying her request for a continuance because she had no opportunity to review the CSEA file and her counsel was not given the opportunity to prepare and conduct meaningful discovery.

The Court of Appeals held that the trial court's denial of the motion for continuance effectively prevented Mother from having a reasonable opportunity to satisfy her burden of proof for her justification in not paying child support. Because Mother's counsel had not received the file prior to the hearing, Mother had to defend her right to have a continued relationship with her child without counsel's full understanding of the situation and evidence to support her position. Mother did not present any evidence of her attempts to find employment during the year prior to the adoption proceeding. Mother's only evidence of her justifiable cause was her own testimony, which was impeached by the absence of corroborating evidence. Counsel's misunderstanding of the nature of the proceeding and delay accessing the file should not result in the termination of Mother's fundamental parenting rights.

TOPIC: **A fraudulent affidavit will not be considered as evidence for an objection to a magistrate's decision.**

TITLE: **In re adoption of N.D.D., 2019-Ohio-727**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **February 28, 2019**

Father and Mother had one child, a son, in 2008. Mother had a daughter from a previous relationship. Father was found guilty of molesting and raping the Mother's daughter, and

sentenced to prison. He is currently incarcerated. Father has not seen his child since he was two-years old. Child does not have a relationship with the Father's family members.

Mother married Stepfather in 2013. The Stepfather petitioned the court for adoption 2014, alleging Father's consent is not required under R.C. 3107.07(A).

After two decisions on appeal having firmly settled that adoption proceedings did not require Father's consent, the matter was again before the probate court. On December 5, 2017, the magistrate held a hearing on the issue of the best interests of the minor child. On March 15, 2018, the magistrate found that it was in the child's best interest for the stepparent adoption.

Father attempted to present objections to the magistrate's decision in the form of an affidavit. Father signed the objections dated March 29, 2018. The proof of service on the document was also dated March 29, 2018. However, the notary seal, acknowledging appellant's signature on the affidavit was dated November 2, 2017. The probate court concluded that Father's objections in their entirety could not be considered as affidavit evidence. The court stated it would consider appellant's filing as an objection, but could not treat the document as a properly sworn affidavit due to the fraudulent affidavit notarization. The court limited its review to whether the magistrate properly applied the law to the facts of the case.

The probate court adopted the magistrate's findings for the best interest of the child. The court noted that Father refused "to acknowledge the relationship of his victim to the minor and the minor's mother, and the convictions that led to his incarceration as being significant factors in the current state of the non-relationship with his son."

On Appeal, Father asserted that the trial court violated his due process by failing to review de novo appellant's factual objections to the magistrate's decision under Civ.R. 53(D)(3)(b)(iii). Father challenged the court's final decision to grant the adoption petition.

The Court of Appeals upheld the trial court's decision. Father had notice of the hearings and was given meaningful opportunities to be heard. The affidavit was properly excluded as evidence because it was fraudulent.

CLAIMS AGAINST AN ESTATE

TOPIC: **Executors and administers of estates are not considered creditors for purposes of R.C. 2117.06. The time period for executors and administers to file claims against an estate is three months from the date of appointment as an executor or administrator, rather than six months from the date of death.**

TITLE: **In re Estate of Curc, 2019-Ohio-416**
COURT: **Court of Appeals, Eleventh District**
COUNTY: **Trumbull County**
DATE: **February 8, 2019**

Joseph Curc, Jr. died testate on June 25, 1987. Thirty years later, on July 19, 2017, Raymond Curc filed an Application to Probate Will in the Trumbull County Probate Court. He was appointed executor of the estate of Joseph Curc. In November 2017, Raymond filed a Fiduciary's Claim against Estate for approximately $45,000 in expenses for Joseph's funeral, as well as the ½ interest in the real estate taxes, electric services, and gas service that had accrued since his death in 1987 for the property where Agnes Curc (Raymond's mother) continued to live.

The magistrate issued a decision denying the claim, finding the claim was not timely filed as required by R.C. 2117.06. The Probate Court adopted the magistrate's decision. Raymond filed an objection to the magistrate's decision, but the trial court affirmed the magistrate.

The Court of Appeals reversed and remanded. The Court distinguished between a creditor and an executor for filing claims against an estate. R.C. 2117.02 governs claims by executor and administrators, allowing claims to be presented within three months *after the date of appointment* (emphasis added). R.C. 2117.06 limits creditor's claims against an estate to six months *after the date of the death* of the decedent (emphasis added). Raymond filed his claims 54 days after his appointment as executor of the estate. Therefore, his claims are not time barred.

TOPIC: **A plaintiff must file a complaint against an estate within six months after the defendant's death under R.C. 2117.06(C).**

TITLE: **Smith v. Estate of Knight, 2019-Ohio-560**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **February 14, 2019**

The plaintiff filed a complaint against Charles Knight alleging numerous torts in January, 2017. On March 1, 2017, the clerk of courts issued a failure of service notice. Plaintiff took no further action; Knight died on October 12, 2017.

In January, 2018, the plaintiff requested the trial court substitute the estate as the defendant. The clerk of courts issued certified mail service on the estate on January 30, 2018 and filed a failure of service notice on April 6, 2018. On April 19, 2018, the plaintiff requested ordinary mail service on the estate. The clerk of courts filed proof of service by ordinary mail.

The estate filed a motion to dismiss for failure to state a claim, including the failure to serve the complaint on the estate within the required six-month period in R.C. 2117.06(C). The court found that the claim was time barred because it was not filed within six-months of Knight's death. The Court of Appeals held that the requirements of R.C. 2117.06 are mandatory and must be strictly construed.

TOPIC: **Substantial compliance with R.C. 2117.06 is not permitted. A creditor must procure the appointment of an administrator against whom he can proceed, when no administrator has been appointed.**

TITLE: **Shepherd of the Valley Lutheran Retirement Servs., Inc. v. Cesta, 2019-Ohio-415**
COURT: **Court of Appeals, Eleventh District**
COUNTY: **Trumbull County**
DATE: **February 8, 2019**

On August 31, 2017, Shepherd of the Valley filed a Complaint in the Trumbull County Court of Common Pleas against Richard Cesta, Executor of the Estate of Rose Cesta. The complaint asserted that at the time of Rose Cesta's death on May 15, 2016, she was indebted to Shepherd of the Valley in the principal amount of $24,867. On January 18, 2018, Cesta filed a Motion for Summary Judgment.

The trial court granted Summary Judgment because the claim was untimely. Under R.C. 2117.06(C), Shepherd of the Valley was required to file the claim within six months of Rose's death.

Shepherd of the Valley appealed, arguing that the claim was timely because the special administrator was not actually appointed within 6 months of the death. When a special administrator's appointment is not granted until after the six months has passed, a creditor loses a property interest without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution. Appellants also claimed the result is not compelled by existing case law, favors unequitable gamesmanship, and undermines the legislative purpose behind R.C. 2117.06.

The Court found that Shepherd of the Valley did not act with due diligence to comply with the procedural requirements under R.C. 2117.06. The Supreme Court has "invoked a literal reading of R.C. 2117.06" with respect to the "mandate upon claimants as to the means of presentation." A claim against an estate must be timely presented in writing to the executor or administrator of the estate per § 2117.06(A)(1)(a). Substantial compliance is not permitted.

If no administrator has been appointed, the creditor must procure the appointment of an administrator against whom he can proceed. The Court held that if a creditor "fails through indifference, carelessness, delay, or lack of diligence to identify the administrator or executor, or to procure the appointment of one so that a claim can be presented, the law should not come to the creditor's aid."

The Court dismissed the Due Process Clause of the Fourteenth Amendment claim because R.C. 2117.06 has been described as a "self-executing" non-claim statute to which the due process requirements do not apply.

TOPIC: **The Ohio Department of Medicaid can record a lien against property owned by a decedent for recovery of benefits paid on behalf of decedent during her**

lifetime. The claim represented by the lien should be paid prior to a nursing home's claim against the estate

TITLE: **Wiesenmayer v. Vaspory, 2019-Ohio-1805**
COURT: **Court of Appeals, Second District**
COUNTY: **Montgomery County**
DATE: **May 10, 2019**

Margaret S. Edwards moved into Brookhaven Nursing and Rehabilitation Center ("BNRC") on October 15, 2014 and stayed there until her death on January 3, 2016. She did not have spouse or children, nor did she leave a will. Her estate included a parcel of real property in Harrison Township.

Edwards received Medicaid benefits during the last five months of her life. The Ohio Department of Medicaid ("ODM") recorded a lien against Edwards's real property in Harrison Township pursuant to R.C. 5162.21, the statutory mandate for Ohio's Medicaid Estate Recovery Program.

The probate court appointed a special administrator of Edwards's estate. BNRC presented a claim against the estate for $40,750.96. ODM presented a claim against the estate in the amount of $27,018.32.

The probate court authorized the sale of the real property to pay the debts. On August 10, 2017, the probate court confirmed the sale of the real property. The probate court next held that ODM had a valid, statutory lien on decedent's real property, and that the claim against her estate represented by the lien should be paid prior to BNRC's claim.

Appellants claimed that the probate court erred in granting ODM a valid interest in the property. They argued that ODM never perfected its lien against Edwards's real property because it did not record the lien before Edwards died.

The Court of Appeals held that R.C. 5162.21(A)-(B) and 5162.211(A)-(C) authorize ODM to record a lien against the real property of a permanently institutionalized Medicaid recipient after the recipient's death. R.C. 5162.211(B)(1) does not apply exclusively to living, permanently institutionalized recipients of Medicaid benefits. Therefore, there was no statutory requirement for ODM to record its lien against Edwards's property before she died. Additionally, Edward's due process rights were not violated by recording the lien after her death because the estate stood in her place.

R.C. 2127.38(C)(1) states that "the remaining proceeds of [the] sale [of property] shall be applied as follows: . . . [2][t]o discharge the claims and debts of the estate in the order provided by law." Although the statute does not specifically refer to Medicaid liens, the Court held that probate court's determination that the language of R.C. 2127.38(B) and R.C. 2127.19 must be interpreted to include Medicaid liens.

ESTATES

TOPIC: **Although minors are entitled to prior notice for appointment of administrators to their mother's estate, the absence of notice is harmless error since minors are not qualified for appointment.**

TITLE: **In re Estate of Hudson, 2018-Ohio-2436**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Preble County**
DATE: **June 25, 2018**

Mother, Husband and Daughter ("Emerie") were killed in a traffic accident. Mother was survived by two daughters (the "girls") from a prior marriage. At the time of Mother's death, the girls were minors and in the custody of their Father.

The Mother's mother, ("Beverly"), moved to be named administrator of the estates. The Husband's mother, ("Denise") and Beverly later agreed to be co-administrators of Emerie's estate. The probate court then issued letters of authority naming Beverly administrator of Mother's estate and co-administrator of Emerie's estate with Denise.

The Father hired counsel to represent the girls. That counsel filed a motion to vacate the appointment of Beverly and Denise as fiduciaries because the girls never received notice "for the purpose of ascertaining whether they desire to take or renounce administration."

The probate court denied the motion to vacate. The probate court determined the girls were precluded from administering the estates because they are minors, that they had received notice of the appointment of Beverly and Denise as administrators of Melissa's and Emerie's estates, and that their interests were protected because Beverly named both girls in paperwork filed in the estate as next of kin to Mother and Emerie.

The girls appealed. Beverly filed a motion to dismiss the appeal for lack of a final appealable order and lack of standing.

The Court of Appeals noted that the Ohio appellate districts are split as to whether a decision on a motion to vacate the appointment of an estate administrator constitutes a final appealable order. Some districts find that such decisions are not special proceedings as contemplated by R.C. 2505.02, regardless of the reason to vacate an appointment. Others, districts find that the order is final and appealable as a provisional remedy because otherwise it would deny a meaningful remedy to appellant.

Here, the Court of Appeals held that the probate court's denial of the motion to remove would leave the girls no effective or meaningful remedy following the final resolution of the

estate because Beverly's and Denise's duties, as co-executors, would terminate once the estate is administered. Thus, the probate court's judgment entry denying the girls' motion for removal was considered a final appealable order.

Additionally, Denise and Beverly claimed the girls did not have standing because they are minors. According to Civ.R. 17, minors lack standing to bring suit. However, Civ.R. 17(B) provides, "a guardian or other like fiduciary. . . may sue or defend on behalf of the minor or incompetent person." The girls had standing because their father, as parent and natural guardian, hired the attorney to represent the girls. The trial court, in further protection of the girls' interests, appointed a Guardian ad Litem. The Court held the girls were fully represented and had standing to challenge the appointment of these fiduciaries.

The Court recognized that the girls were entitled to notice before the probate court issued Denise's and Beverly's letters of authority. However, the Court held the probate court's failure to issue the notice was harmless error.

If the girls had proper notice, they only would have been entitled to challenge Beverly and Denise as being unsuitable fiduciaries. As minors, they were not qualified to seek appointment themselves. The girls never asserted that Beverly or Denise were improper only that they were not notified. Additionally, the probate court appointed a guardian ad litem to assist in protecting the girls' interests. The Court held that although the girls were not notified of the appointments until after they were made, the girl's interests were fully protected.

TOPIC: **An executor of an estate who has fraudulently conveyed property from the estate should be removed. Requiring her to first provide notice to the court before entering a contract of sale was not a viable alternative to removal.**

TITLE: **<u>In re Estate of Brate</u>, 2019-Ohio-446**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Warren County**
DATE: **February 11, 2019**

Sherry Walsh, executrix of the estate of Homer Brate ("Sherry"), appealed from the decision of the Warren County Probate Court which found that she fraudulently conveyed the estate's real property and ordered her to return the property to the estate.

Homer Brate died in 2005. The Probate Court appointed Sherry as executrix. The beneficiaries of the estate were Sherry and Nolan Brate ("Nolan"). The primary asset of the estate was a property located in Franklin, Ohio.

In September 2016, the probate court ordered Sherry to sell the property at a public sale. However, without court approval or notice, Sherry signed an executor's deed and transferred the property to two acquaintances, Larry Walsh and Steven Miller. The estate received no cash consideration. Instead, the transfer was intended to pay an untimely claim against the estate by Larry and to repay a personal loan that Steven made to Sherry.

Nolan filed a complaint against Sherry, Larry, and Steven. The complaint alleged that Sherry breached her fiduciary duties in transferring the property and that she converted rent monies from the property. Nolan asked the court to reverse the property transfer and quiet title to the estate, as well as remove Sherry as fiduciary.

The probate court held that the transfer was made with the intent to defraud the only other beneficiary of the estate besides herself and a creditor of the estate. Sherry had transferred the property without notice to the probate court even though it was required by the court order. The court allowed Sherry to continue as executrix with a requirement that she not enter into a contract for the sale of the property without written notice to the other beneficiary and the court.

The Court of Appeals upheld the Probate Court's finding that the property transfer was improper and constituted a fraudulent conveyance under R.C. 1336.04. However, it also held that the probate court abused its discretion in permitting Sherry to continue as fiduciary. Her past actions demonstrated an attitude of indifference to the court and its orders. Requiring her to first provide notice to the court prior to entering a contract of sale was not a viable solution. The Court remanded for the probate court to remove Sherry as fiduciary and appoint a bonded successor fiduciary to finalize the administration of the estate.

TOPIC: **The word "cooperate" with Medicaid approval in a nursing home contract does not require an Executor to ensure the Medicaid application will be approved.**

TITLE: **HCF of Findlay, Inc. v. Bishop, 2019-Ohio-319**
COURT: **Court of Appeals, Third District**
COUNTY: **Hancock County**
DATE: **February 4, 2019**

On October 2, 2017, HCF of Findlay, Inc., d.b.a. Fox Run Manor ("Fox Run Manor") filed a breach-of-contract and quantum-meruit complaint seeking damages from the Executors of the Estate of Anna P. Weber ("Executor"). Fox Run Manor alleged it was owed for services provided to Weber, for her nursing-home care from October 1, 2016 through the date of her death.

In August, 2018, the trial court granted summary judgment in favor of the Executor and dismissed the complaint. Fox Run Manor appealed. Fox Run Manor claimed that the Executor failed "to cooperate with the Medicaid application process as required by the unambiguous

definitions contained in [the contract]" because the Executor "never applied to have a Qualified Income Trust [("QIT")] established until after the Medicaid denial was issued."

The Court of Appeals upheld the trial court's findings that there was no breach of contract. The contract was unambiguous. Specifically, the contract stated: "Representative agrees to pay from his/her own resources any unpaid charges due to the Manor as a result of the Representative's failure to *cooperate* in the Medicaid eligibility or redetermination process." (Emphasis added.) The Court concluded the Executor did not fail to cooperate with the Medicaid application process. The Executor was not required to "ensure" Medicaid eligibility, she was just required to "cooperate" with the application process.

Here, the Executor acted promptly to establish Weber's eligibility for Medicaid by applying for Medicaid benefits within the first month after Weber was admitted to Fox Run Manor. The Executor made a full and complete disclosure of Weber's financial resources and income during the Medicaid application process and cooperated fully in providing all requested information.

When the initial application for Medicaid benefits was denied, the Executor cooperated in the redetermination process as specified in the contract. The Executor took the necessary action to appropriately reduce Weber's assets to the allowable limit to be eligible for Medicaid benefits. The Executor established a QIT, which is "a trust that allows an individual whose income is over the special income level (SIL), as described in rule 5160:1-6-03.1 of the Administrative Code, to have some or all of his or her income not be counted when determining Medicaid eligibility by placing income in the trust." Ohio Adm. Code 5160:1-6-03.2(B)(6). The Executor submitted the QIT documents to County Department of Job and Family Services, as required per the contract.

Fox Run Manor was not entitled to summary judgment because there was no genuine issue of material fact that the Executor had attempted to qualify Weber for Medicaid benefits in accordance with the contract. The Court additionally cautioned Fox Run Manor's "zealous pursuit of damages in breach-of-contract actions where it has broadly drafted its contract by including such terms as 'cooperating,' while minimizing a relatively narrow window-of-time concerning government-benefit determinations

TOPIC: **A witness to a "non-conforming" will under R.C. 2107.24 may inherit thus protecting a testator's intent over formalities.**

TITLE: **<u>In re Estate of Shaffer</u>, 2019-Ohio-234**
COURT: **Court of Appeals, Sixth District**
COUNTY: **Lucas County**
DATE: **January 25, 2019**

Joseph I. Shaffer, died July 20, 2015, at the age of 87. A 1967 will was admitted to probate and a subsequent 2006 will was produced. The 2006 will benefited Juley Norman ("Norman") and her son, Zachary ("Appellant"), who developed a close relationship with Shaffer

prior to his death. Norman was Shaffer's "meaningful other." He also had a son, Terry with whom he had established a sleep disorder company.

On December 22, 2006, when Shaffer was approximately 78 years old, he decided to go to the hospital because he was not feeling well. Before leaving, Shaffer asked Appellant to get him some paper, which he used to write the document at issue, signed it, and gave it to Norman. Shaffer then told Appellant to keep the document for his mother. They then went to the hospital, where Shaffer was treated for elevated glucose levels and had a heart cath.

The 2006 document stated as follows:

> Dec 22, 2006/My estate is not/completely settled/All of my Sleep Network/ Stock is to go to/Terry Shaffer./Juley Norman for/her care of me is to/receive 1/4 of my estate/Terry is to be the/executor./This is my will./
>
> /s/ Joseph I Shaffer

During the next few years, Shaffer referred to the "will" on two occasions. According to Norman, Shaffer had a will from 1967 but never updated it after his wife died. She testified the decedent did not like to talk about death and had never probated his wife's estate. She believed that the decedent would not have talked to an attorney about changing his will because it would have raised the issue of probating his wife's estate, which he wanted to avoid.

After Shaffer's death in 2015, Appellant attempted to probate the 2006 will. The court did not allow Appellant to testify or cross examine opposing witnesses because he was pro se. The magistrate found that the will was not properly executed and could not be admitted. The magistrate also noted that 1) the decedent had not referenced his prior will in the 2006 document or to the witnesses, 2) the language of the 2006 document is contradictory because the decedent wrote his estate was not completely settled and yet he devised "all" of his property; 3) the decedent prepared the document while he was in the midst of a health crisis and may not have been able to form a clear intent; 4) Norman questioned the decedent as to the validity of the document as a will and yet no one at the hospital was asked to witness the 2006 document; 5) the 2006 document did not mention the decedent's other son or indicate how the remainder of the decedent's estate would be distributed.

Finally, the magistrate held that R.C. 2107.24 which governs documents purporting to be wills but which do not comply with the formalities of R.C. 2107.03 including attestation and subscription did not apply R.C. 2107.24 is intended to provide for admission of nonconforming wills due to an inadvertent mistake in execution or unusual circumstances warranting a remedy rather than in cases where the testator was ignorant of the law. The trial court adopted the magistrate's decision.

The right to dispose of property at death is a limited statutory right controlled by law. R.C. 2107.03 and 2107.15 work together to protect a decedent's intent that property distribution follow decedent's wishes and not the laws of descent. A statutorily compliant will must be admitted but can be challenged on other grounds.

Witnesses who are also heirs are competent but subject to "purging" under 2107.15. Purging voids the bequest to a witness but prevents the will as a whole from being declared invalid.

Here the Appeals Court found that R.C. 2107.24 does not require "competent or disinterested witnesses" so the purging statute does not apply to a 2107.24 will. The probate court must still find by clear and convincing evidence that decedent prepared the document and intended it to be a will. Here, the Probate Court should have admitted the will.

TOPIC: **The Court will look at the plain language of the annuity beneficiary designation form to determine beneficiaries. If the language is ambiguous, the Court will look to extrinsic evidence, including the decedent's will to determine intent.**

TITLE: **In re Estate of Harris, 2018-Ohio-3725**
COURT: **Court of Appeals, Seventh District**
COUNTY: **Belmont County**
DATE: **September 13, 2018**

William Harris, Sr. was married to Emily Harris. They had two children: William II and appellant John Harris. Emily also separately had a daughter, appellant Jeri Sanders Mesler.

William Sr. completed an annuity application, designating Emily as his primary beneficiary and William II as the only contingent beneficiary of his annuity. When William Sr. and Emily divorced, William Sr. executed a change in beneficiary form designating Emily as the primary beneficiary "until she dies." He designated William II as the first contingent beneficiary and stated William II "will get 100% of annuity remaining after she [Emily] dies." William Sr. designated his cousin, Margaret Roberts Van Kirk, as the second contingent beneficiary "if anything remains."

William Sr. died in 2002. Emily received the annuity payments until her death in 2006. William II then received the annuity payments until his death in 2008. After William II's death, Margaret received the annuity payments until her death on November 23, 2016. The annuity had a remaining value of $77,946.90 after Margaret's death.

The Attorney for the appellants indicated that William II was the beneficiary of the annuity and it was necessary to reopen the estate to liquidate that asset. The probate court reopened William II's estate and the $77,946.90 was issued to that estate.

At the request of the Attorney for the appellants, the probate court held a hearing to determine who was entitled to the balance of the annuity. The court found that the balance of the annuity funds was to be paid to Margaret's estate. John Harris and Jeri Sanders Mesler appealed.

The Court of Appeals held that based on the language of the annuity beneficiary form as well as William Sr.'s will, he intended to cut off the inheritance ty his own family after the death of William II. The balance of the annuity passed to William Sr.'s cousins.

TOPIC: **The trial court erred in ruling that the decedent's siblings were not beneficiaries of her investment account because the weight of the evidence demonstrated the clear intent of the decedent was to name the siblings as beneficiaries.**

TITLE: **Murphy v. Hall, 2019-Ohio-188**
COURT: **Court of Appeals, Eleventh District**
COUNTY: **Trumbull County**
DATE: **January 22, 2019**

Six of the siblings ("Appellants") of the decedent filed a complaint against the seventh sibling ("Appellee") seeking a declaration that all seven siblings are the beneficiaries of her Fidelity 403(b) account. They claimed the decedent completed a change of beneficiary form, leaving each of them a 14 percent interest in her 403(b) account. Appellee filed an answer arguing that all the proceeds of the 403(b) account should be paid to The Estate of Catherine M. Murphy, which named Appellee as sole beneficiary. She claimed the change of beneficiary form was not properly executed and did not reflect the decedent's intent.

A friend of the decedent had completed the change of beneficiary form. She testified that she changed the form to include all the siblings as equal beneficiaries because this is what decedent wanted. She testified that she observed the decedent's mental state was "clear" at the time that the decedent signed the form.

The trial court held that proceeds from the 403(b) account should be paid to the estate of the one sibling. The court applied the clearly expressed intent test, finding that the change of beneficiary form did not reflect the decedent's intent because the friend did not have explicit direction from the decedent." The siblings appealed.

The Court of Appeals reversed, finding the weight of the evidence demonstrated that the beneficiary form revealed the decedent's clearly expressed intent. Although the friend admitted that she may have completed the form incorrectly, she also testified that she completed the form to reflect the decedent's intent. The recorded phone calls between the decedent and Fidelity indicate that she understood that her investment account would pass to her estate if she did not complete a change of beneficiary form.

TOPIC: **The attorney who created a will and is counsel for the executor of the estate can testify to resolve a latent ambiguity in a will when neither party moves to disqualify the testimony during the evidentiary hearing.**

TITLE: **Bogar v. Baker, 2019-Ohio-1762**
COURT: **Court of Appeals, Seventh District**
COUNTY: **Mahoning County**

DATE: April 29, 2019

Thomas Bogar died testate. He made two bequests in his will: he left his home and "all contents of said real estate" to his brother ("Appellant") and the remainder of his property to the defendant-appellees. Appellant claimed the contents of the real estate included the farm equipment and vehicles located at the property. The executor claimed the "real estate" only included the contents of the home located on the property.

The attorney who created Bogar's will testified that Bogar did not consider the farm equipment and vehicles to be part of the contents of the real estate. He wanted the farm equipment and vehicles to be part of the residuary for his other beneficiaries.

The probate court awarded Appellant the real estate and the contents of the main house only. All other tangible and intangible personal property, which included the farm equipment, was awarded to the Appellees.

On appeal, Appellant argues that it was inappropriate for the probate court to consider testimony from Bogar's attorney because he was not administered an oath before testifying and he was Appellee's counsel in this matter.

The Court of Appeals held that since Appellant made no objection to the lack of an oath during the hearing, the claim was waived. The Court also noted that as an officer of the court, an attorney is always under oath when speaking to matters within his personal knowledge.

Appellant claimed the attorney's testimony created a conflict of interest because although he created the will, he was representing the executor in this case. The Ohio Supreme Court has held that neither the Ohio nor the Federal Rules of Evidence bar an attorney from testifying on behalf of his own client. Here, the Appellant actually called the attorney to testify at the evidentiary hearing. Neither party disputed the admissibility of the attorney's testimony and Appellant did not make a motion to disqualify the attorney's testimony.

Appellant also argued that the probate erred in construing the plain language of the will. The probate court used extrinsic evidence to determine the latent ambiguities in the will. Appellant testified that he did not have any conversations with Bogar about how he wanted his property distributed after his death. However, the attorney testified as to Bogar's intent. The Court of Appeals held that the Attorney's testimony resolved the latent ambiguity in the will.

FRIVOLOUS CONDUCT

TOPIC: **A trial court's findings of frivolous conduct will be upheld without proof of abuse of discretion through the review of the transcripts.**

TITLE: **Taneff v. Lipka, 2019-Ohio-887**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **March 14, 2019**

An ancillary estate was opened in Ohio for real estate owned by the decedent. One of the decedent's four children, who was also an attorney in Ohio, was appointed as administrator. Two of the other siblings filed for her removal. The probate court appointed a successor administrator. The attorney/heir and another sibling (the "appellants") disagreed with the successor administrator's ("appellee") handling of the sale of the property and attempted to have him removed.

The probate court found that the appellants' arguments to remove appellee as administrator were without credible evidence to suggest he neglected his duty or engaged in any conduct warranting his removal. After much interference with the sale of the property, the probate court held that the attorney/heir willfully violated both Civ. R. 11 and R.C. 2323.51 and that reasonable attorney fees and costs would be assessed to her. The court found that the attorney/heir had willfully drafted, read, and signed numerous baseless pleadings and other documents, which she filed to cause delay. On appeal, the appellant asserted 12 assignments of error, all of which the Court of Appeals overruled.

The Court of appeals held that it lacked jurisdiction to consider the attorney's challenge to removal and substitution rulings because the appeal was untimely under App.R. 3. A notice of appeal, which must designate the judgment, order, or part thereof appealed from, must be filed within 30 days of a judgment of the trial court.

Appellant also failed to demonstrate the order was void. She did not properly present her related claims in her appellate brief. Pursuant to App.R. 16(A)(7), the appellant must include in its brief an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.

In adjudicating a motion for sanctions under Civ.R. 11, a trial court must consider whether the individual signing the document: (1) has read the pleading; (2) has good grounds to support it to the best of his or her knowledge, information, and belief; and (3) did not file it for purposes of delay. If the trial court determines that the filing did not meet one or more of these requirements, then the court must determine whether the violation was willful.

The appellant is required to submit a transcript of the trial proceedings. Without a transcript, the appellate court must presume the regularity of the proceedings of the trial court

and that the facts were correctly interpreted. Sanctions of attorney fees were properly assessed against the attorney because, without a transcript for court to review, the appellant failed to demonstrate she had not willfully violated Civ.R. 11 and R.C. 2323.51.

TOPIC: **An appeal is deemed frivolous when it does not present a reasonable question for review.**

TITLE: **Waller v. Menorah Park Ctr. For Senior Living, 2019-Ohio-671**
COURT: **Court of Appeals, Fifth District**
COUNTY: **Stark County**
DATE: **February 19, 2019**

Marie A. Waller ("Appellant") was an employee of Menorah Park Center for Senior Living ("Appellee"). After she slipped and fell into a tub while cleaning it, appellant filed a worker's compensation claim. Her claim was allowed, and then she filed subsequent claims.

On April 20, 2016, the trial court filed a Judgment Entry indicating that the case had been settled by agreement of the parties and dismissing the case. In in its Judgment Entry, the trial court ordered that "A final agreed upon judgment entry approved by counsel for all parties shall be filed with the Court within 30 days of the filing of the within entry."

On February 9, 2018, appellant filed a Motion to Enforce Settlement. Appellant, in her motion indicated that on or about December 4, 2017, she had mailed all executed settlement documents to Appellee's counsel. She claimed that on December 20, 2017, her counsel had received a call from Appellee's counsel rejecting the settlement agreement.

A hearing was scheduled on the Motion to Enforce Settlement for March 16, 2018. The trial court noted that after appellant's counsel realized that there was no legal basis for her motion, appellant retracted her argument that the settlement was valid and made an oral motion to withdraw the Motion to Enforce. The trial court granted the motion to withdraw. The trial court also granted appellee's request for attorney fees and ordered that counsel for appellant pay the sum of $1,277.50 to appellee.

R.C. 2323.51 provides a court may award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. A motion for sanctions brought under R.C. 2323.51 requires a three-step analysis by the trial court. The trial court must determine (1) whether the party engaged in frivolous conduct, (2) if the conduct was frivolous, whether any party was adversely affected by it, and (3) if an award is to be made, the amount of the award.

The Court of Appeals upheld the trial courts determination of a frivolous filing and award of attorney's fees and expenses. The Court noted that the "Plaintiff's [appellant's] counsel admitted that there was no legal basis for the motion to enforce settlement to be filed. It is every attorney's duty to know the laws that apply to his or her case. Even after this mistake was made,

Plaintiff [appellant] had three weeks in between the filing of the brief in opposition and the hearing date in which she could have withdrawn her motion to enforce."

The Court of Appeals also awarded $1,358.75 in attorney fees and expenses expended for the appeal. App.R. 23 provides a court of appeals with authority to order an appellant or his attorney to pay the reasonable expenses of the appellee, including attorney fees and costs, where the court determines that the appeal is frivolous. The function of App. R. 23 is to compensate a non-appealing party for the expenses incurred in having to defend a frivolous appeal and to deter frivolous appeals in order preserve the appellate calendar and limited judicial resources for cases that are truly worthy of the court's consideration. (Citations omitted).

TOPIC: **A satisfaction of judgment renders an appeal from that judgment moot. A law firm does not have standing to appeal a Civ.R. 11 judgment against an attorney. If a party persists in relying on allegations or factual contentions with no evidentiary support, the party has engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(iii).**

TITLE: **Hoover Kacyon, L.L.C. v. Martell, 2018-Ohio-4928**
COURT: **Court of Appeals, Fifth District**
COUNTY: **Stark County**
DATE: **December 3, 2018**

Wife filed a motion under Civ.R. 60(B), requesting relief from the Decree of Divorce and Separation Agreement between Husband and Wife. She argued she was entitled to relief from judgment due to newly discovered evidence and fraud and/or misrepresentation. Wife subsequently amended her motion, withdrawing her claims of fraud and misrepresentation.

Husband filed a motion for sanctions against Wife and her counsel, alleging the motion for relief from judgment was frivolous and brought in bad faith. The trial court granted Husband's motion pursuant to Civ. R. 11 and R.C. 2323.51. The trial court awarded $34,620.00 to Husband for attorney's fees and costs. Wife and her counsel paid the judgment.

Wife dismissed the remainder of her pending motion for relief from judgment. Husband filed a motion for sanctions against Wife and her counsel pursuant to Civ.R. 11, R.C. 2323.51, and R.C. 3105.73. Husband argued Wife and her counsel engaged in frivolous conduct for filing a motion for relief from judgment alleging Wife was incompetent and under duress when she signed the Separation Agreement and Decree of Divorce.

The trial court found at the time of the filing of the Civ.R. 60(B0 motion, Wife's counsel did not possess good grounds pursuant to Civ.R. 11 to support the argument of incompetency. The court also found under R.C. 2323.51, Wife and counsel engaged in frivolous conduct by filing a motion with no evidentiary support. The Husband was entitled to $80,000 in attorney's fees for the frivolous filing based on R.C. 3105.73. Hoover Kacyon, LLC, the Wife's law firm appealed both judgments.

The Court of Appeals dismissed the law firm's appeal of the judgment for lack of jurisdiction because the law firm lacked standing pursuant to Civ.R. 11. The payment of a judgment rendered the appeal from that judgment moot.

The Court of Appeals then determined whether the law firm had standing to appeal the trial court's judgment as to Civ. R. 11. A law firm cannot be sanctioned pursuant to Civ.R. 11 because the trial court could only sanction the individual attorneys who signed the pleadings. The law firm, as a legal entity, had not been prejudiced by the judgment, and thus, it did not have a personal stake in the outcome in the action and did not have standing to appeal the Civ.R. 11 issue.

The Court held that the trial court did not err in determining that a wife and her counsel's conduct was frivolous under R.C. 2323.51(A)(2)(a)(iii). If a party makes an allegation or factual contention on information or belief, then the party must have the opportunity to investigate the truth of that allegation or factual contention. However, if a party persists in relying on that allegation or factual contention when no evidence supports it, then the party has engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(iii). The wife and her counsel's persistence in pursuing her claims of mental incompetence amounted to frivolous conduct. Additionally, the Court upheld the award of $80,000 in attorney's fees because the trial court appropriately used R.C. 3105.73(B) to determine the amount of the sanction.

GUARDIANSHIPS

TOPIC: **To vacate a final account pursuant to R.C. 2109.35(B), appellant must demonstrate that it was a person affected by the order, it was not a party to the proceeding in which the order was made, it had no knowledge of the proceeding in time to appear in it, and there is good cause to vacate the order.**

TITLE: **In re Stropky, 2018-Ohio-5371**
COURT: **Court of Appeals, Fifth District**
COUNTY: **Stark County**
DATE: **December 28, 2018**

Kahler was the court appointed guardian of the estate of John Stropky ("Stropky"). He filed a guardian's inventory on July 11, 2016 and an amended guardian's inventory on December 1, 2016. He then filed a motion to resign as guardian on December 21, 2016. The trial court granted the motion on December 22, 2016 and ordered appellee to file a final account within thirty days. Kahler filed a final account on February 9, 2017. On March 29, 2017, the trial court approved and settled the account, finding the guardianship estate was fully and lawfully administered and discharged Kahler as guardian.

Rose Lane Health and Rehabilitation, Inc. ("Rose Lane") filed a motion to vacate the entry approving and settling account on February 7, 2018. Rose Lane claimed Kahler breached

his statutory duties as guardian and thus good cause existed for vacating the entry approving and settling account. Rose Lane alleged Stropky was indebted to Rose Lane in excess of $110,000.

The trial court held Kahler was not responsible for Stropky's debt to Rose Lane and denied the motion to vacate. The court found that Rose Lane had not required Kahler to sign the Residency Agreement in his representative capacity as guardian of Stropky's guardianship estate. Therefore, the Guardianship was never a party to the Residency Agreement. Rose Lane appealed.

The court of appeals held that to vacate a final account pursuant to R.C. 2109.35(B), appellant must demonstrate that it was a person affected by the order, it was not a party to the proceeding in which the order was made, it had no knowledge of the proceeding in time to appear in it, and there is good cause to vacate the order.

The Court of Appeals held that the trial court erred when it held that the appellant has not shown "good cause" to vacate the order. The appellant demonstrated that it was a person affected by the order, it was not a party to the proceeding in which the order was made, and it had no knowledge of the proceeding in time to appear in it. Accordingly, the trial court erred in not granting appellant's motion to vacate the entry approving and settling account.

TOPIC: **The appointment of a guardian is not clearly erroneous when the ward consented to the appointment at the magistrate's hearing and did not file objections.**

TITLE: **In re Guardianship of Ronald Foster, 2019-Ohio-1649**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **May 2, 2019**

Ronald Foster appealed the appointment of Peter Russell as the guardian of his estate and of his person. Foster's siblings requested a guardian be appointed to Foster after he was admitted to the hospital for vascular dementia, psychosis, diabetes, and multiple medical issues. The probate court appointed Foster independent legal counsel under R.C. 2111.02(C)(7).

Foster consented to the court appointing Russell as guardian. Foster did not file objections to the magistrate's decision. Foster then filed a written request with the probate court, asking the court to evaluate the continued necessity of the guardianship. Under R.C. 2111.49(C), when the ward alleges competence, the court is required to conduct a hearing at which time the guardian or applicant for guardianship must prove the ward's continued incompetence by clear and convincing evidence.

The Court of Appeals held that because Foster did not file objections to the magistrate's decision personally or through his appointed counsel, the appeal can only be reviewed for plain error. The Court held that since Foster was represented by counsel during the probate court proceedings and consented to the appointment of the guardian, there was no plain error or

manifest miscarriage of justice. By consenting to the outcome, Foster relieved the applicant for guardianship of the burden to demonstrate his incompetence by clear and convincing evidence.

TOPIC: **A father was appropriately held in indirect contempt for forging his attorney's signature on a guardianship application.**

TITLE: **In Re Guardianship of Polete, 2018-Ohio-5275**
COURT: **Court of Appeals, Second District**
COUNTY: **Montgomery County**
DATE: **December 28, 2018**

Sean Polete is the father of Bailey, an adult child with medical and developmental disabilities. When she turned 18 years-old, Carrie Polete, Bailey's mother, filed an application to become Bailey's guardian. Mr. Polete expressed the desire to file an application to become a co-guardian. At the guardianship hearing, the matter was referred for mediation, which was unsuccessful. The Poletes subsequently filed for divorce and a guardian ad litem was appointed.

In March 2017, both parties consented to the appointment of a third-party guardian and withdrew their respective guardianship applications. Mr. Polete subsequently sought to withdraw his consent, but the probate court denied the request. On April 7, 2017, the court appointed Melinda Poist, one of Bailey's therapists, as guardian.

Poist alleged Mr. Polete engaged in repeated behavior that interfered with Bailey's caregivers and which also interfered with Poist's ability to act as guardian. In August 2017, Poist filed a motion seeking to resign as guardian, citing Mr. Polete's behavior, which she claimed rendered her unable to continue in the capacity of guardian.

On September 15, 2017, Mr. Polete attempted to file an application for guardianship of Bailey. The clerk for the probate court noticed that Mr. Polete tried to file a duplicate of a previously filed application. She printed a blank application for him to complete. Mr. Polete completed the form while standing at the clerk's desk. When the clerk took the form to the court's chambers, she realized that Mr. Polete had forged his attorney's signature. After reviewing the application, the court issued a show cause order alleging that the form contained a forged signature.

At the hearing, Mr. Polete testified that he did bring the previously-filed application, which was signed by his attorney. His attorney advised him to take the form to the courthouse to file. She did not seem to notice that it was the previously filed form. When Mr. Polete completed the new form, he claimed that he merely "transcribed" the information from the denied application onto the blank application, and that he "believed" he had Holm's implied consent to sign her name to the document. Mr. Polete further testified that he had "no intent to defraud the Court" or to "delay or impede the judicial process." The magistrate held Mr. Polete in indirect criminal contempt of court and ordered him to pay $500 as a sanction. The probate court adopted the decision. Mr. Polete appealed.

The Court of Appeals held that the probate court did not abuse its discretion in finding Mr. Polete in contempt of court under R.C. 2705.01 because there was sufficient evidence upon which a reasonable trier of fact could conclude his acts were intentional and that they impeded the effective administration of justice. Even without direct evidence, forging a signature on a document required for a guardianship action and then submitting it for filing with a court constitutes misconduct.

TOPIC: A trial court's duty to issue findings of fact and conclusions of law is mandatory when such request complies with Civ.R. 52.

TITLE: In re Guardianship of Bernie, 2019-Ohio-334
COURT: Court of Appeals, Twelfth District
COUNTY: Butler County
DATE: February 4, 2019

Appellant, Marlene Penny Manes ("Penny"), appealed a decision of the Butler County Court of Common Pleas, Probate Division, denying her motion to remove the guardian previously appointed by the court for William Bernie ("Bill"), or, in the alternative, to have the guardian show cause for denying her visitation with Bill.

Penny and Bill were in a romantic relationship for eight years before Bill contracted encephalitis. The virus severely affected Bill's cognitive function and he now requires 24-hour care. Prior to contracting encephalitis, Bill had executed a general power of attorney and a health care power of attorney, giving authority to his siblings for his affairs and healthcare. Howard Bernie, Bill's brother, was appointed as Bill's guardian. Howard and Penny disagreed regarding Bill's care, which led to Howard denying Penny visitation with Bill.

On appeal, Penny argued that the probate court erred when it refused to issue findings of fact and conclusions of law pursuant to Civ. R. 52. The Court of Appeals disagreed, holding that the probate court offered sufficient findings of fact and conclusions of law to allow meaningful appellate review of a guardianship proceeding. The probate court specifically found that the guardian's decisions regarding the ward's care were made in "good faith" and in furtherance of what the guardian believed to be in the ward's best interest.

Penny also asserted that the probate court erred in not considering the Rules of Superintendence governing its responsibilities of guardians mandatory. Penny believed the probate court should have found Howard in violation of the Superintendence Rules.

The Superintendence Rules are administrative directives only and do not function as, or have the force of, law in the same manner as rules of practice and procedure. Instead, the Superintendence Rules are internal "housekeeping rules" of concern to judges but create no rights in individual defendants. As such, a violation of the Superintendence Rules is not grounds for reversal on appeal.

The Court of Appeals found that the guardian did not violate Sup.R. 66.09(E) by suspending the girlfriend's visitation based upon the ward's medical problems and the inability of the girlfriend to effectively communicate with the guardian.

TOPIC: **A probate court's determination concluding a guardianship is warranted is not an abuse of discretion, even if the Appellant's health has improved and a less restrictive alternative to a guardianship exists.**

TITLE: **In re Guardianship of Mannies, 2019-Ohio-430**
COURT: **Court of Appeals, Sixth District**
COUNTY: **Wood County**
DATE: **February 8, 2019**

Appellant, Wayne Mannies, appealed from the July 2, 2018 judgment of the Wood County Court of Common Pleas, Probate Division, declaring appellant incompetent due to a developmental disability. The court appointed a guardian of the person of appellant.

On January 26, 2018, an emergency guardianship was established for the appellant because of health issues. The court extended the guardianship until March 1, 2018. A healthcare power of attorney was executed on appellant's behalf in March 2018.

A court investigator concluded that appellant could not take care of his personal finances, care for himself, drive, or take medications due to his moderate intellectual disability. The appellant asserted his opposition to the guardianship at a review hearing on July 2, 2018. He asserted that the failure of health care providers to understand the healthcare power of attorney was an insufficient reason to continue the guardianship.

The guardian and service coordinators from the Wood County Board of Developmental Disabilities testified that the guardianship should continue. The guardian stated that the appellant could not make decisions for himself and had not been taking his medicines on his own. The service coordinators testified that some health care providers will not speak with the guardian if appellant only had a power of attorney.

At the hearing, the probate court continued the guardianship based on the court investigator's evaluation, the expert's report, and the appellant's overall demeanor. The probate court indicated that the least restrictive means of the power of attorney was insufficient.

The Court of Appeals upheld the probate court's decision because although the appellant's health issues had improved, there was no evidence to substantiate the claim that the improvement was because of the healthcare power of attorney. The Court noted that the probate court had considered the appellant's objections and observed his demeanor before concluding that a guardianship was warranted. Therefore, the probate court did not abuse its discretion.

TOPIC: **There are circumstances in which a non-party next-of-kin can intervene in a guardianship proceeding as a matter of right, pursuant to Civ.R. 24(A)(2).**

TITLE: **In re Guardianship of Bakhtiar, 2019-Ohio-581**
COURT: **Court of Appeals, Ninth District**
COUNTY: **Lorain County**
DATE: **February 19, 2019**

Khashayar Saghafi appealed from the judgment denying his motion to intervene in the guardianship proceedings involving his mother, Fourough Bakhtiar.

Saghafi filed a motion to intervene as a party in the guardianship proceedings in order to gain access to the guardianship file, to obtain visitation with his mother and for other next of kin, to obtain and evaluate his mother's records, to obtain and review probate court filings, to obtain and review financial records related to the guardianship, to exercise his rights as next of kin, and to request evidentiary hearings on matters that affect the best interests of his mother. The trial court denied the motion to intervene, stating "there is no recognized right or need to 'intervene' in a guardianship. Mr. Saghafi may request the Court for any of the relief that he listed in his Motion to Intervene, without necessity to intervene."

Saghafi appealed, asserting the probate court erred when it failed to preserve the best interests of the ward in denying his motion to intervene in the guardianship proceeding.

The Court of Appeals agreed with Saghafi, finding that there are circumstances in which a nonparty next of kin would be permitted to intervene as a matter of right, pursuant to Civ. R. 24(A)(2). Citing an Ohio Supreme Court case in which the Court stated that the appellant "could have filed a motion to intervene," the Court of Appeals concluded that there is in fact a recognized right or need to intervene in guardianship proceedings. *In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915. The case was remanded for the trial court to consider whether Saghafi met the standard required in Civ.R.24(A)(2) to intervene in the guardianship proceedings.

NAME CHANGES

TOPIC: **When granting an application for a name change for a minor child from the child's female birth name to a male name, the probate court must consider seven factors in determining whether the name change serves the child's best interest and give special weight to the parents' assessment of their child's best interest.**

TITLE: **In re H.C.W., 2019-Ohio-757**
COURT: **Court of Appeals of Ohio, Twelfth District**
COUNTY: **Warren County**

DATE: March 4, 2019

The mother of H.C.W. filed an application to change her 15 year-old child's name from her female birth name to a male name, with the father's consent. H.C.W. had completed approximately 20 hour-long sessions with a therapist who specialized in transgender issues and had been formally diagnosed with gender dysphoria. The child was scheduled to begin testosterone therapy at Children's Hospital. The child had a short hair-cut, wore male clothing and has been going by a male name at school and at home. The parents petitioned the court for a legal name change to help the child formalize the gender change for purposes of a driver's license, passport, prescriptions, and college applications.

Pursuant to R.C. 2717.01(B) the standard for deciding whether to permit a name change for a minor is proof that the facts set forth in the application show reasonable and proper cause for changing the name of the applicant. The trial court must consider the best interest of the child in determining whether reasonable and proper cause has been established.

In considering a gender name change for a transgender child, a court should consider:

(1) the age of the child;
(2) the child's motivations regarding the name change;
(3) the length of time the child has used the preferred name;
(4) any potential anxiety, embarrassment, or discomfort that may result from the child having a name he or she believes does not match his or her outward appearance and gender identity;
(5) the history of any medical or mental health counseling the child and parents have received;
(6) the name the child is known by in his or her family, school, and community; and
(7) the wishes and concerns of the child's parents.

The Court of Appeals held that the probate court erred in failing to consider the parents' assessment of their child's best interest. The court should give the parents' assessment some special weight when ruling upon the name change application. The probate court abused its discretion by failing to consider appropriate best interest factors before it denied the name change application.

TOPIC: A probate court has no authority to amend a birth certificate to add race and nationality classifications in a name change.

TITLE: In re Easterling, 2019-Ohio-1516
COURT: Court of Appeals, First District
COUNTY: Hamilton County
DATE: April 24, 2019

Appellant filed an application in the probate court seeking to change his "Name/Race/Nationality." He requested his name be changed from Douglas Brett Easterling, Jr

to Raphael Kulika Bey. He also requested that the probate court change his race from "Black/African American" to "Moor/Aboriginal American national." The only evidentiary material attached to the application was a copy of his certificate of live birth. The certificate did not list his race or nationality.

R.C. 2101.24(A)(2) and 3705.15 provide the probate court with jurisdiction over the registration of unrecorded births and the correction of birth records. R.C. 3705.15 provides that anyone born in Ohio whose registration of birth has not been properly and accurately recorded, may file an application with the probate court to correct that birth record. The application must set forth all of the available facts required on the birth record that is sought to be corrected.

The probate court changed Appellant's name as requested, but denied the race and nationality designation change. The Court of Appeals upheld the trial court's decision. The probate court did not have authority to add additional facts to the birth record provided. The probate court only has jurisdiction to correct facts already on the record.

PROCEDURE

TOPIC: **An affidavit may not be disregarded simply because the person providing the affidavit has an interest in the outcome of the litigation. There is not a requirement of a "susceptible testator" if the will is not being contested.**

TITLE: **Estate of Henderson v. Henderson, 2018-Ohio-5264**
COURT: **Court of Appeals, Ninth District**
COUNTY: **Lorain County**
DATE: **December 28, 2018**

James Peter Henderson and Martha L. Henderson had three sons. In February 2007, both parents executed a durable power of attorney designating son Gene Henderson, as attorney in fact. James Henderson died in December 2007. Martha Henderson died in November 2010.

In September 2011, the Estate of Martha L. Henderson and the two other sons filed a complaint against Gene Henderson, including claims for breach of fiduciary duty, fraud, misrepresentation, undue influence, constructive trust, accounting, conversion, tortious interference with expectancy, replevin, and punitive damages/attorney fees. The most significant event was a wire-transfer transaction of $185,820.00 from a money market account held by Martha and Peter Henderson to Gene. The transfer occurred in September 2007, while Peter Henderson was alive.

The trial court granted partial summary judgment to Gene regarding the transfer. The trial court based its findings on an affidavit provided by a bank officer regarding the wire transfer. The court held that the evidence was "overwhelming that on September 21, 2007, James "Pete" Henderson went to the Credit Union and wire-transferred the sum of $185,820.00 from one of his accounts to Gene."

The Court of Appeals held that that trial court erred in finding that the evidence was overwhelming. The trial court did not consider an affidavit of one of the other sons, stating that James Henderson did not have the physical or mental capacity in September 2007 to go to the bank and make the transfer. The court noted that the affidavit may not be disregarded simply because the son had an interest in the outcome of the litigation. A non-moving party may rely on a self-serving affidavit to satisfy his reciprocal burden for summary judgment, as long as the affidavit relates to a genuine issue of material fact.

Additionally, the Court of Appeals held that not all claims for undue influence require a "susceptible testator." Because this was not a will contest case, there was not a requirement of a susceptible testator. The claim for undue influence did not fail because the money was not transferred by way of a testamentary gift. The issue of a fiduciary duty between Gene and his parents by the durable power of attorney was not addressed by the trial court. A gift to family members who are in a fiduciary relationship must yield to a more specific presumption of undue influence.

TOPIC: **When the motion on which the probate court ruled was filed in a different court and had already been ruled upon, the ruling is void.**

TITLE: **Estate of Welch v. Taylor, 2018-Ohio-4558**
COURT: **Court of Appeals, Twelfth District**
COUNTY: **Clinton County**
DATE: **November 13, 2018**

Plaintiffs filed a complaint in the Clinton County Court of Common Pleas, General Division, alleging that Defendant exercised undue influence upon decedent before his death. The general division court dismissed Plaintiffs' suit in an order granting judgment on the pleadings, finding that the probate court held proper jurisdiction over the matter. However, the general division's "Final Judgment" order did not include a transfer to the probate court. It was actually a straight dismissal of "all claims by plaintiffs."

Plaintiffs then filed a complaint in the probate division alleging that the inter vivos transfers from decedent to Defendant were predicated upon undue influence, requesting declaratory judgment, and alleging that Defendant was liable for conversion and unjust enrichment. Defendant filed a motion for summary judgment and moved to stay discovery until the probate court ruled on her motion for summary judgment.

The probate court held a hearing on the motions and later issued a judgment entry finding in favor of the Defendant. The probate court's entry indicated that it ruled upon Defendant's pleadings filed in November 2016 which was actually the original claim filed in the Court of Common Pleas, General Division. The only pending motions before the probate court were Defendant's motion for summary judgment and to stay discovery, as well as Plaintiffs' motion to compel discovery.

The Court of Appeals held that the probate court's decision was void. It had ruled on a motion that was never before it, and one that had been decided by a different court. The judgment of the probate court was reversed and remanded for the probate court to consider the correct motions.

TOPIC: The probate court does not have jurisdiction over claims based on contract law.

TITLE: Wiggins v. Safeco, 2019-Ohio-312
COURT: Court of Appeals, Second District
COUNTY: Montgomery County
DATE: February 1, 2019

Plaintiff, Wiggins, was administrator of his wife's estate. While the estate was being probated, the family home, titled solely in the wife's name, was damaged in a fire. The wife had an insurance policy through Praetorian Insurance. Wiggins had also purchased an insurance policy from Safeco after his wife's death. Both insurance policies provided the same coverages. Both insurance policies provided that if a loss covered by the policy was also covered by another policy, the insurance company would pay only its proportionate share of the loss, based on the total amount of coverage available. Safeco refused to cover the entire loss, claiming the Pratorian policy was responsible for part of the loss.

Wiggins filed a declaratory-judgment action in the probate court in June 2018, individually and as administrator of his wife's estate, against SafeCo, Liberty Mutual Group, Inc. Praetorian, Seterus, Federal National Mortgage Association, and the City of Dayton. All of the claims related to the SafeCo insurance policy and his belief that, under the policy, Safeco was obligated to fully pay for his losses from the fire and to pay all of the proceeds to him.

The probate court dismissed Wiggins' complaint for a declaratory judgment because it lacked subject matter jurisdiction under R.C. 2101.24(A)(1)(l) to address issues relating to defendant's obligations to plaintiff under his homeowner's insurance policy. The matter involved a contract dispute between the parties that was unrelated to the administration of the estate, therefore the probate court did not have jurisdiction. The probate court also lacked concurrent jurisdiction under § 2101.24(B)(1)(c)(i) over plaintiff's action because it did not involve 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. The Court of Appeals affirmed.

TOPIC: A meritorious claim or defense must be alleged to require the trial court to hold an evidentiary hearing for a Motion for Relief from Judgment under Civ.R. 60(B).

TITLE: RiverPark Group, LLC v. City of Dublin, 2019-Ohio-723
COURT: Court of Appeals, Tenth District

COUNTY: Franklin County
DATE: February 28, 2019

Dublin initiated an eminent domain action to acquire easements from RiverPark's property for construction of a public shared-use path as an appurtenance to the road.

On March 31, 2016, RiverPark filed a complaint for damages, temporary restraining order, and preliminary injunction, alleging that Dublin had trespassed on the property when, in September 2015, Dublin exercised its quick-take authority, and entered the property to begin construction of a public project.

The parties then notified the trial court that they had reached a settlement agreement. However, on May 26, 2016, before the parties submitted a settlement entry for the trial court's approval, RiverPark's counsel filed a motion to withdraw as counsel because RiverPark was unresponsive to communications from his attorneys and reasonable requests from Dublin. They also noted that RiverPark had instructed them to rescind the settlement agreement which was previously authorized.

RiverPark engaged new counsel and the parties agreed to the previously agreed-upon settlement. The parties recorded the settlement agreement with the trial court on June 29, 2016. On July 5, 2016, the trial court dismissed RiverPark's case against Dublin with prejudice, but retained jurisdiction to enforce the parties' settlement agreement.

Nearly one year later, on June 27, 2017, RiverPark sought to rescind the parties' settlement agreement by reopening the TRO action through a motion for relief from judgment under Civ.R. 60(B)(3), alleging that Dublin had engaged in fraud. RiverPark's primary allegation was that Dublin had failed to comply with the terms of the parties' settlement agreement.

Pursuant to Civ.R. 60(B), all of the requirements for relief from judgment must be satisfied. The three requirements are: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken.

The trial court found that RiverPark's motion failed to specifically allege that it has a meritorious claim or defense if relief was granted and failed to prove that it was filed within a reasonable time. Since two of the three requirements were not satisfied, RiverPark's Motion for Relief from Judgment was denied. On appeal, RiverPark claimed the trial court erred in denying the motion for relief from judgment under Civ.R. 60(B)(3) without holding an evidentiary hearing.

The Court of Appeals upheld the trial court's findings. Because the demonstration of a meritorious claim or defense is a requirement for relief for judgment, and RiverPark's motion did not allege that it had a meritorious claim or defense, there was no requirement for an evidentiary hearing.

TRUSTS

TOPIC: **A Trust has standing to bring a claim for declaratory judgment concerning the ownership rights of a property when it is the residuary beneficiary of an estate.**

TITLE: **Gerston v. Parma VTA, L.L.C., 2018-Ohio-2185**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **June 7, 2018**

The Decedent and his wife, Kimberly, had formed a Trust which named the survivor of them as the trustee. The Decedent was the sole owner of an LLC and owned a 76.62% majority interest in the subject property. The Appellants owned a minority 23.28% interest in the property. Kimberly, appellee and now primary trustee of his trust, sought a declaratory judgment declaring the trust to be the owner of the LLC. She also claimed breach of fiduciary duty, fraudulent conveyance, and conspiracy on behalf of the Trust.

When decedent created the trust, he also created his last will and testament. The will provided that upon his death, the remainder of his estate and property were to pour over into the assets of the trust. The Appellants contend that the Trust does not have standing because if it had an ownership interest in the property it would have passed to his estate through probate. The Court of Appeals held that the trust was a beneficiary of the estate with a vested interest in the outcome of the litigation, therefore finding the trust had standing.

The Appellants claimed that the decedent transferred his interests in the subject to them through an oral contract prior to his death. It was undisputed that there was no writing or document conveying, assigning, or transferring decedent's majority interest in the property to Appellants. The Appellants argued that the statute of frauds did not apply because the ultimate issue in the case was not the transfer of real estate but, rather, the transfer of a membership interest in the LLC. Appellants also claimed that the statute of frauds claim was not raised at the trial court level.

The Court of Appeals upheld the trial court's decision in favor of the Trust. A transfer, conveyance, or assignment would be subject to the statute of frauds. An agreement that does not comply with the statute of frauds is unenforceable. The Court found that the record showed the trial court questioned Appellants' counsel about the statute of frauds issue during an in-chamber conference. Since there was no writing signed by the decedent or the Trust, the trial court properly found that any alleged oral assignment did not comply with the statute of frauds or transfer provisions as set forth in the loan documents.

TOPIC: **A grantor of an irrevocable trust does not have standing to bring an action to modify the trust terms to obtain more favorable tax terms.**

TITLE: **Millstein v. Millstein, 2018-Ohio-2295**
COURT: **Court of Appeals, Eighth District**
COUNTY: **Cuyahoga County**
DATE: **June 14, 2018**

Appellant created two irrevocable trust agreements for the benefit of his children. He retained no rights as a beneficiary of the trusts, is responsible for reporting any net taxable income associated with the trusts. On July 28, 2017, Appellant filed a petition for declaratory and equitable relief. He alleged that under federal income tax law, the two trusts were designed so Appellant would personally report the federal taxable income, deductions and credits realized from the investments of trusts under the "grantor trust" rules of the Internal Revenue Code sections 671 et seq. He sought "equitable reimbursement of income taxes" from the two trusts as well as a "virtual representation" finding of the relevant beneficiaries of the two trusts for the purpose of effectuating such reimbursement.

The trust beneficiaries named as defendants in Appellant's petition moved for the petition to be dismissed pursuant to Civ.R. 12, arguing that 1) appellant lacked standing to request that the trusts make any payment to him, 2) that there is no cognizable claim in Ohio for equitable reimbursement to a grantor for tax liability incurred under the terms of a trust the grantor created, 3) appellant's claim was inequitable and 4) appellant's petition was barred by collateral estoppel. The trial court granted the motions to dismiss on October 18, 2017, without opinion.

On appeal, Appellant only alleged that the trial court erred in dismissing his petition for equitable relief pursuant to Civ.R. 12. The Court of Appeals upheld the trial court's dismissal of the claims. It held that the relief sought by appellant is specifically addressed in the Ohio Trust Code and unavailable to him without the cooperation of a trustee or beneficiary.

Under R.C. 5804.16, "To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect." However, pursuant to R.C. 5804.10, only a trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification under R.C. 5804.16. R.C. 5804.10 specifically limits a settlor's ability to commence a proceeding to approve a proposed modification or termination of a trust to certain situations involving the consent of the trust's beneficiaries under R.C. 5804.11. The court held that Appellant did not bring the suit under R.C. 5804.11 and is precluded by R.C. 5804.10 from unilaterally seeking modification to achieve his tax objectives under R.C. 5804.16. The Court noted that no court may employ equitable principles to circumvent valid legislative enactments.

TOPIC: **A creditor is able to enjoin a trustee from making prospective distributions from the spendthrift trust to the beneficiary when the beneficiary has an unqualified right to withdraw from the trust.**

TITLE: **Fahey Banking Co. v. Carpenter, 2019-Ohio-679**
COURT: **Court of Appeals, Tenth District**
COUNTY: **Franklin County**
DATE: **February 26, 2019**

Plaintiff-appellant, the Fahey Banking Company ("Fahey"), appealed from a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 12(B)(6) motion to dismiss of defendant-appellee Stephen D. Enz, Trustee of the Kenneth N. Carpenter Irrevocable Trust ("Trustee"). The trial court determined that the trust is a spendthrift trust and held that R.C. 5805.01 prohibits a creditor of the beneficiary from reaching the interest or a distribution from a spendthrift trust by the trustee before its receipt by the beneficiary.

The Trial Court erred by failing to recognize that a present right of withdrawal from a Trust is a present ownership interest to which a spendthrift provision does not apply and the interest may be attached by a creditor pursuant to a Creditor's Bill under R.C. § 2333.01. R.C. 5805.05(A) states:

> To the extent that a trust that gives a beneficiary the right to receive one or more mandatory distributions does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary's interest by other means.

The Court of Appeals held the language "to the extent" applies to the spendthrift provision and not to the right to receive one or more mandatory distributions. Therefore, the mere existence of a spendthrift provision in a trust is not dispositive of the right of a creditor to gain access to trust distributions that are mandatory. Based on R.C. 5805.06, since Carpenter has the power to withdraw an amount annually, she could be treated as the settlor of a revocable trust but only to the extent of the amount that she may withdraw annually ($5,000 or five percent of the principal).

TOPIC: **A beneficiary does not have a choice between occupying any of the settlor's properties when the language of the trust stipulates a specific property.**

TITLE: **Wyper v. DuFour, 2019-Ohio-1035**
COURT: **Court of Appeals, Sixth District**
COUNTY: **Wood County**
DATE: **March 22, 2019**

Dan Wyper included a provision in his trust for Nadine DuFour to live in his home located at 11149 River Bend Court West, Perrysberg, Ohio. ("River Bend") When he died, he and Nadine were living together in Dan's other home, located at 29666 Chatham Way in Perrysberg ("Chatham"). Dan had leased the River Bend property to a tenant on a one-year lease with an automatically renewing month-to-month option. The tenant was living at the River Bend Property at the time of this appeal.

Nadine was named the Trustee of the Trust. Margaret and David Wyper, Dan's children, sought to remove Nadine as trustee for failure to make distributions to them in accordance with the trust agreement. The court removed Nadine as trustee and appointed a successor trustee.

The successor trustee requested assistance from the court to sell the Chatham property. Margaret and David wanted to sell the Chatham property in an effort to prevent foreclosure. The property was encumbered with a mortgage and the income generated from the trust was insufficient to make the mortgage payments.

Nadine claimed that she had a right to continue living at the Chatham property. The trial court found that the language in the trust was clear. Dan specified that Nadine was to have a right to occupy the River Bend property. The court noted that he had ample time to amend his trust to allow her to live in the Chatham property prior to his death.

The Court of Appeals upheld the trial court's decision. The language in the trust was not ambiguous. Nadine was entitled to the exclusive occupancy of the River Bend property.

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ESTATE OF: JOSEPH CURC, JR. : OPINION

CASE NO. 2018-T-0044

17 Est 0638

Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2017 EST 0638.

Judgment: Reversed and remanded.

John H. Chaney,III, Daniel Daniluk LLC, 1129 Niles-Cortland Road, S.E., Warren, OH 44484 (For Appellant, Raymond Curc).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Raymond Joseph Curc, appeals from the judgment of the Trumbull County Court of Common Pleas, Probate Division, denying his Fiduciary's Claim Against Estate. The issue before this court is whether the fiduciary's claim for maintenance of estate is barred by operation of the limitations period set forth under R.C. 2117.06, governing creditors' claims; or, alternatively, whether the claim was presented within the limitations period set forth under R.C. 2117.02, the statute governing presentation of claims for executors and administrators. For the following reasons, we hold R.C. 2117.02 governs the presentation of the claim in this case and,

therefore, we reverse the judgment of the trial court and remand the matter for further proceedings.

{¶2} On July 19, 2017, appellant filed an Application to Probate Will in the Trumbull County Probate Court. He was later appointed executor of the estate of Joseph Curc, Jr., who died testate on June 25, 1987. In November 2017, appellant filed a Fiduciary's Claim against Estate for the following debts/expenses paid on behalf of the Estate of Joseph Curc, Jr.:

{¶3} 1. $3,564.23 to the Herbert R. King Funeral Home for the funeral expenses related to Joseph Curc, Jr.;

{¶4} 2. $22,113.68 to the Trumbull County Treasurer for the real estate taxes accruing regarding decedent's one half (1/2) interest in the real estate from June 25, 1987;

{¶5} 3. $11,884.11 to Ohio Edison/First Energy for electric service necessary to preserve and maintain decedent's one half (1/2) interest in the real estate from June 25, 1987; and

{¶6} 4. $8,154.42 to East Ohio Gas/Dominion for gas service necessary to preserve and maintain decedent's one half (1/2) interest in the real estate from June 25, 1987.

{¶7} A hearing was held before a magistrate on appellant's fiduciary's claim. On February 28, 2018, the magistrate issued a decision denying the claim, concluding: "since the estate was not opened for 30 years after the death of the decedent, the claim presented by the fiduciary was not timely filed as required by ORC 2117.06." The probate court adopted the decision on the same day. Appellant subsequently filed

objections to the magistrate's decision, which the trial court overruled and reaffirmed its adoption of the magistrate's decision. This appeal followed.

{¶8} Appellant's sole assignment of error provides:

{¶9} "Whether Fiduciary's Claim against Estate can be denied as untimely, when such claim was filed in accordance with, and well within the time guidelines of, Ohio Revised Code [Section] 2117.02."

{¶10} The issue presented for review by this court is a question of law: whether appellant's fiduciary's claims are governed by R.C. 2117.02 or R.C. 2117.06. We review questions of law de novo. *Portage Cty. Bd. Of Dev. Disabilities v. Portage Cty. Educators' Ass. For Dev. Disabilities*, 153 Ohio St.3d 219, 2018-Ohio-1590, ¶25.

{¶11} R.C. 2117.02 provides, in relevant part: "An executor or administrator within three months after the date of appointment shall present any claim the executor or administrator has against the estate to the probate court for allowance."

{¶12} R.C. 2117.06(B) and (C), which govern the procedure for presenting *creditor's* claims, provide: "[A]ll claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period. * * * [A] claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties, including, but not limited to, devisees, legatees, and distributes."

{¶13} In adopting the magistrate's decision, the trial court concluded "the claims of the fiduciary were not filed within the timeframe as set forth in ORC 2117.06 and therefore the claims should be denied."

{¶14} Alternatively, appellant contends that R.C. 2117.06 has no application to his claims insofar as "the provisions of R.C. 2117.01 through 2117.04 are mandatory and provide the exclusive method for presentation and allowance of claims by an executor against the estate which he represents." (Citation omitted.) *In re Estate of Bohl*, 12th Dist. Brown Nos. CA2015-01-005 and CA2016-01-006, 2016-Ohio-637, ¶44. We agree with appellant.

{¶15} R.C 2117.02 governs claims by executors and administrators; R.C. 2117.06 governs claims by creditors. These are two specific groups of people and thus each are specific to a particular class of individuals. To be sure, the former is a more narrow class than the latter, but they are nevertheless two specific groups. Appellant, in this case, filed his claims as an executor and, as such, he fits within the narrow class of individuals enumerated under R.C. 2117.02.

{¶16} We recognize that R.C. 2117.06 governs "all claims" and "all parties," without regard to who the creditor is or the nature of that creditor's claim. Still, the "all claims" and "all parties" provisions specifically fall under the rubric of a statute specifically designated to apply to "creditors." Were we to read these universal pronouncements to include executors and administrators, R.C. 2117.02 would be rendered inconsequential. Observing the plain language of the statutes, "[i]t is clear * * * that the legislature recognized that a claim by an executor against the estate he represents must be processed differently from those of other creditors." *Wilhoit v. Estate of Powell*, 70 Ohio App.2d 61, 62 (12th Dist.1980). Given this difference, the fact that a party is a creditor of a decedent upon his or her death, does not negate the effect and import of R.C. 2117.02 if an estate is open and that former creditor is appointed

executor and his or her claims are properly leveled against the estate. Upon such appointment, R.C. 2117.02 vouchsafes additional privileges to a party appointed executor; privileges that may have been long extinguished to an ordinary creditor by operation of R.C. 2117.06.

{¶17} Appellant presented his claims some 54 days after his appointment, well within the three-month limitations period of R.C. 2117.02. His claim was therefore timely and the matter must be reversed and remanded for the trial court to determine whether the claims are proper.

{¶18} Appellant's assignment of error has merit.

{¶19} In light of the foregoing, the judgment of the Trumbull County Court of Common Pleas, Probate Division, is reversed and the matter is remanded for the trial court to hold a hearing on appellant's presentation and determine what, if any, claim(s) were properly filed against the estate in appellant's role as executor, consistent with the letter and purpose of R.C. 2117.02.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶20} I respectfully dissent and would affirm the probate court's decision to deny the fiduciary, Raymond Joseph Curc's, claim for maintenance of estate property and funeral expenses.

{¶21} It is not disputed that "[a]ll creditors having claims against an estate" must present their claims "within six months of the death of the decedent." R.C. 2117.06(A) and (B). "[A] claim that is not presented within six months after the death of the decedent shall be ***forever*** barred as to ***all parties*** * * *." (Emphasis added.) R.C. 2117.06(C).

{¶22} Joseph Curc, Jr., died on June 25, 1987. As a creditor of the estate, Raymond Curc had until December 25, 1987, to present his claims. Since he failed to do so, his claims were barred ***forever***, i.e., "without ever ending," "eternally," and/or "lasting for an endless period of time,"[1] as of December 26, 1987.

{¶23} The majority candidly disagrees: "R.C. 2117.02[2] vouchsafes additional privileges to a party appointed executor; privileges that may have been long extinguished to an ordinary creditor by operation of R.C. 2117.06." *Supra* at ¶ 16. The majority's position that claims ***forever*** barred as to ***all parties*** may be resurrected if the creditor is fortunate enough to have himself appointed administrator of the debtor estate is unsupported by law or other authority. Such a ruling would surely be an incentive for disenfranchised creditors to seek appointment as special administrators as a way of obtaining the privilege of reviving claims allowed to lapse.

{¶24} It is worth noting, moreover, that all Raymond Curc's claims against the estate are for expenses incurred after the death of the decedent. These claims are for funeral expenses and for the maintenance of the property in which his mother, Agnes Curc, continued to live (and in which she owned a one-half interest).

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1. https://www.dictionary.com/browse/forever (accessed February 1, 2019).
2. R.C. 2117.02: "An executor or administrator within three months after the date of appointment shall present any claim the executor or administrator has against the estate to the probate court for allowance."

{¶25} These expenses, incurred for Agnes Curc's benefit and after Joseph Curc's death, are not properly debts of Joseph's estate but of Agnes' estate. "In an action to recover compensation for services, when it appears that the plaintiff was a member of the family of the person for whom the services were rendered, no obligation to pay for the services will be implied; and the plaintiff cannot recover in such case unless it be established that there was an express contract upon the one side to perform the services for compensation, and upon the other side to accept the services and pay for them." *Hinkle v. Sage*, 67 Ohio St. 256, 65 N.E. 999 (1902), paragraph one of the syllabus. Assuming, arguendo, the existence of such an agreement, Raymond's claims would be barred under the statute of limitations for written as well as oral contracts, former R.C. 2305.06 (fifteen years for written contracts); R.C. 2305.07 (six years for oral contracts), if not barred by the statute of limitations for claims against the estate of Agnes Curc (the existence of which there is no evidence in the record).

{¶26} Raymond's claim for funeral expenses was subject to the same six-month period mandated by R.C. 2117.06. *See* R.C. 2117.25(D)(1).

{¶27} For the foregoing reasons, I respectfully dissent and would affirm the decision of the probate court.